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CORRIGENDA

[1961] 1 All E.R.

p. 52. JEWISH BLIND SOCIETY TRUSTEES *v.* HENNING (VALUATION OFFICER). Line I.3: for " inoculation for blind persons " read " inoculation or for blind persons ".

p. 348. GROSVENOR PLACE ESTATES, LTD. *v.* ROBERTS (INSPECTOR OF TAXES). Line B.3: for " Pedentium " read " Pedetemptim ".

p. 417. ARCHBOLDS (FREIGHTAGE), LTD. *v.* S. SPANGLETT, LTD. Line I.1: for " (ii) the defendants," read " (ii) the plaintiffs,". Page 418, line H.4: for " liable to the defendants " read " liable to the plaintiffs."

p. 494. PRACTICE DIRECTION. Footnote *: for " the Criminal Justice Act, 1960, s. 13 " read " the Administration of Justice Act, 1960, s. 13 ".

p. 530. *Re* BERRY (*decd.*). Line I.2: delete " read the following judgment ". Page 532, line D.2: for " deducted " read " derived "; line D.6: for " but the whole of this " read " but no part of this ". Page 535, line A.5: for " actual " read " sole "; line E.3: for " a part " read " income ". Page 537, line B.6: for " view " read " decision ". Page 538, line G.2: for " distinctly " read " simply ". Page 539, lines C.3 & 4: for " some moneys which the testator received " read " such moneys as are received "; line C.6: for " held " read " paid ". Page 540, line G.5: for " analogy to " read " analysis of the difference between ".

p. 609. R. *v.* GOVERNOR OF BRIXTON PRISON. Line I.4: for " not on oath " read " on oath ".

p. 737. AUSTRALIAN HARDWOODS PTY. LTD. *v.* COMMISSIONER FOR RAILWAYS. Line A.4: for " February 6 " read " February 16 ".

THE
ALL ENGLAND
LAW REPORTS
INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

ALDER *v.* MOORE.

[COURT OF APPEAL (Sellers and Devlin, L.JJ., and Slade, J.), October 12, 13, November 18, 1960.]

Contract—Penalty—Insurance—Football—Sum payable if accident made it impossible for insured to resume employment as professional football player—Payment made "subject to a penalty of the amount paid . . ." if insured again took part in playing professional football—Whether repayment a penalty—Whether recoverable.

A professional football player was injured while playing football and sustained a disability which was believed to amount to permanent total disablement within the terms of a policy insuring him against accident. Pursuant to the policy the insurers, in consideration of their making payment of £500 (the full sum insured in this event) under the policy, were given by the assured a written assurance "I will take no part as a playing member of any form of professional football in the future and in the event of infringement of this condition I will be subject to a penalty of the amount" of £500. Twelve months after the injury the assured began again the playing of paid professional football. In an action by the insurers for the £500, the assured contended that the £500 was a penalty, and so was irrecoverable.

Held (DEVLIN, L.J., dissenting): the provision for repayment of the £500 was for reimbursement of what the assured had received on a basis proved by events to be false, and was not an unfair nor penal provision; therefore the sum, although described as a penalty, was not in law a penalty but was recoverable (see p. 5, letters C and F, and p. 11, letter G, post).

Re Apex Supply Co., Ltd. ([1941] 3 All E.R. 473) applied.

Cooden Engineering Co., Ltd. v. *Stanford* ([1952] 2 All E.R. 915) distinguished.

Appeal allowed.

[As to when a contractual payment is a "penalty", see 11 HALSBURY'S LAWS (3rd Edn.) 298, para. 488; and for cases on the subject, see 17 DIGEST (Repl.) 148-165, *487-610*.]

Cases referred to:

Apex Supply Co., Ltd., Re, [1941] 3 All E.R. 473; [1942] Ch. 108; 111 L.J.Ch. 89; 166 L.T. 264; 17 Digest (Repl.) 154, *522*.

Cooden Engineering Co., Ltd. v. *Stanford*, [1952] 2 All E.R. 915; [1953] 1 Q.B. 86; 17 Digest (Repl.) 154, *523*.

Dunlop Pneumatic Tyre Co., Ltd. v. *New Garage & Motor Co., Ltd.*, [1915] A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 17 Digest (Repl.) 149, *491*.

Houghton v. *Trafalgar Insurance Co., Ltd.*, [1953] 2 All E.R. 1409; [1954] 1 Q.B. 247; [1953] 3 W.L.R. 985; 3rd Digest Supp.

Law v. *Redditch Local Board*, [1892] 1 Q.B. 127; 61 L.J.Q.B. 172; 66 L.T. 76; 56 J.P. 292; 17 Digest (Repl.) 151, *496*.

Lindus v. *Melrose*, (1858), 3 H. & N. 177; 27 L.J.Ex. 326; 31 L.T.O.S. 36; A
157 E.R. 434; 17 Digest (Repl.) 299, *1043*.

Love v. *Pares*, (1810), 13 East, 80; 104 E.R. 297; 2 Digest (Repl.) 124, *933*.

Wallis v. *Smith*, (1882), 21 Ch.D. 243; 52 L.J.Ch. 145; 47 L.T. 389; 17 Digest (Repl.) 280, *862*.

Willson v. *Love*, [1896] 1 Q.B. 626; 65 L.J.Q.B. 474; 74 L.T. 580; 17 Digest
(Repl.) 148, *488*. B

Appeal.

The plaintiff insurer, suing on behalf of and for the benefit of himself and all
other persons interested and named as underwriters in syndicate No. 122 attached
to Lloyd's policy made between the said underwriters and the Association
Football Players' and Trainers' Union and dated Aug. 8, 1955, appealed against
the decision of PAULL, J., dated Nov. 24, 1959, dismissing his action against the C
defendant insured, who had been a member of the union during the currency of
the policy, for £500. The facts are stated in the judgment of SELLERS, L.J.

Anthony Cripps, Q.C., and *E. Grayson* for the plaintiff, the insurer.

D. S. Hunter for the defendant, the insured.

Cur. adv. vult. D

Nov. 18. The following judgments were read.

SELLERS, L.J.: This is an appeal from a decision of PAULL, J. The learned judge appears to have taken a preliminary view of the case which I think was right and with respect is to be preferred to that on which he gave judgment for the defendant.

The plaintiff sues as a representative underwriter and the claim arises under E
or as a consequence of a Lloyd's policy of insurance entered into between the
subscribing underwriters and the Association Football Players' and Trainers'
Union. The policy expressly provided that it and all benefits payable under
it should be held by the union in trust for the respective members and the union
should have no beneficial interest thereunder. It was current from Aug. 1, 1955,
to July 31, 1956. At the commencement of this period the defendant was a F
member of the union and was a professional footballer with West Ham United
Football Club, which was a club in the first division of the Football League.
On Dec. 26, 1955, in the course of a match, the defendant received an injury
which caused damage to his right eye with the result that its visibility is permanently reduced to no more than ten per cent. of full vision and it was thought
by those advising the underwriters, and it would seem by the defendant himself, G
that such a disability would preclude him from further participation in professional football.

The policy of insurance provided that if at any time during the period of the
policy a member of the union should sustain any bodily injury caused by accidental violent external and visible means the subscribing underwriters would pay
to the union or its nominee certain sums in the circumstances stated. The first H
and relevant benefit is as follows:

> "In respect of a member registered as a player with the Football League
> and who has not reached the age of thirty-one at inception of this policy:
> £500 in the event of injury which shall solely and independently of any
> other cause occasion his death or permanent total disablement (as herein-
> after defined) or such lesser sum as may be mutually agreed (see General I
> Condition 9) but payment to be in any case within seven days after the
> total claim being substantiated under this policy."

The defendant was twenty-one at the time of his accident and was registered as a player with the Football Association, which I understand controls the Football League, and there is no dispute that it was the registration intended and he became entitled to the benefit of £500 in accordance with the insurance cover given by provision 1 and applying definition 4, which is:

> " 'Permanent Total Disablement' shall be deemed to have arisen in relation to a member if the member shall have been disabled from playing association football for six consecutive months and has become so permanently incapacitated as to make it impossible for him ever to resume employment as a professional player of association football, as the result of sustaining accidental personal injury occasioned directly by violent external and visible means which solely and independently of any other cause results in death or permanent total disablement."

Under the general conditions of the policy, by cl. 4, payment of the permanent total disablement benefit was made conditional on such disablement being established to the satisfaction of the underwriters within twelve months after the accident in respect of which a claim is made.

Under cl. 2 the claimant was required to submit himself to reasonable medical examination and before making a payment in this case the underwriters were provided with medical opinion. The policy contained a further important provision, as follows. Clause 8:

> "No claim shall be paid hereunder for permanent total disablement unless the claimant shall have given to underwriters a signed declaration to the effect that he will take no part as a playing member of any form of professional football in the future and that in the event of infringement of this condition he will be subject to a penalty of the amount paid him in settlement of his claim."

In purported pursuance of this clause the underwriters took an undertaking from the defendant dated Aug. 25, 1956, and on Aug. 31, 1956, the union received £500 which was forthwith passed on without deduction to the defendant in settlement of the claim under the policy.

The policy itself appears to be ill-written or inaccurate in several places (for example, "Football League" for "Football Association"), and it is further accepted that the document which the defendant signed was not an appropriate document under cl. 8 and was less favourable to the defendant in his present resistance to this claim against him than the appropriate document would be. It was therefore properly agreed without more formal consideration of rectification that the undertaking given on Aug. 25, 1956, should be treated as being as follows:

> "I, Brian Magowan Moore of 7, Roman Road, East Ham, E.6, agree to accept from Lloyd's underwriters (per L. Hammond & Co., Ltd.) the sum of £500 in full satisfaction and discharge of all claims under the Association Football Players' Accident Insurance Scheme 1954/55, in respect of my injury which occurred on or about Dec. 26 last. In consideration of the above payment I hereby declare and agree that I will take no part as a playing member of any form of professional football in the future and that in the event of infringement of this condition I will be subject to a penalty of the amount stated above. (Signed) Brian Moore. Date Aug. 25, 1956."

By this policy of insurance the union, which was concerned with the interests of players and trainers in professional football, was making provision for those members who in the circumstances stated were disabled from playing professional football and so earning a livelihood thereby. It was not a policy compensating merely for loss of faculties but for the effect of such on a member's capacity to earn money at football.

This case illustrates that a view, medical or otherwise, of total incapacity for football, however carefully and genuinely assessed, may be belied by events. Young and energetic footballers are perhaps a tough breed. Under economic pressure the defendant, without any improvement or alteration in the condition of his right eye and no doubt with skill, courage and good fortune, resumed employment as a professional player of association football with Cambridge

United Football Club in December, 1956, that is within four months of receiving the £500 benefit on the basis that he was so permanently incapacitated as to make it impossible for him ever to resume such employment. It may well be a difficulty or even a hardship for a lump sum to be refunded in such circumstances. The money may have been expended to bridge a period of unemployment but before the defendant received the money he signed the undertaking, which I think must have brought to his mind the obligation to refund the money if he played professional association football again. He, I think, would recognise that the union was concerned with the incapacity of a member to earn money as a professional footballer rather than with physical injury to a member in itself.

Clause 8 has the effect of making a payment for permanent total disablement conditional and not final. This was conceded in the argument for the defendant if the defendant at the time when he was asked to pay back the £500 that he had received had been a member of the union, but subject to the defence that the plaintiff was seeking to enforce a penalty which the court would not sanction. Apparently when the defendant commenced to play professional football again in December, 1956, he was not then a member of the union; the club for which he played was not in the Football League and was not a club of the highest class. The defendant played first for payment of a sum for each match and when he had established himself he was engaged on a weekly but part-time basis. The defendant had, however, declared and agreed in consideration of the payment to him of the £500 as follows: " I will take no part as a playing member of any form of professional football in the future ", which I read as meaning " I will take no part in any form of professional football in the future as a playing member " (or more briefly, " as a player "). So read I do not find it doubtful or ambiguous. The stipulation with regard to partaking in any form of professional football is as a playing member (or player) not as a spectator, or trainer or referee, manager, or in any other capacity. I cannot read it as referring in any way to the defendant's membership of the union. There are many references in the policy to "member", both with a large "M" and a small "m" apparently indiscriminately, and the definition of " member " as a person of the male sex who is registered with the union as a member of the union, and the union by its title, would appear to include both players and trainers. But the words " playing member " are not together in the policy except in cl. 8 and in that setting, as I read them, clearly have no reference to membership of the union.

I can see no ground for invoking the " contra proferentem " rule of construction, which cannot defeat the clear meaning of the words (see *Love* v. *Pares* (1); *Lindus* v. *Melrose* (2)). It was suggested that if a man who had been compensated under this policy recovered and played again and remained a member of or rejoined the union the underwriters would not wish to insure him a second time and that that is the purpose of the clause. If further insurance was not desired it could have been quite clearly and simply stated or effected by the union.

The declaration and agreement continues, " and that in the event of infringement of this condition I will be subject to a penalty of the amount stated above ". The defendant has filed a counter-notice of appeal alleging that the plaintiff's claim herein is for the enforcement of a penalty. PAULL, J., rejecting this submission, held that " a penalty " meant a return or refund of the money paid on a certain event occurring, or alternatively that the parties had reasonably fixed a sum by way of damages for breach of the undertaking. Despite the unsuitability of the words and phrasing, the sense of the obligation the defendant entered into is that if he played professional football again he would refund the sum he had received on the basis that he could not so do. One isolated trial which served to show his unfitness for professional football would not, I think, have been held an infringement of the condition, if that had been the case. It would have served to show how right the decision was on which payment had been made, and as far as infringement was concerned it would be de minimis. The provision is not a technical but a practical one. The requirement of repayment in this case does not appear to me to be unreasonable or unjust and, like the judge, I can see no reason why the court should not enforce it. Far from being extravagant or unconscionable it is the precise sum which the defendant had received from the underwriters and which he would not have received at all if the future could have been foreseen only four months ahead. If the sum claimed is to be regarded as damages it is in effect an agreed and fair pre-estimate of the loss which the underwriters have suffered. However, that way of putting it does not seem to me to be quite appropriate. Neither do I think the obligation is in any way in the nature of a threat held over the defendant in terrorem. The underwriters had no concern or desire to preclude the defendant from playing football for reward. They wished if he did so to be reimbursed that which they had paid on a basis proved to be false by events and no more.

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(1) (1810), 13 East, 80.

(2) (1858), 3 H. & N. 177.

In *Re Apex Supply Co., Ltd.* (3) there was an agreement for the payment of a sum of money on a certain event which it was submitted was neither a sum claimed by way of liquidated damages nor a penalty. SIMONDS, J., after reviewing several authorities, came to the conclusion that no question of penalty versus liquidated damages arose but that there was a contract for the payment of a certain sum in a certain event and, that event having happened, the sum was payable. That decision would fit this case, for neither in that case nor this is there anything unconscionable or unjust and therefore unenforceable to be found. In *Cooden Engineering Co., Ltd.* v. *Stanford* (4) this court by a majority took a different view and considered whether, applying the principles laid down in LORD DUNEDIN's speech in *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.* (5), the payment in dispute was a penalty.

The defendant's argument here has the advantage that underwriters have chosen to call the payment that they wish to recover a " penalty ". Why they did so I cannot understand, but whilst they run a risk of being taken at their word, the law looks at the substance of the matter and not at the words used, whether " penalty " or " liquidated damages ". I would regard it, as the learned judge did, as a repayment of a sum in circumstances which are entirely equitable. It is in no way an imposition of a fine or penal payment and if it has to be made to fall under one head or the other it is to be regarded as a payment by way of damages for breach of an undertaking which is not unfair or unconscionable and therefore not a penalty.

I have not thought it necessary to go through the cases. The law on this subject has from time to time been extensively reviewed. It was the subject of an elaborate exposition by Sir GEORGE JESSEL, M.R., in *Wallis* v. *Smith* (6) and of a shorter statement of KAY, L.J., in *Law* v. *Redditch Local Board* (7), and somewhat more recently it was considered in the House of Lords in *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.* (5).

I regret to find myself at variance with the views of DEVLIN, L.J., whose judgment I have read, but I find nothing in the authorities which precludes the learned judge and me in my turn from holding, as I have already expressed, that the provision for repayment " of the amount stated above ", that is, the amount received and no more, is not in any way penal or punitive and therefore unenforceable in whole or in part. The underwriters' loss is £500, for that is the sum they paid on the basis of an incapacity which, if the facts could have been foreseen, did not exist and they made provision for that possibility concurrently with the payment. This aspect alone differentiates *Cooden Engineering Co., Ltd.* v. *Stanford* (4), in which all the members of the court regarded the sum claimed as being oppressive and penal in point of amount, in which view I would respectfully A concur.

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(3) [1941] 3 All E.R. 473; [1942] Ch. 108.

(4) [1952] 2 All E.R. 915; [1953] 1 Q.B. 86.

(5) [1915] A.C. 79.

(6) (1882), 21 Ch.D. 243.

(7) [1892] 1 Q.B. 127.

There is another defence adumbrated in the counter-notice to the effect that the policy sought to impose restrictive conditions on the defendant greater than are reasonably necessary for the protection of the underwriters or in the interest of the public and therefore the conditions were invalid and unenforceable. No argument was advanced to this effect and nothing was said in the judgment about B it. I do not know why it was raised even on paper.

I would allow the appeal and enter judgment for the plaintiff for £500.

DEVLIN, L.J.: The defendant, Brian Moore, is or was a football player of some distinction and in 1955 he was playing as a full-time professional for West Ham, a well-known club. On Dec. 26, 1955, he suffered an accident which C injured his right eye. As a member of a body, referred to in this case as the union, he was insured under a policy against permanent total disablement. The sum of £500 was payable to him, (i) if within twelve months after the relevant accident it was established to the satisfaction of the underwriters (a) that he had been disabled from playing association football for six consecutive months, and (b) had become so permanently incapacitated as to make it impossible for him ever D to resume employment as a professional player of association football; and (ii) he signed a declaration to the effect that he would take no part as a playing member of any form of professional football in the future and that in the event of infringement of this condition he would be subject to a penalty of the amount paid to him in settlement of his claim.

The defendant did not play professional football in the six months following E his accident and towards the end of the period he was examined by doctors on his own behalf and on behalf of the underwriters. It was found that he had a ninety per cent. loss of vision in his right eye and that this loss was permanent. On May 15, 1956, the underwriters' doctor reported to them that he agreed with the defendant's doctor that the defendant " is permanently and totally disabled from taking any further part in professional football ". This last statement goes F beyond the medical province. Underwriters had to consider whether the loss of an eye—for they accepted it as that—made it impossible for the defendant ever to resume employment as a professional player. They appear to have had in mind a case of a player who played very well for Chelsea with one eye and of another who played for England. Clearly, as, indeed, events in this case showed, it is not impossible to play professional football with one eye only; but it may G very well be dangerous and unwise to do so. If the claim had been resisted, it would have been necessary to determine just what is meant by " impossible ", but the underwriters took the liberal view and on Aug. 31, 1956, they paid up. They obtained, of course, the signed declaration which, after rectification as agreed, follows the words I have set out.

In these circumstances one can understand that underwriters felt strongly H about it when four months later they heard that the defendant was playing professional football again. The defendant says that when he took the money he intended to give up football. But he spent all the money and then found that it was difficult to get another job. There are always minor clubs keen to have as part-time players stars or distinguished players who are no longer fit enough for first-class football. Cambridge United is a minor club, and in December, 1956, I they got in touch with the defendant and offered to find a job for him if he played on a part-time basis. At first the defendant only got a fee for the match but now he is employed at £16 per week. He says that he regarded his undertaking as one which required him to pay the money back if he became a full-time professional in a League club as opposed to a part-time professional in a non-League club. So the underwriters now sue under the signed declaration to recover the £500 and in this appeal we have to consider two points on the construction of that document. The material words are:

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> "I hereby declare and agree that I will take no part as a playing member of any form of professional football in the future and that in the event of infringement of this condition I will be subject to a penalty of the amount stated above"

that is, £500.

B The first point is what is meant by taking "no part as a playing member of any form of professional football". The second point is whether "the amount stated above" is correctly described in the document as a penalty for the infringement of the undertaking. If it is, it is conceded that the underwriters cannot enforce it, but it is argued that it is either money payable on an event or on the true construction of the document a sum agreed as liquidated damages.

C On the first point, everyone is agreed that the term "a playing member of any form of professional football" is ungrammatical, ill-chosen and obscure. In the opinion of the learned judge, apart from any special rule of construction, the phrase is best interpreted as "a member of a team playing professional football"; and on that interpretation the undertaking has been broken. I agree that that is the most sensible interpretation to give the words and I do not on D this point wish to add anything to that which has been said by SELLERS, L.J. The learned judge has, however, held that the application of the contra proferentem rule leads to a different construction which exonerates the defendant. I am not prepared to say that in this the learned judge is wrong, though, if I were to go into the point, I should want to invoke a rule of construction rather wider than the contra proferentem. This undertaking and the clause from which it springs E are most unusual impositions to put on an assured. Insurance policies are concerned with events; insurers either pay or do not pay the sum assured according to whether or not the event has happened; they do not normally exact undertakings from the assured about his future behaviour once he has got the money. The money that they pay out under a policy of this sort is obviously intended to be spent as soon as the assured gets it; it will be his only support F while he is looking for another means of livelihood. I think that it can be strongly argued that if underwriters want to get the money back again on the happening of a certain event, they must define the event in clear and unambiguous terms so that the assured can know exactly what he can and cannot do. If they do not do that, they cannot rely on the promise at all just as they could not rely on an exception in their favour unless they express it in clear and unambiguous terms. G They must phrase it, as ROMER, L.J., said in *Houghton* v. *Trafalgar Insurance Co., Ltd.* (8), "so that the motorist knows exactly where he stands". But I prefer to decide this case on the other point of construction on which I have arrived at a clear view in the defendant's favour. Although the view is clear in my own mind, I express it with considerable diffidence since I am differing not only from my brethren in this court but also from the judge below.

H In the contract which we have to consider, underwriters have asked for a penalty for breach of contract. So the onus is on them to satisfy the court that they did not mean what they said. That is the ordinary rule; and in particular it has been held to be applicable to one who wishes to say that by penalty he meant damages: see *Willson* v. *Love* (9), per LORD ESHER, M.R., and *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.* (10), per LORD DUNEDIN. It is argued in the first place that they must have meant that the money I should be a sum payable on an event.

If a man says: "If I play football again, I will pay you £500", his only promise is a contingent promise to pay. If he says: "I will not play football again and, if I do, I will pay you £500", the practical result may in the end be much the same, but he is making two promises instead of one, the main promise absolute and a supplementary promise contingent as before. In the former case, if he plays football again, he breaks no promise. In the latter case, he does. In the A latter case the promisee could in suitable circumstances obtain an injunction to enforce the promise; in the former case there is no promise, except that of payment, to be enforced. Apart from legal consequences and sanctions there is a difference which honourable men observe; in the one case he has pledged his word and in the other case he has retained full liberty of action. The two cases are, therefore, quite different with different consequences, and I know of no way B in which the difference between them can be recognised except by looking at the language the parties themselves have used. The language of this contract is as plain as a pikestaff. It is said with truth that the underwriters cannot really care whether the defendant plays football again or not and that they could get all that they really want by providing for the payment of money on an event. If so, why did they ask for and obtain a promise? If words are not rectified, the C parties' rights must depend on the language they actually use and not on that which they might have used if they had realised that there was a simpler and better way of achieving what they really wanted. It is well settled that if there are two ways of making an arrangement—one clumsy and complicated which avoids a penal statute and the other simple and elegant which falls within it—the clumsy and complicated transaction cannot be brought within the statute by D means of an argument that the other way would have been simpler and better. The reverse must also be true. If there are two legal ways of achieving the same result, the parties themselves must choose the way they want and signify their choice by the form they use. The court will not then reform the contract they have made either to their advantage or to their disadvantage.

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(8) [1953] 2 All E.R. at p. 1410; [1954] 1 Q.B. at p. 250.
(9) [1896] 1 Q.B. at p. 630.
(10) [1915] A.C. at pp. 86, 89.

For these reasons, this contract cannot in my judgment be re-written as a E contingent promise to pay on the event of the defendant's playing professional football. It is argued in the alternative that on the language the parties have used the money is payable on an event, the event being the infringement of the condition. This argument cannot be sound. If it were, every penalty clause would have been enforceable from the beginning of time. In *Cooden Engineering Co., Ltd.* v. *Stanford* (11) it was held by this court that where money was expressed F as being payable on an event and that event was also a breach of contract, if the sum was penal in amount it could not be recovered. That was a decision of the majority of the court, JENKINS, L.J., dissenting, and there had previously been a difference of judicial opinion on the point. The facts in the present case are stronger against the plaintiff's contention than those in *Cooden Engineering Co., Ltd.* v. *Stanford* (11) in two respects. First, in the present case, the sum is ex- G pressed as a penalty. Secondly, in the present case, the breach is the only event on which the sum is payable, while in *Cooden Engineering Co., Ltd.* v. *Stanford* (11) the sum was payable in a number of events of which one was also a breach. The second respect alone is sufficient to show that the plaintiff's contention gets no support even from the minority view. JENKINS, L.J., said (12):

> H
> "It remains to consider the first and more difficult question whether (being, as I have held, penal in point of amount) the sum payable on determination of the hiring under cl. 11 is a penalty in the relevant sense at all. In order to be such the sum in question must, as I understand the law, be (as I have already described it) a sum which the hirer undertakes to pay to the owners in the event of, and in respect of, some breach by the hirer of the I terms of the hire-purchase agreement. If the agreement contains a provision of that description, and a breach on the part of the hirer ensues and the owners sue for payment of the sum stipulated to be paid in respect of such breach, then, no doubt, arises the question of penalty or no penalty, turning on a comparison between the stipulated sum and the damages capable of flowing from the breach or breaches in respect of which the stipulated

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(11) [1952] 2 All E.R. 915; [1953] 1 Q.B. 86.
(12) [1952] 2 All E.R. at p. 928; [1953] 1 Q.B. at p. 109.

A sum is, according to the terms of the agreement, expressed to be payable. But the provision here in question does not appear to me to answer that description. Clause 11 provides for the determination of the hire in a number of different events and in some of these events it enables the hiring to be determined by a specified notice from the owners to the hirer, while in others of them it causes the hiring to determine automatically."

B Then it is said that the essential feature in this case, which differentiates it from all preceding cases, is that the obligation in this contract is not to pay but to repay the £500. It is no doubt convenient to talk of repayment in the circumstances of this case, but it is none the less a terminological inexactitude and one which the contract does not itself use. If a distinction is to be drawn between C repayment and payment, repayment must mean the handing back of a sum which the payee has never in law been entitled to treat as his own because it has been paid under a mistake of fact or as a deposit or for a consideration which has wholly failed or for some similar reason. This sum was paid to the defendant on an event and in exchange for a promise. When paid, it was due absolutely and without qualification; and nothing has happened since that has altered the D character of the payment. If the defendant now has to pay £500 to the plaintiff, it is not because the plaintiff has shown that he was never truly liable to pay that sum to the defendant but because something has happened which has created a new liability on the defendant to pay a like sum to the plaintiff.

The same point is put in another way when it is argued that, since the plaintiff was liable only in the event of permanent total disablement and since events E have shown that the defendant never was totally disabled, his promise to pay it back must be enforceable. This argument appears to me to put underwriters in a dilemma. Either the word " impossibility " in the policy is to be strictly construed or it is not. If it is not, if the definition in the policy is satisfied when the assured shows that on medical advice and with due regard to his own health and safety it is impossible for him to play professional football again, then the F claim was a good one and properly met. If it is to be construed strictly as physical impossibility, then the claim was a bad one, but the underwriters paid it with their eyes open. Conceivably they might have made some sort of conditional payment pending some further proof or disproof of permanent total disablement, but they sought to protect their interests, not by making a qualified or conditional payment but by obtaining an undertaking. Without this undertaking they would have no cause of action at all, so now their rights depend solely on the undertaking G and their remedy must be for the breach of it.

This leads to the alternative case made on behalf of the plaintiff that the £500 can be recovered as liquidated damages. The law on this point is well settled and is summarised by LORD DUNEDIN in the *Dunlop* case (13). The £500 must be a genuine covenanted pre-estimate of damage; it must not be imposed in terrorem or be extravagant and unconscionable in amount in comparison with the greatest H loss that could follow from the breach. If, as the defendant submits, his resumption of football caused the underwriters no injury so that they could not recover more than nominal damages for the breach of contract, the £500 must be a penalty in reality as well as by description.

The learned judge considered that the damages for the breach would be substantial because underwriters might in certain circumstances have to pay out a I second £500. I should have thought with respect that the risk of having to pay £500 can only properly be estimated at something less than £500; £500 is compensation for the certainty, but it is sufficient to say that this risk only arises if the promise be construed, as the learned judge construed it, as one by the defendant not to play professional football as a member of the union, for it is only if he is a member of the union that the risk can arise again. If the promise is not so construed, the defendant has not broken it and is not liable to pay anything, either as a penalty or as liquidated damages. This point must, therefore, be considered on the other construction on which there is no possibility of the underwriters suffering any substantial damage under this head.

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(13) [1915] A.C. at p. 86.

In this court it has been argued that the underwriters would not have paid the money except in exchange for the promise and, therefore, that the amount of their payment must be taken as the measure of the damage which they have suffered. This is not the law. Damages are not measured at the price which the aggrieved party has thought it worth while to pay for the undertaking he has obtained; they are measured by the harm done to him by the breach. They are to be estimated as the sum necessary to put him in the same position as if the contract had not been broken, not in the same position as if the contract had not been made. By this argument, the underwriters are seeking to treat the case as analogous to one in which the consideration for the payment had wholly failed; apart from other objections, the undertaking was only part of the consideration for the £500.

There is, therefore, no evidence of any direct damage flowing from the breach, but in the *Dunlop* case (14) it was held that for the purposes of this branch of the law indirect as well as direct damage must be considered. In that case the sum was payable for breach of an undertaking given by the buyer to the seller of goods not to sell them below list price. The sale below list price did the seller no direct damage, but it was held to damage him indirectly. Lord Parker of Waddington put the point succinctly when he said (15) that the damage consisted

> ". . . in the disturbance or derangement of the system of distribution by means of which the appellants' goods reach the ultimate consumer."

The most that can be said here by way of comparison is that underwriters are interested as a matter of principle in paying only claims for genuine permanent total disablement. Is that the sort of thing that Lord Parker of Waddington would have had in mind? In my opinion it is not. A system for the distribution of goods is a concrete thing capable of commercial injury; a rule or principle whereunder only just claims are met is abstract. If underwriters can be said to have a " system " of paying only claims for permanent total disablement within the meaning of the policy, that system was not disturbed or deranged by the assured's act in playing football again. I can only repeat the reasoning I have already used. If the test of " impossibility " is the strict one, the underwriters' loss was caused by their own act in paying a claim that they knew not to be within the policy. If the test is the liberal one, then payment of a good claim cannot cause disturbance or derangement of any system. Either way the defendant's act in playing football has caused the underwriters no injury. All he has done is to demonstrate as a fact something which everybody at all material times knew to be the fact, namely, that he was physically capable of playing football again if he wanted to.

If this reasoning be dismissed and if it becomes necessary to examine all the circumstances in order to see whether the plaintiffs' real object was to compensate themselves for a loss or to deter the defendant from a course of action, I entertain no doubt that it was the latter. I am satisfied that their intention, so far as it can be inferred from the material before the court, was to exact a penalty. Clearly underwriters cannot care at all whether the assured plays football or not. Why, then, do they demand the promise? Theoretically it is futile for underwriters to require of a man a promise that he will not perform the impossible, but in practice, as this case shows, claims that fall short of proof of impossibility may be made and met. Underwriters are not interested in whether the assured plays football again but they are interested in diminishing the number of claims they have to meet. A very good way of doing that is to demand, as a sort of

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(14) [1915] A.C. 79.

(15) [1915] A.C. at p. 99.

A guarantee, a promise that the assured will not play again; playing is his livelihood, and if he has any real capacity left for it he will not sell it for £500. I cannot see that the promise is of any use to underwriters except as an instrument for restricting claims; but it is not of great use for that purpose unless it has a sanction and the sanction is the penalty prescribed. I can see no reason at all for thinking that the object of this clause is not expressed clearly and precisely B in the language which the underwriters themselves have used.

In saying this I imply no criticism of underwriters. They are perfectly open about what they are doing. They do not even seek to veil the word " penalty ". They might keep claims down by insisting on a literal fulfilment of the definition of " permanent total disablement " and then the undertaking would be of no added use to them. They do it instead—and no doubt more satisfactorily for all C concerned—by taking a more liberal view of the definition and seeking to penalise claimants who take money when they are still fit for professional football and prepared to play it. Unfortunately for themselves, underwriters have chosen a way which the law does not permit them to enforce. It does not help them if they are not acting unconscionably in this particular case. The meaning and effect of the clause, as LORD DUNEDIN said in the *Dunlop* case (16), has to be D considered as at the date of the contract and not at the date of the breach. It has, moreover, to be tested in the light of its potentialities and not by speculation about how decent underwriters might be expected to use it. It could be used extremely harshly. Under it a man who, years after his accident and after he has spent the benefit he has received, has taken payment for a single game might be faced with a demand that might ruin him. It is because it is capable E of such harsh use that equity deems a penalty clause to be unconscionable unless it can be justified by showing that the penalty bears a reasonable relation to the injury done by the breach and is a genuine estimate of the damage occasioned.

I would therefore dismiss the appeal and uphold the judgment for the defendant. Since it has appeared from this case that underwriters have now adopted a new form of undertaking which does not use the word " penalty " and which F may in the future come up for consideration, I think it wise to say that I have not formed any opinion about the construction of the new form. Clearly, it places underwriters in a better position than they are in in this case, for the burden will then be on the assured to show that the payment is in truth a penalty though not so described. Whether he can successfully discharge that burden may have to be determined in some future case. I think it wise to say also that, G although in the course of this judgment I have canvassed alternative meanings of the word " impossibility " in the policy, I have reached no conclusion about the true meaning.

SLADE, J.: I agree with the judgment of SELLERS, L.J. It is clear from cl. 1 of the policy dated Aug. 8, 1955, that the sole basis of the payment of £500 H to the defendant was that the injury he sustained had occasioned him " permanent total disablement " as defined in definition cl. 4 of the policy. By definition cl. 4, " permanent total disablement " is deemed to have arisen if, as a result of his injury, the member has been disabled from playing association football for six consecutive months

> " and has become so permanently incapacitated as to make it *impossible* I for him ever to resume employment as a *professional* player of association football."

General condition 4 provides the machinery for establishing permanent total disablement to the satisfaction of the underwriters so that payment can be made after the expiration of the period of six months. General condition 8 gives the necessary protection to the underwriters in case future events should falsify the medical certificates (see general condition 2) which had established to the satisfaction of the underwriters that the defendant had in fact suffered permanent total disablement. The effect of general condition 8 is, as SELLERS, L.J., has pointed out, to make payment for permanent total disablement conditional and not final. The best evidence of falsification by subsequent events would, of course, be that the defendant had achieved the " impossible " by resuming employment as a professional player and by actually playing professional football.

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(16) [1915] A.C. at p. 87.

The policy was a contract between the underwriters and the union, albeit one made by the union for the benefit of its members, of whom the defendant was one.

General condition 8 provides that no claim for permanent total disablement shall be paid until the claimant has given to the underwriters a " signed declaration ". It does not mention the word " agree ". The document which this court has to construe *does*, however, use the words " I hereby declare *and agree* ". In the light of the sole purpose for which this document was required by the underwriters, and for which it came into existence, namely, to enable them to recover their money if the " permanent " total disablement turned out to be merely temporary, I am unable to construe the words " I hereby declare and agree that I will take no part as a playing member of any form of professional football in the future " as imposing a contractual obligation on the defendant never again to play professional football. The sole concern of the underwriters, for whose protection the document alone came into existence, was not to stop the defendant from playing professional football again but to recover their £500 if he did so, and thereby established conclusively that he had never at any time been *permanently* totally disabled from doing so. It seems to me quite unrealistic to construe the document as imposing a *contractual* ban on the defendant from playing professional football again. I should have thought that the underwriters would welcome his doing so, since that was their only hope of recovering their £500. They certainly could not recover it, however fit the defendant became to play professional football again, if he refrained from playing it or if he played football again but confined himself to the amateur game.

I would allow this appeal and enter judgment for the plaintiff for £500.

E. Grayson: My Lords, my clients, the underwriters, have contended that this action is one of principle because it affects a group accident insurance scheme and not this particular gentleman: therefore my clients wish to say in open court that they do not intend to enforce their judgment for recovery of £500.

[After further discussion counsel added that the plaintiff did not ask for costs.]

Appeal allowed: judgment for the plaintiff for £500.

Solicitors: *William Charles Crocker* (for the plaintiff, the insurer); *Vizard, Oldham, Crowder & Cash*, agents for *Wild, Hewitson & Shaw*, Cambridge (for the defendant, the insured).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

GREEN *v.* BOWES-LYON.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), November 16, 17, 1960.]

Landlord and Tenant—" Reversionary tenancy " or agreement for the grant of a " future tenancy "—Distinction—" Landlord "—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 28, *s.* 65 (3).

R. was the head lessor, under a long lease, of the whole of certain premises; W. held a sub-lease of the whole premises from R. expiring on Apr. 4, 1959. W., in turn, had sub-let to the plaintiff the ground floor shop and basement of the premises for a term which expired on Apr. 1, 1959. By an instrument dated Mar. 19, 1958, which described itself as a reversionary lease, R., the head lessor, granted the defendant a lease of the ground floor shop for a term of seven years beginning on Apr. 5, 1959, viz., just after the expiration of W.'s lease, at a stated rent; the instrument recited that R. was the superior landlord of the whole premises and that the whole premises were let to W. for a term expiring on Apr. 4, 1959. The defendant was then in occupation of the ground floor shop. The grant of the reversionary lease was conditional on the defendant first obtaining a lease of the shop until Apr. 1, 1959. In fulfilment of that condition the defendant obtained a sub-lease of the ground floor shop from the plaintiff for the period June 17, 1958, until Mar. 31, 1959, at a yearly rent of £750. The defendant occupied the shop under this sub-lease for business purposes. The plaintiff occupied the basement for business purposes. The plaintiff claimed £187 10s. rent, being a quarter's rent to June 24, 1959, in respect of the defendant's tenancy of the shop under the sub-lease. Under s. 65 (3)* of the Landlord and Tenant Act, 1954, the lease of Mar. 19, 1958, to the defendant, if it created a " reversionary tenancy ", would take effect subject to any tenancy of the ground floor shop continued by s. 24 of the Act, and both the plaintiff's and the defendant's tenancies were so continued. The defendant contended that by the instrument of Mar. 19, 1958, the " landlord " (viz., R.) agreed to grant the defendant a " future tenancy " of the holding and that the case, therefore, was within s. 28† of the Act with the consequences that her sub-tenancy of the shop from the plaintiff ended when the term granted by the instrument of Mar. 19, 1958, began.

Held: the plaintiff was entitled to recover the £187 10s. rent for the following reasons—

(i) the plaintiff continued on and after Apr. 1, 1959, to be the defendant's landlord within s. 44 (1)‡ of the Landlord and Tenant Act, 1954, because the effect of the prolongation of tenancy by s. 24 (1)§ was that the plaintiff's common law tenancy of the ground floor and basement continued after Mar. 31, 1959, subject to a statutory variation as to the mode of its determination,

(ii) accordingly, even if the lease of Mar. 19, 1958, were not a reversionary lease within s. 65 (3), R. would not have been " landlord " within s. 28, so that the reversionary lease would not have been an agreement by a landlord within s. 28 and would not have terminated (by virtue of s. 28) the existing common law tenancy on Apr. 5, 1959.

Cornish v. *Brook Green Laundry, Ltd.* ([1959] 1 All E.R. 373) applied.

Decision of PEARSON, J. ([1960] 1 All E.R. 301) affirmed on different grounds.

[As to the statutory continuation of a tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 887, para. 1709.

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* The terms of s. 65 (3) of the Landlord and Tenant Act, 1954, are printed at p. 16, letter B, post.

† The terms of s. 28 of the Landlord and Tenant Act, 1954, are printed at p. 15, letter I, post.

‡ Section 44 (1) is printed at p. 17, letter E, post.

§ Section 24 (1) is printed as a footnote to p. 16, post.

For the Landlord and Tenant Act, 1954, s. 24 (1), s. 28, s. 44 (1) and s. 65 (3), see 34 Halsbury's Statutes (2nd Edn.) 409, 413, 427 and 442.]

Cases referred to:

Bolton (H. L.) (Engineering) Co., Ltd. v. *Graham (T. J.) & Sons, Ltd.*, [1956] 3 All E.R. 624; [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; 3rd Digest Supp.

Cornish v. *Brook Green Laundry, Ltd.*, [1959] 1 All E.R. 373; [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; 3rd Digest Supp.

Walsh v. *Lonsdale*, (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 31 Digest (Repl.) 255, *3905*.

Young v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 30 Digest (Repl.) 225, *691*.

Appeal.

In this action the plaintiff, Olga Mary Green, claimed from the defendant, Edith Katherine Bowes-Lyon, the sum of £187 10s. as rent which the plaintiff alleged was due to her on June 24, 1959, in respect of the defendant's tenancy of the ground floor shop at 64, South Molton Street, London. By her defence the defendant admitted that on June 17, 1958, the plaintiff granted her an underlease, expiring on Mar. 31, 1959, of the ground floor shop at a yearly rent of £750. The defendant contended that though this underlease was continued by the Landlord and Tenant Act, 1954, s. 24, it was continued only until Apr. 5, 1959, at which date a term of seven years at an annual rent of £520 granted by the head lessor to the defendant by deed called a reversionary lease dated Mar. 19, 1958, was by the terms of that deed to begin, and that the tenancy created by the underlease then ceased by virtue of s. 28 of the Act of 1954. The defendant further contended that this deed was binding on the plaintiff under Sch. 6, para. 3 (1), to the Act of 1954. The plaintiff contended that the interest granted to the defendant under the deed of Mar. 19, 1958, was a reversionary tenancy within the meaning of s. 65 (3) of the Act of 1954, not a future tenancy within s. 28, and that under s. 65 (3) the reversionary tenancy took effect subject to the defendant's underlease which was continued indefinitely by the Act of 1954, on which basis the defendant was still the plaintiff's tenant and owed the plaintiff the rent claimed. On Dec. 21, 1959, Pearson, J., in a reserved judgment ([1960] 1 All E.R. 301), held that the distinction between the reversionary tenancy referred to in s. 65 (3) of the Landlord and Tenant Act, 1954, and the agreement for a future tenancy referred to in s. 28 was the difference between that which created an estate and that which created merely a set of contractual rights and obligations, and, on the true construction of the instrument of Mar. 19, 1958, it granted a reversionary tenancy within the meaning of s. 65 (3); that, accordingly, the plaintiff was entitled to the rent claimed under the sub-lease of June 17, 1958, for the reversionary lease of Mar. 19, 1958, took effect subject to the tenancy created by the sub-lease and continued by s. 24 of the Landlord and Tenant Act, 1954, and gave judgment for the plaintiff for the amount claimed and costs. The defendant now appealed. The facts are set out in the judgment of Pearce, L.J.

Neil Lawson, Q.C., and *J. G. Wilmers* for the defendant.

C. L. Hawser, Q.C., and *C. Lawson* for the plaintiff.

PEARCE, L.J., at the request of Sellers, L.J., gave the first judgment: This is a defendant's appeal against a decision of Pearson, J., (1) giving judgment for the plaintiff for £187 10s., being one quarter's rent of a shop on the ground floor of 64, South Molton Street.

The question in the case is whether the defendant is liable to pay that rent to the plaintiff, or whether the defendant's real landlord is in fact a Mr. Rye, who is not a party. The answer to that question turns on the construction and effect of the Landlord and Tenant Act, 1954. Mr. Rye has indemnified the defendant on this appeal because he wishes to show that he, and not the plaintiff, is the landlord. Mr. Rye has a long lease from the city corporation of the whole of 64, South Molton Street. On Apr. 5, 1945, Mr. Rye demised the premises to Mr. Wells for fourteen years, expiring on Apr. 4, 1959. On Feb. 18, 1946, Mr. Wells sub-let the ground floor and basement to a sub-tenant for ten years ending on Jan. 31, 1956, and the sub-tenant's interest was assigned before 1956 to the plaintiff and another. On Jan. 11, 1956, the personal representative of Mr. Wells, who had died, executed a lease supplementary to the sub-lease of February, 1946, to the plaintiff, extending the period of the demise of the ground floor and basement for three years and fifty-nine days from Jan. 31, 1956. That term would therefore end on Apr. 1, 1959.

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(1) [1960] 1 All E.R. 301.

On Mar. 19, 1958, by a reversionary lease under seal, Mr. Rye agreed to lease the ground floor only to the defendant for seven years from Apr. 5, 1959, the day after the lease to Mr. Wells would expire; but the reversionary lease was conditional on the defendant obtaining a lease of the ground floor up to Apr. 1, 1959, whereupon the reversionary lease would have effect. On June 17, 1958, the defendant did obtain a sub-lease of the ground floor only from the plaintiff from Mar. 31, 1958, expiring on Mar. 31, 1959.

In April, 1959, when the legal position under the Landlord and Tenant Act, 1954, had to be considered, the plaintiff was occupying the basement, carrying on the business of a club, and the defendant was occupying the ground floor carrying on the business of a shop. The legal position as at Apr. 1, 1959, was this: the defendant's sub-lease of the ground floor from the plaintiff had expired a day before. As the defendant was using the ground floor for business purposes, the tenancy under the sub-lease, by reason of s. 23 and s. 24 of the Landlord and Tenant Act, 1954, did not come to an end, and it has not been determined under the Act. The plaintiff's lease of the ground floor and basement expired on Apr. 1, 1959, but the basement was being used by her for business purposes, and her tenancy also continued and has not been determined under the Act. Mr. Wells' fourteen years' lease of the whole premises subsisted up to Apr. 4, 1959. It expired on that date because the representatives of Mr. Wells were not using any part of the premises for business purposes, and, therefore, there was no continuance of the tenancy by the Landlord and Tenant Act, 1954.

The case turns on what were the legal consequences of this situation on Apr. 5, 1959. The two possibilities are, first, that the defendant became a tenant to Mr. Rye under the reversionary lease of Mar. 19, 1958, expressed to run for seven years as from Apr. 5, 1959; the second is that the defendant continued as a sub-tenant to the plaintiff under the continuation of that sub-tenancy by the Landlord and Tenant Act, 1954.

Counsel for the defendant argues that by virtue of the reversionary lease of Mar. 19, 1958, the defendant became, on Apr. 5, and thereafter, Mr. Rye's tenant of the ground floor and the continuance of the sub-tenancy which she had had under the Act from Apr. 1 to Apr. 4 ceased to be operative. The basis for that contention is s. 28 of the Act, which reads:

> " Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies."

It is argued that " the landlord " within the meaning of that section is Mr. Rye, and that the reversionary lease was an agreement " for the grant to the tenant of a future tenancy." Therefore, it is argued, the continuance of the tenancy under the Act would cease at the date when that agreement began to run—it would merely continue till midnight on Apr. 4, 1959, and then be superseded by the reversionary lease. A

The plaintiff's case is that the plaintiff, and not Mr. Rye, is "the landlord" of the property for the purposes of s. 28, since her holding continued under the Act of 1954, and that the reversionary lease from Mr. Rye does not come within the section. Counsel for the plaintiff argues that the section applicable to the facts of this case is not s. 28, but s. 65 (3), which reads: B

> "Where by virtue of any provision of this Act a tenancy (in this subsection referred to as 'the continuing tenancy') is continued beyond the beginning of a reversionary tenancy which was granted (whether before or after the commencement of this Act) so as to begin on or after the date on which apart from this Act the continuing tenancy would have come to an end, the reversionary tenancy shall have effect as if it had been granted subject to the continuing tenancy." C

The reversionary tenancy was granted so as to begin after the date on which, apart from the Act of 1954, the continuing tenancy would have come to an end. The plaintiff's tenancy was, by operation of s. 65 (3) of the Act, continued beyond Apr. 5—that is, beyond the beginning of the reversionary tenancy. Therefore, argues the plaintiff, by s. 65 (3) the reversionary lease from Mr. Rye to the defendant has effect as if it were subject to the continuing tenancy from the plaintiff to the defendant. D

Those are the two main contentions. Counsel for the defendant contends that one must approach the Act from the point of view, first, that it is intended merely to protect the business occupier by continuing his contractual tenancy, with the ultimate object of giving him the right to apply for a new lease under the continuation of his tenancy, and that the protection of the continuation of his tenancy is only a step towards the giving of a new lease; and secondly, that the business tenant in occupation gets rights effective as against parties with superior interests in the property even though they do not happen to be the immediate landlord. He argues that the whole scheme of the Act is inconsistent with giving to a transient tenant (the plaintiff in this case) the position of a landlord quoad the sub-tenant, since in due course when that tenant comes to apply for a new lease the court will not grant a new lease of any part not occupied by her for her purposes, and the sub-tenant will then assume her true position, which is that of direct tenant to the superior landlord. E F

However, it must be remembered that the Act protects tenancies and not merely holdings (2) under s. 23; it is the whole tenancy and not merely the holding that survives. No mischief is in fact done if the Act be construed against the contention of counsel for the defendant, since in this case the superior landlord can by proceedings terminate the plaintiff's tenancy; she will then get a new lease of the basement only, and the superior landlord will then deal with the defendant direct. There is obviously an argument for reading s. 28 as relating to a bargain between the de facto landlord (whose position might or might not endure for some time without any intervention or alteration by the court) and the tenant with a view to superseding by contract the statutory situation. G H

The learned judge took a short cut in this matter, by saying that the reversionary lease did not come within the terms of s. 28. He said (3):

> "The question in the end is a very simple one: is the instrument of Mar. 19, 1958, a reversionary lease or is it an agreement for the grant of a I

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(2) By s. 23 (3): "... the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies".

By s. 24 (1): "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act..."

(3) [1960] 1 All E.R. at pp. 304, 305.

> future tenancy? Having regard to its name and provisions, I hold that it is a reversionary tenancy and not an agreement for the grant of a future tenancy. It creates an estate and not merely a set of contractual rights and obligations."

Then, having considered WOODFALL ON LANDLORD AND TENANT (25th Edn.), at pp. 286, 287, and the definition of a term of years in the Law of Property Act, 1925 (4), he concludes (5)

> ". . . that the distinction between the reversionary lease referred to in s. 65 (3) and the agreement for a future tenancy referred to in s. 28 is the difference between something which creates an estate and something which creates merely a set of contractual rights and obligations."

Counsel for the defendant argues that that is illogical, because for the purposes of this Act there is no difference between an estate and contractual rights; and he refers to the wide definition of " tenancy " in s. 69 (1). I myself should be inclined to think that the learned judge was right in the conclusion at which he arrived; but the matter is obviously one of difficulty.

There is, however, a further difficulty which is quite fatal to the defendant. On an authority binding on this court, Mr. Rye is not, as it seems to me, " the landlord " under s. 28, and therefore counsel for the defendant cannot bring the reversionary lease under s. 28, even if it did not come under s. 65 (3). It is conceded that " the landlord " is one entity. To find out who " the landlord " is one has to refer to s. 44 (1), which says:

> " Subject to the next following subsection, in this Part of this Act the expression ' the landlord ', in relation to a tenancy (in this section referred to as ' the relevant tenancy '), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(a) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (b) that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord . . ."

Those words—and particularly the words of para. (b) —are an indication, according to counsel for the defendant's argument, that it is the common law contractual landlord of whom the draftsman is thinking, and not the statutory landlord who is such by virtue only of the continuance of his tenancy under the Act. *Cornish* v. *Brook Green Laundry, Ltd.* (6) is fatal to counsel for the defendant's argument. He attempted to distinguish that case from this, but in my view there was no substance in the distinction that he tried to put forward. The facts of that case, so far as they affect the one before us, are these. Brook Green Laundry, the defendants, who were called the landlords in the case, had business premises under a lease from the Westminster Settled Estates. At the material time that lease had expired and they had been negotiating for a fresh lease. There was an argument in the case which is irrelevant for this purpose, whether they had acquired rights as *Walsh* v. *Lonsdale* (7) tenants, or whether their rights in the premises were merely those of persons whose lease had expired and whose tenancy had been continued by the Act. The latter was found to be the case. Brook Green had a tenant of part of the premises and wished to deny that tenant a fresh tenancy of the part which she had been occupying and to transfer the tenant to a less attractive part. The tenant tried to make direct contact with the Westminster Settled Estates, and to maintain that Brook Green were not the landlords and

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(4) By s. 205 (1) (xxvii) " term of years absolute " includes a term of years " taking effect either in possession or in reversion whether or not at a rent."

(5) [1960] 1 All E.R. at p. 305.

(6) [1959] 1 All E.R. 373; [1959] 1 Q.B. 394.

(7) (1882), 21 Ch.D. 9.

A had no right to oppose her application for a new lease. The question whether Brook Green were landlords for the purpose of s. 26 and s. 30 was argued before the Court of Appeal, and ROMER, L.J., in giving the judgment of the court, accepted (8) the view put forward by DENNING, L.J., in *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* (9), that the true view of a continuance of a tenancy under the Act "was that the common law tenancy subsisted with a statutory variation as to the mode of determination." The learned lord justice then B said (10):

> "In these circumstances it would seem prima facie that Brook Green continued to be Mrs. Cornish's landlord and entitled as such to oppose her application for a new tenancy. Nor can we find anything in the Act to displace the prima facie view."

He reviewed the various sections of the Act, and concluded by saying (11): C

> "In our judgment, therefore, Brook Green were by virtue of their extended tenancy from the trustees the 'landlords' of Mrs. Cornish and entitled as such to oppose her application."

In my view, "the landlord" for the purposes of s. 28 cannot be distinguished as a different person from "the landlord" for the purposes of s. 26 and s. 30 of the D Landlord and Tenant Act, 1954. Therefore, that case, which is binding on this court, is fatal to the argument of counsel for the defendant.

Counsel for the defendant then seeks to argue that that case must have been decided per incuriam. The decision is not in conflict with any prior authorities, but he contends that it is wrong and that it does not give due weight to various considerations in the Act. He cites *Young* v. *Bristol Aeroplane Co., Ltd.* (12), E where LORD GREENE, M.R., dealing with cases decided per incuriam, said (13):

> "Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right F to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind."

Counsel for the defendant tried to bring *Cornish* v. *Brook Green Laundry, Ltd.* (14) within the class of case where this court has decided per incuriam. In my view, that is a perfectly hopeless and untenable argument, and I think that there G is no purpose in pursuing the matter further. It is not open to us to hold that that decision is wrong. It was a considered judgment of this court, and therefore we are bound by it.

I must not be taken as suggesting that I have been in any way persuaded that the decision is wrong; in my view that is not a matter which we have to decide. Therefore, for those reasons, the appeal fails and must be dismissed. H

DEVLIN, L.J.: I agree entirely with what my Lord has said.

SELLERS, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords on terms that the House should not be asked to vary the orders for costs in favour of the plaintiff made by PEARSON, J., *and the Court of Appeal.*

Solicitors: *Layton & Co.* (for the defendant); *Tringhams* (for the plaintiff).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(8) [1959] 1 All E.R. at pp. 382, 383; [1959] 1 Q.B. at p. 409.
(9) [1956] 3 All E.R. at p. 626; [1957] 1 Q.B. at p. 168.
(10) [1959] 1 All E.R. at p. 383; [1959] 1 Q.B. at p. 409.
(11) [1959] 1 All E.R. at p. 384; [1959] 1 Q.B. at p. 410.
(12) [1944] 2 All E.R. 293; [1944] K.B. 718.
(13) [1944] 2 All E.R. at p. 300; [1944] K.B. at p. 729.
(14) [1959] 1 All E.R. 373; [1959] 1 Q.B. 394.

THOMAS *v.* THOMAS. SAME *v.* SAME.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Cairns, J.), November 7, 1960.]

Magistrates—Husband and wife—Maintenance order—Enforcement—Previous experience of husband's conduct—No opportunity given to husband to deal with inferences drawn by justices from previous proceedings.

In 1955 the wife obtained an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and the husband (who was then out of work) was ordered to pay 5s. a week as maintenance for herself and the two children. In 1956 this order was varied and the husband was ordered to pay £1 a week as maintenance for the wife and 10s. a week as maintenance for each child. In 1957 the elder child being sixteen years of age, the order was again varied by substituting a payment of £1 for the wife and £1 5s. for the younger child. In August, 1959, a summons was issued against the husband on the wife's complaint that the husband was in arrear with payments amounting to £68 0s. 6d. The police were unable to effect service until April, 1960. The husband failed to answer the summons and he was brought before the court, after the issue of a warrant, on May 6, 1960. On that date there was also before the court a complaint by the husband to vary the order by reducing the amount of maintenance on the ground that his means had decreased. The husband had made no payment since September, 1959, and by the date of the hearing the arrears were £152 15s. The justices remitted £100 of the arrears, but dismissed the husband's complaint to vary and made a committal order against him, suspended so long as he paid the amount of the order and 2s. 6d. a week off the balance of the arrears. The husband appealed against the dismissal of his complaint and against the committal order. In their reasons for dismissing the complaint the justices stated: " We have each of us had experience in dealing with these parties over the past five years and such experience has shown that if pressure is brought to bear the [husband] makes an effort to comply with the order." In the Case Stated, by way of appeal against the committal order, the justices stated: " 6. We were of opinion that the husband's failure to comply with the order was due to his wilful refusal and culpable neglect and that we were entitled to come to this decision having regard to our experience in dealing with these parties over the past five years, which has shown us that if pressure is brought to bear, the [husband] makes an effort to comply with the order . . . 7. The question for the opinion of the High Court is whether we were entitled to take this action to enforce payment and whether in so doing we were entitled to take into consideration our previous experience of dealing with this [husband] over the past five years."

There was no reference in the reasons or the Case Stated to any previous order by the justices relating to payment by the husband of arrears, nor to any facts supporting the statement that the husband had complied with the order when pressure had been put on him. Nor was the husband given the opportunity before the justices to deal with the suggestion that, as he had in the past complied with the order under pressure, his present failure to pay was due to his wilful refusal and culpable neglect.

Held: save for the order remitting £100 of arrears, the orders made by the justices on both complaints would be set aside since the justices were not entitled to take into consideration their previous experience in dealing with the husband without having referred in open court to the previous proceedings and given the husband an opportunity to deal with those proceedings and any inference to be drawn therefrom.

[**Editorial Note.** This case may appropriately be considered with *Church* v. *Church* ((1933), 148 L.T. 432).

As to the duty of magistrates not to act, in domestic proceedings, on their A
personal knowledge of a party without giving him an opportunity to deal with the facts, see 12 HALSBURY'S LAWS (3rd Edn.) 498, para. 1097.

As to judicial notice of particular facts given in evidence in previous proceedings, see 15 HALSBURY'S LAWS (3rd Edn.) 339, para. 615, note (s); and for cases on the subject, see 22 DIGEST (Repl.) 136, *1200*.]

Cases referred to: B

Keane v. *Mount Vernon Colliery Co., Ltd.*, [1933] A.C. 309; 102 L.J.P.C. 97; 149 L.T. 73; 26 B.W.C.C. 245; Digest Supp.

Lane v. *Lane*, [1952] 1 All E.R. 223, n.; [1952] P. 34; 116 J.P. 72, n.; 3rd Digest Supp.

Palmer v. *Crone*, [1927] 1 K.B. 804; 96 L.J.K.B. 604; 137 L.T. 88; 91 J.P. 67; Digest Supp. C

R. (*Giants' Causeway, etc. Tramway Co.*) v. *Antrim County JJ.*, [1895] 2 I.R. 603; 33 Digest 300, *149i*.

Reynolds v. *Llanelly Associated Tinplate Co., Ltd.*, [1948] 1 All E.R. 140; 40 B.W.C.C. 240; 2nd Digest Supp.

Van Breda v. *Silberbauer*, (1869), L.R. 3 P.C. 84; 39 L.J.P.C. 8; 22 L.T. 667; 16 E.R. 746; 22 Digest (Repl.) 136, *1200*. D

Appeal and Case Stated.

These were appeals by the husband (a) against an order of the Birkenhead justices sitting at Birkenhead dated May 6, 1960, whereby they dismissed his complaint to vary a maintenance order and (b) by way of Case Stated, against a committal order made against him. E

On Mar. 8, 1955, the justices made an order in favour of the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had been guilty of persistent cruelty towards her, and ordered the husband (who was at that date unemployed) to pay to the wife 5s. a week as maintenance for herself and the two children. On Mar. 13, 1956, this order was varied and the husband was ordered to pay £1 a week as F
maintenance for the wife and 10s. a week as maintenance for each child, making a total of £2. On Oct. 8, 1957, the order was again varied, and the husband was ordered to pay £1 a week, as before, as maintenance for the wife, and £1 5s. a week as maintenance for the younger child (the older child then having attained the age of sixteen years).

On Aug. 17, 1959, the wife preferred a complaint against the husband that G
he was in arrears under the order to the extent of £68 0s. 6d. A summons was issued, but could not be served by the police on the husband until Apr. 16, 1960; it was then due for hearing on Apr. 19, 1960. The husband failed to attend and the justices issued a warrant for his arrest. The warrant was executed and the husband came before the justices on May 6, 1960; the arrears were then £152 15s. On the same day the husband applied to vary the order under the H
Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, by reducing the award of maintenance on the ground that his means had decreased. Before the justices the husband stated in evidence that he had been dismissed from his employment in April, 1959; that in October, 1959, he had a job which he gave up of his own accord after one week and that over the past thirteen months his income had consisted mainly of unemployment pay; and that he I
was living with his mother who was ninety-one years of age. The wife stated that during the twenty-one years of their marriage the husband had worked for only six years, that he was now being kept by his mother, and that he had no intention of keeping a job to maintain the wife and his family.

The justices found that the husband had made no payment under the order since September, 1959; that the husband had made little effort to comply with the order and that the wife had to apply to the court to enforce payment; that the husband had been out of work almost continuously for the previous

A nine months. The justices remitted £100 of the arrears* and on the wife's complaint to enforce the arrears, the justices committed the husband to prison for six weeks in respect of the balance of the arrears but suspended the commitment so long as the husband paid the amount of the order and 2s. 6d. a week off the balance of the arrears. They dismissed the husband's complaint to vary the order.

B The husband now appealed against the order dismissing his complaint and also appealed by way of Case Stated against the order of commitment. In their reasons for dismissing the husband's complaint the justices stated:

> ". . . 6. We believe that the [husband] will not work and maintain his wife and child and will continue to allow his wife to be maintained by the National Assistance Board as she has been for most of the marriage C and that his default is due to his wilful refusal and culpable neglect. 7. We have each of us had experience in dealing with these parties over the past five years and such experience has shown that if pressure is brought to bear the [husband] makes an effort to comply with the order. 8. We were unanimous in our decision to dismiss the [husband's] application for a variation in the order."

D In their Case the justices stated:

> ". . . 6. We were of opinion that the [husband's] failure to comply with the order was due to his wilful refusal and culpable neglect and that we were entitled to come to this decision having regard to our experience in dealing with these parties over the past five years, which has shown us that if E pressure is brought to bear, the [husband] makes an effort to comply with the order, and we accordingly remitted £100 of the arrears and committed the [husband] for six weeks in respect of the balance but suspended the issue of the commitment under the Magistrates' Courts Act, 1952, s. 65 (2)†, so long as the [husband] paid the amount of the order plus 2s. 6d. off the arrears. We were also aware of the additional safeguard for the [husband] F under the Maintenance Orders Act, 1958, s. 18‡.
>
> "7. The question for the opinion of the High Court is whether we were entitled to take this action to enforce payment and whether in so doing we were entitled to take into consideration our previous experience of dealing with this [husband] over the past five years."

R. G. Hamilton for the husband.

G *F. D. Paterson* for the wife.

LORD MERRIMAN, P., stated the facts, said that he was not prepared to interfere with the remission of £100 off the arrears, referred to the Case Stated and continued: I propose to deal with this matter, as we are bound to do, with strict reference to what I understand to be the facts of this case. I am certainly H not going to make any general pronouncement about the rights of justices to use or not to use their own personal experience in dealing with a case that comes before them, for, as ASQUITH, L.J., said in *Reynolds* v. *Llanelly Associated Tinplate Co., Ltd.* (1):

> "The authorities have not attempted, nor, perhaps, is it possible, to lay down a formula defining with precision the limits within which the county I court judge may in such cases as the present rely on his personal knowledge of local conditions in supplement of or in substitution for regular evidence."

That was a case of what used to be an arbitration under the Workmen's Compensation Act in which the county court judge was the arbitrator. He goes on (1):

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* See the Magistrates' Courts Act, 1952, s. 76; 32 HALSBURY'S STATUTES (2nd Edn.) 480.

† 32 HALSBURY'S STATUTES (2nd Edn.) 472.

‡ 38 HALSBURY'S STATUTES (2nd Edn.) 708.

(1) [1948] 1 All E.R. at p. 145.

> "As [Lord Greene, M.R.,] has pointed out, Lord Buckmaster in the House of Lords in *Keane* v. *Mount Vernon Colliery Co., Ltd.* (2), goes no further than to lay down that the judge is entitled to use his personal knowledge within reasonable limits. This means in practice that, in deciding whether such limits have been exceeded or not, the court must have regard to the facts of each individual case."

For the purposes of this case I think that the crucial point is this phrase:

> ". . . our experience . . . has shown us that if pressure is brought to bear, the [husband] makes an effort to comply with the order",

and that is the reason why, amongst other things, they made this commitment order and, incidentally, dismissed the husband's complaint to vary. As far as I know there is no record of that particular pressure having been brought to bear at all; certainly there was no previous order adding on to the sum total of the order so much a week in respect of the arrears.

My difficulty goes further than that. I have given an outline of the proceedings which have happened over the last five years. There is no precision about the statement as to whose experience was relied on at any given stage but I assume that every one of the three justices sitting had had personal experience at one stage or another. Even on that assumption it almost necessarily follows from the way it is put that that experience must have been communicated from one or more of them to the other justices at second-hand, because there is nothing whatever to show or suggest that all three of them had sat at all stages of this litigation between these parties from 1955 onwards.

However that may be, I think that there is a more vital criticism. Whatever it was that the justices were referring to as putting pressure on the husband as the result of which he paid, that was, so far as I can see, never put to the husband in such a way that he could answer it. It is true that the wife was not represented but then that, of course, is no reason for anything which the husband ought to answer not being put to him, because under s. 61 of the Magistrates' Courts Act, 1952 (3), it is the duty of the justices to put, or cause to be put by the clerk or otherwise, anything which the wife unrepresented was perhaps incapable of putting for herself. Putting it the other way round: if justices are going to find as a fact that on previous occasions when some pressure has been put on him, the husband has always proved to be able to pay and, therefore, that it is a legitimate inference that in not paying (as I assume was proved) during the last nine months, he had been guilty of wilful refusal or culpable neglect, the husband ought to have the opportunity of meeting that case. For this is the type of case in which justice must be seen to be done as well as be done. In saying that I do not ignore the fact that they relied, and I think were justified in relying, on the fact that the husband had given up the last job which he held after a week. That is some evidence of capacity to work, but it certainly does not deal with the point that when pressure has been put on him he has paid. On the contrary, the supposition as to the finding is that he paid nothing during the last nine months.

If there really had been something on the record which justified this statement by the justices I have already pointed out that in my opinion the husband should have been given an opportunity of dealing with it. I think that we are bound to be strict about that sort of thing, and particularly in a case where the liberty of the subject is involved, by reason of some observations made by the Court of Appeal in *Lane* v. *Lane* (4). Without going into detail, the Court of Appeal upheld with some reluctance the fact that in this court we had looked at the notes of an earlier hearing than the one which was the subject of the appeal but which, admittedly, threw a great deal of light on the question at issue. This was whether or not there had been in the circumstances before the court constructive desertion on the part of the husband, and for that purpose it was very material to look back at what had happened at earlier stages of the case. It was the fact that the notes had not been put in before the justices or proved in evidence and we had looked at them, really by consent, and on that ground the Court of Appeal allowed them to be referred to and acted on. The implication was that if it is desired in a matrimonial case before justices, to rely on earlier proceedings the matter should be strictly proved and proved in a way in which the party affected might be able to deal with it.

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(2) [1933] A.C. at p. 317. (3) 32 Halsbury's Statutes (2nd Edn.) 469.
(4) [1952] 1 All E.R. 223 n.; [1952] P. 34.

For that additional reason I am not satisfied that in the present case the justices were entitled to rely as much as they did for their decision on what they call their previous experience of dealing with this husband over the past five years and I think, myself, that while we uphold the remission of the £100 of the arrears, we ought to refer back the husband's complaint for variation and the wife's complaint for enforcement to a fresh panel of the justices.

CAIRNS, J.: I agree. On both of these complaints it appears, from the reasons given by the justices in one case and the Case Stated in the other, that they arrived at their decision taking into account their previous experience in dealing with these parties, which experience they say, in both cases, has shown that if pressure is brought to bear on the husband he makes an effort to comply with the order. It may be that if they had not taken that previous experience into account they would have arrived at a different decision. This court has, therefore, to consider whether they were entitled to take such previous experience into account in the manner in which they did on these two complaints.

It is argued on behalf of the husband that that previous experience was something which the justices were not entitled to take into account at all, and in support of that contention four cases were referred to. In two of these, *Palmer* v. *Crone* (5), and *R.* (*Giants' Causeway, etc. Tramway Co.*) v. *Antrim County JJ.* (6), it is clear from the reports that the matters which the justices were alleged to have taken into account were matters which they had learnt in some private capacity quite outside the court altogether. It does not appear to me that either of those cases is any guide as to what magistrates' rights and duties are in respect of their previous experience of litigation between the parties before them. The same might be said of the other two cases which were relied on on behalf of the husband. The first of these was *Reynolds* v. *Llanelly Associated Tinplate Co., Ltd.* (7). The question there was whether a county court judge sitting as arbitrator under the Workmen's Compensation Act was entitled to take into account as a matter of common knowledge something which was really a piece of special and not of general knowledge, but again was something which it was not suggested had been learnt in the litigation between the same parties. The last case referred to is *Van Breda* v. *Silberbauer* (8). In the judgment of the Judicial Committee given by Sir James Colvile it was said (9):

> "But two of the learned judges below dispute this [a certain finding], founding their conclusions, somewhat irregularly as it appears to their Lordships, upon their personal knowledge, derived either from a personal view of the locality, had in the former suit, or from a recollection of the evidence taken in that suit."

So that it appears that the Judicial Committee were in that case treating as somewhat irregular the founding of a conclusion by a judge on either a view held in a former suit or his recollection of the evidence taken in that suit. When one looks at the statement of facts earlier one finds that the former suit was a suit between different parties from those who were the parties to the suit in question, so again that case affords no real guide whether what has happened in a previous suit between the same parties can be considered.

Curiously enough, the industry of counsel on both sides in the present case has failed to produce for us any authority on the general question whether justices are entitled to refer to their knowledge of what happened between the same parties in some earlier proceedings and I should certainly not wish to attempt to lay down any general ruling with regard to this matter. In the present case it appears to me that it is unnecessary to do so because what appears to have happened here is that the justices, having heard the evidence, and perhaps looked at the record of previous proceedings between the parties, then in their consideration of the case brought to bear on the matter the recollection which individuals among the justices had of previous proceedings between the parties.

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(5) [1927] 1 K.B. 804. (6) [1895] 2 I.R. 603. (7) [1948] 1 All E.R. 140.
(8) (1869), L.R. 3 P.C. 84. (9) (1869), L.R. 3 P.C. at p. 99.

It would appear from what they say that each one of the three justices who were deciding these two cases had participated in some previous proceedings between the parties. What those previous proceedings were is not clear because they refer in the Case Stated and in their reasons to pressure being brought to bear and the husband making an effort to comply with the order, although the proceedings which are actually referred to in the Case Stated are not proceedings dealing in any way with enforcement but are the original complaint under which the maintenance order was made and two subsequent applications to vary. However that may be, it would appear that at no stage in the hearing of these two cases, which were taken together before the justices as they have been before us, was it brought to the notice of the husband that the justices were proposing to take into account what had happened on previous occasions and at no stage was the husband given an opportunity of saying whether the justices' recollection of those previous proceedings was right and, if so, what bearing those previous proceedings had on the issues which were then before the court.

In those circumstances I agree that the hearing of these two cases was unsatisfactory and that the two matters must go back to a different panel of justices for decision. I agree that so far as the justices on the committal proceedings made an order for remission of £100 of the arrears, that that order can stand. With regard to the remainder of the decision on the committal proceedings, in my view the answer to the question which is raised in para. 7 of the Case is that the justices were not entitled to take into consideration their previous experience of dealing with the husband, without having referred in open court to the previous proceedings and giving an opportunity to the husband to deal with those proceedings and any inference to be drawn from them. I agree in those circumstances that these two matters, with the reservation of the remission order, should go back to a different panel of justices for them to consider on the basis of the decision of this court.

LORD MERRIMAN, P.: The question in the Case Stated will be answered as follows: "The justices were not entitled to take into consideration their previous experience of dealing with the husband without having referred in open court to the previous proceedings and giving him an opportunity to deal with those proceedings and any inference to be drawn therefrom." On the Case Stated the order will be set aside, except as to the remission of the £100 of the arrears, and the wife's complaint for enforcement remitted to a fresh panel for re-hearing. On the husband's appeal the order will be set aside dismissing his complaint for variation and the complaint referred to a fresh panel for examination. The two cases will go back together to be dealt with by the same fresh panel of justices.

Order accordingly.

Solicitors: *Robbins, Olivey & Lake*, agents for *Ernest B. Kendall & Rigby*, Liverpool (for the husband); *Marris & Shepherd*, agents for *David Carr & Roe*, Birkenhead (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

NOTE.

Re SANDERSON'S SETTLEMENT TRUSTS.

[CHANCERY DIVISION (Pennycuick, J.), December 6, 1960.]

Settlement—Variation of trusts—Disability—Beneficiary under disability and receiver of income appointed—Application by receiver to master of Court of Protection to determine whether arrangement for her benefit—Costs of application paid out of settled funds—Variation of Trusts Act, 1958 (6 *&* 7 *Eliz.* 2 *c.* 53), *s.* 1 (3).

[As to applications to the Court of Protection to determine whether proposed variations of trusts are for the benefit of patients, see 29 HALSBURY'S LAWS (3rd Edn.) 591, para. 1079.]

Adjourned Summons.

This was an application by originating summons dated Sept. 21, 1959, for an order of the court under s. 1 of the Variation of Trusts Act, 1958, approving a scheme of arrangement enlarging the powers of the trustees of a settlement of managing or administering the trust property. The sixth respondent, who was contingently interested in reversion in the capital of the trust funds, was under a disability, and a receiver of her income had been appointed. The Official Solicitor had been appointed her guardian ad litem. Her receiver applied to the master of the Court of Protection under s. 1 (3) of the Act to determine whether the carrying out of the arrangement would be for her benefit, and the master made an order declaring that it would be for her benefit.

Counsel on her behalf asked that the costs of the applications to the Court of Protection be paid out of the settled funds, because if such an order were not made the costs would be borne by the respondent herself.

W. S. Wigglesworth for the applicants.

F. G. King for the first, second and third respondents, the trustees of the settlement.

R. Gwyn Rees for the fourth, fifth and seventh respondents, the infant beneficiaries.

J. A. Wolfe for the sixth respondent.

PENNYCUICK, J., said that he would approve the arrangement (subject to a slight amendment which counsel for the patient had been authorised by the Court of Protection to accept) on behalf of the infant respondents and all other unborn and unascertained persons who might become interested. He directed that all costs, including the costs in the Court of Protection, be paid out of the trust estate.

Solicitors: *Official Solicitor* (for the sixth respondent); *Biddle, Thorne, Welsford & Barnes* (for the applicants and the first, second, third, fourth, fifth and seventh respondents).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

THAMES LAUNCHES, LTD. *v.* CORPORATION OF THE TRINITY HOUSE OF DEPTFORD STROND. A

[CHANCERY DIVISION (Buckley, J.), November 29, 1960.]

*Injunction—Criminal proceedings—Civil proceedings instituted previously—
Issues of law in both sets of proceedings substantially the same—Originating
summons to determine whether plaintiff company subject to s.* 11 *and s.* 43 B
of the Pilotage Act, 1913*—Informations laid by defendants' employee against
plaintiff company's employee alleging offences under s.* 11 *and s.* 43*—Whether
injunction granted to restrain criminal proceedings while civil proceedings
pending.*

The plaintiff company applied to the court by originating summons dated
Apr. 13, 1960, to determine whether, on the true construction of the Pilotage C
Act, 1913, s. 11 and s. 43, they were entitled to navigate their passenger-carrying
vessels throughout those parts of the Port of London which were
within the London Pilotage District on pleasure tours operating from piers
outside, or from piers either inside or outside, the London Pilotage District
without having on board either a licensed pilot or a master or mate with a
pilot's certificate. The defendants thereto were Trinity House, the pilotage D
authority for the London Pilotage District. On Oct. 21, 1960, two summonses
were issued, on informations laid by the principal of the Pilotage
Department of Trinity House, against an employee of the plaintiff company
alleging that on May 18, 1960, he, being the master of one of the plaintiff
company's vessels, had committed offences under s. 11 and s. 43 of the
Pilotage Act, 1913, by failing to have on board a qualified pilot. On motion E
by the plaintiff company for an injunction to restrain the defendants from
proceeding with the magistrates' court's summonses until the questions
raised by the originating summons had been determined,

Held: where matters which involved substantially the same issues were
raised both in civil proceedings and at a later stage in criminal proceedings
in an inferior court between parties who, looking at the substance of the F
matter, were in reality the same, the court could restrain the prosecutor
in the criminal proceedings from continuing them until the civil proceedings
had been decided (see p. 29, letter H, post); accordingly, an injunction
would be granted in the present case since the substantive legal question
raised by the criminal proceedings was the same as that raised by the
originating summons. G

York Corpn. v. *Pilkington* ((1742), 2 Atk. 302); *Hedley* v. *Bates* ((1880), 13 Ch.D. 498) and *Re Connolly Brothers, Ltd.* ([1911] 1 Ch. 731) applied.

[As to restraint of legal proceedings in English courts, see 21 HALSBURY'S LAWS (3rd Edn.) 404-406, paras. 847-850; and for cases on the subject, see 28 DIGEST (Repl.) 871, 872, *989-999*.

For the Pilotage Act, 1913, s. 11, s. 43, see 23 HALSBURY'S STATUTES (2nd H
Edn.) 842, 860.]

Cases referred to:

Connolly Brothers, Ltd., Re, Wood v. *Connolly Brothers, Ltd.*, [1911] 1 Ch. 731; 80 L.J.Ch. 409; sub nom. *Re Conolly Brothers, Ltd., Wood* v. *Conolly Brothers, Ltd.*, 104 L.T. 693; 16 Digest 196, *1014*. I

Hedley v. *Bates*, (1880), 13 Ch.D. 498; 49 L.J.Ch. 170; 42 L.T. 41; 16 Digest 376, *2137*.

Saull v. *Browne*, (1874), 10 Ch. App. 64; 44 L.J.Ch. 1; 31 L.T. 493; 39 J.P. 181; 28 Digest (Repl.) 872, *997*.

Stannard v. *St. Giles, Camberwell Vestry*, (1882), 20 Ch.D. 190; 51 L.J.Ch. 629; 46 L.T. 243; 16 Digest 376, *2139*.

York Corpn. v. *Pilkington*, (1742), 9 Mod. Rep. 273 (88 E.R. 447); 2 Atk. 302 (26 E.R. 584); 28 Digest (Repl.) 871, *995*.

Motion.

This was a motion on Nov. 29, 1960, by the plaintiffs, Thames Launches, Ltd., for an order that the defendants, the Corporation of the Trinity House of Deptford Strond, be restrained from further proceedings against J. Watson, a licensed waterman in the employ of the plaintiffs, on two summonses in the Thames Magistrates' Court, both dated Oct. 21, 1960, alleging offences contrary to s. 11 and s. 43, respectively, of the Pilotage Act, 1913, until the determination of the question, raised in the Chancery Division by an originating summons therein, dated Apr. 13, 1960, whether (in effect) the plaintiffs were subject to s. 11 and s. 43 of the Pilotage Act, 1913. The plaintiffs further moved for an order restraining the defendants from taking proceedings against any licensed waterman in respect of offences contrary to s. 11 and s. 43 of the Pilotage Act, 1913, arising out of the navigation of passenger boats in the Port of London on pleasure trips operating from piers either inside or outside the London Pilotage District until the determination of the question raised by the originating summons. The plaintiffs were a company which owned and operated passenger-carrying pleasure steamers in the Port of London and the defendants were the pilotage authority for the Port of London. The facts appear in the judgment.

Lionel Blundell, Q.C., and *K. R. Bagnall* for the plaintiffs.
J. V. Naisby, Q.C., and *Gerald Darling* for the defendants.

BUCKLEY, J.: This is a motion launched by the plaintiff company, Thames Launches, Ltd., in proceedings which have been commenced in this Division of the High Court by originating summons seeking relief against Trinity House, the pilotage authority for the Port of London. The motion seeks an injunction to restrain the defendants from proceeding with certain summonses that are pending before the Thames Magistrates' Court until the determination of a question of construction of the Pilotage Act, 1913, which is raised in the originating summons.

The plaintiffs own and operate pleasure steamers in the area of the Port of London, and the defendants are the pilotage authority for that area. Section 11 (1) of the Pilotage Act, 1913, lays down as follows:

> " Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship), while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either—(a) under the pilotage of a licensed pilot of the district; or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship."

Subsection (2) provides that if sub-s. (1) is breached, then the master of the ship shall be liable in respect of each offence to a fine. Then " excepted ships " are defined, and that definition, as far as I know, is not relevant to the present case.

Section 43 of the Pilotage Act, 1913, is in the following terms:

> " (1) The master of a ship (other than an excepted ship) shall when navigating in circumstances in which pilotage is compulsory under this Act, display a pilot signal, and keep the signal displayed until a licensed pilot comes on board.
>
> " (2) The master of a ship, whether navigating in circumstances in which pilotage is compulsory or not, which is being piloted in a pilotage district by a pilot not licensed for the district, shall display a pilot signal and keep the signal displayed until a licensed pilot comes on board.
>
> " (3) If the master of any ship fails to comply with this section, he shall be liable in respect of each offence to a fine not exceeding £20."

The question which the plaintiff company seek to have determined in the originating summons is whether, on the true construction of the Pilotage Act, 1913,

> " the plaintiffs are entitled to navigate their passenger carrying vessels throughout the whole of the Port of London on pleasure tours operating from piers outside the London Pilotage District without being either (a) under the pilotage of a licensed pilot of the district or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship."

They also ask to have determined whether on the true construction of the Act

> " the plaintiffs are entitled to navigate their passenger carrying vessels throughout the whole of the Port of London on pleasure tours operating from piers inside and outside the London Pilotage District without . . .",

putting it shortly, having a licensed pilot or a certificated master or mate. That summons was issued on Apr. 13, 1960, and substantially the question raised is a question of the construction of s. 11 of the Act and whether what the plaintiff company does is such as to make pilotage obligatory under that section.

On Oct. 21, 1960, two summonses were issued out of the Thames Magistrates' Court on informations laid by one Sydney Rawlings Smith of Trinity House, Tower Hill, London, E.C.3, the principal of the Pilotage Department of Trinity House, addressed to J. Watson, and complaining that on May 18, 1960, Watson

> ". . . being the master of the m.v. Viscountess did navigate the m.v. Viscountess (not being an excepted ship) in the River Thames below Tower Pier within the limits of the London Pilotage District, in circumstances in which pilotage was compulsory, the m.v. Viscountess not being under the pilotage of either—(a) a licensed pilot of the said district; or (b) a master or mate possessing a pilotage certificate for the said district who was bona fide acting as master or mate of the ship, after a licensed pilot of the said district had offered to take charge of the ship."

The first summons alleges that that was contrary to s. 11 (1) and (2) of the Act. The other summons, also addressed to Watson, and based on an information laid by Smith, alleged that Watson on May 18, 1960,

> ". . . being the master of the m.v. Viscountess did navigate the m.v. Viscountess (not being an excepted ship) in the River Thames below Tower Pier within the limits of the London Pilotage District, in circumstances in which pilotage was compulsory, but failed to display a pilot signal and to keep the signal displayed until a licensed pilot came on board, contrary to s. 43 (1) and (3) of the Pilotage Act, 1913."

I am told that those summonses are due to come before the learned magistrate tomorrow. He has already been invited to stay those proceedings until the determination of the question of construction raised by the originating summons, but he has declined to grant a stay. The motor vessel Viscountess is the property of the plaintiff company and Watson is a licensed waterman and was at all material times in the employment of the plaintiff company and he was at the relevant time in charge of the vessel.

On this motion I am asked by the plaintiffs to restrain the defendants from further proceeding against Watson on the two summonses that I have mentioned until the final determination of the question of construction raised by the originating summons. It is conceded that the informations were laid by Sydney Rawlings Smith in his capacity as principal of the Pilotage Department of Trinity House and as part of and in the course of his duties in that office and that in respect of these two summonses he is acting on behalf of the Trinity House corporation, which is the defendant in the Chancery proceedings. It is also in evidence that Watson, the respondent to those summonses, is in the employ of

A the plaintiffs in the Chancery proceedings and that as such he was acting as the master of the vessel in respect of the matters complained of in the summonses.

Counsel for the plaintiffs says that it would be wrong in principle for the magistrates' court to proceed to deal with the summonses while the point of construction is sub judice in this court, or, at any rate, it would be wrong for the defendant corporation to press on with those proceedings and proceed with those B proceedings while this point of construction is sub judice in this court. He says there is jurisdiction in this court to restrain proceedings which are in their nature vexatious because they tend to multiplicity of legal proceedings relating to the same subject-matter and substantially relating to the same relief. He has referred me to a number of authorities in that connexion. The first to which I should make reference is *York Corpn.* v. *Pilkington* (1). The headnote to that case is as C follows:

> "Whilst suits are depending here, the plaintiffs indict the defendant's agent at the sessions, where they themselves are judges, for a breach of the peace. LORD HARDWICKE, L.C., made an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause, and further order."

D The Lord Chancellor in his judgment said this (2):

> "This court has not originally, and strictly, any restraining power over criminal prosecutions; and, in this case, if the defendant had applied to the Attorney-General, he would have granted a nolle prosequi. For when a complaint is grounded on a civil right, for which an action of trespass would lie, E the Attorney-General of course grants a nolle prosequi.
>
> "This is a complaint merely for fishing in the river, without any actual breach of the peace, which the mayor and corporation say, is a trespass upon them. If it could be made appear at law, that the plaintiffs were both judges and parties, it might come out to be coram non judice, but it might be difficult to make out this. If actions of trespass had been brought vi et F armis, this court would have stopped them; but though I cannot grant an injunction, yet I may certainly make an order upon the prosecutors to prevent the proceeding on the indictment.
>
> "Supposing it was a suit for a right of land where entries had been made, and the bill was brought to quiet the possession, and after that they prefer an indictment for a forcible entry, which is of a double nature, as it partakes G of a breach of the peace, and is also a civil right, this court would certainly stop the proceedings upon such indictment.
>
> "Where parties submit their right to the court, they have certainly a jurisdiction, and may interpose. Therefore I will make an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause and further order."

H I have read the whole of the Lord Chancellor's judgment because it makes clear, I think, that the part of the headnote which refers to the corporation being themselves judges in their own cause was not really any part of his decision, but it does establish, as I think, that where matters which involve substantially the same issues are raised both in civil proceedings and at a later stage by criminal proceedings, this court can restrain the prosecutors in the criminal proceedings I from continuing such proceedings until the civil proceedings have been decided.

Jurisdiction of that kind, in my judgment, is very clearly a jurisdiction which must be exercised with the greatest care, and this court, I think, would be very slow to interfere with the course of criminal proceedings unless it was clear that the issues in the civil proceedings and the criminal proceedings really raised in substance the same issue and that if the civil proceedings succeeded the criminal proceedings must necessarily fail. In principle the court discourages multiplicity of litigation in any form. In other words, the court must be satisfied that to allow the criminal proceedings to be proceeded with pending the decision of the civil proceedings would really be vexatious. A

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(1) (1742), 2 Atk. 302.

(2) (1742), 2 Atk. at p. 302.

In that connexion I must mention *Re Connolly Brothers, Ltd., Wood* v. *Connolly Brothers, Ltd.* (3), which is the most recent authority to which I have been referred. That was not a case of civil and criminal proceedings but of two sets of civil proceedings, one in the High Court and one in the County Palatine Court B of Lancaster. That came before the Court of Appeal on appeal from PARKER, J. The language of the judgment of the Court of Appeal, in my view, makes it clear that the basis on which they were proceeding was that to allow the case in the Palatine Court, which was instituted at a later stage than the case in the High Court, to go on would be vexatious. COZENS-HARDY, M.R., put the matter in this way (4): C

> "It is enough to say that the jurisdiction of the court in a case like this undoubtedly exists and ought to be exercised if the court comes to the conclusion that the defendant in the High Court action, the plaintiff in the foreign action—in this case the Palatine action—acted vexatiously in instituting the proceedings in the foreign action; and from that point of view I have no hesitation in saying that the proceedings taken by O'Reilly in the Palatine action were vexatious and unreasonable to such an extent that the court ought to exercise the jurisdiction which it plainly possesses to grant an injunction." D

FLETCHER MOULTON, L.J., said (5):

> "It is quite clear that the court has felt justified in exercising this jurisdiction where it is satisfied that it would be vexatious to let the other action proceed." E

It seems to me that exactly the same principle must apply where the two sets of proceedings are a civil proceeding and a criminal proceeding as where what is being considered is what should be done in the case of two sets of civil proceedings. F

I ought also to refer to *Hedley* v. *Bates* (6), which is a decision of SIR GEORGE JESSEL, M.R. In that case the plaintiffs and the defendant were the owners in fee simple of adjoining freehold estates, and the defendant, in proceeding to make certain drainage works on his estate, proposed, by putting in force the powers given to landowners by the Land Drainage Act, 1861, to utilise and improve for the purpose a burn or watercourse which flowed through the plaintiffs' G land. Accordingly the defendant, on Nov. 4, 1879, served on the plaintiffs a notice stating that he proposed to lay a barrel or pipe drain from his land along and under the bed of the burn, and to make the necessary excavations for the purpose, ultimately restoring the bed of the burn to its original level, except in certain parts which he proposed to deepen. Then, before giving the notice, the defendant had already, without the plaintiffs' leave or knowledge, entered on the H plaintiffs' land and started to carry out excavations, but as the defendant still intended to proceed in this way the plaintiffs issued a writ and moved for an injunction to restrain the defendant from committing any further acts of trespass or waste on the plaintiffs' land, and from further interfering with the burn except pursuant to any order of the court for restoring the same, and from taking any proceedings whatever before the justices of the peace under his notice—that I was the notice that he had given under the Land Drainage Act, 1861—or at all events until he should have restored the burn pursuant to any order of the court. There was a question whether the notices were in proper form about which I need not trouble. There was some debate whether the justices would have jurisdiction to entertain any application to them under the Act having regard to the form in which the notices were framed. In his judgment JESSEL, M.R., said this (7):

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(3) [1911] 1 Ch. 731. (4) [1911] 1 Ch. at p. 744. (5) [1911] 1 Ch. at p. 746.
(6) (1880), 13 Ch.D. 498.

> " In the first place it must be remembered that one of the main objects of the Judicature Act was to enable the court to decide, if possible in one proceeding, all the questions in dispute between the same parties relating to the same matters (Judicature Act, 1873, s. 24 (7)); and that is a very important provision. Here is a dispute for which an action has to be brought for trespass, and a further, or second, dispute relating to the same piece of land and to the same matter—the improvement of a drain—and both disputes are between the same parties. If I can properly decide the second question in dispute in this action, it is, according to my view of the Judicature Acts, my duty to do so.
>
> " Can I then properly decide the question? The defendant objects, in the first instance, to the jurisdiction: he says that the magistrates themselves have the jurisdiction to decide whether or not this is a proper notice. Now I will take it both ways: in the first place I will assume they have jurisdiction. There is nothing in the Act of Parliament to say that though the magistrates may decide the question when it comes before them, another court may not."

That is all that he says about the first question—that is assuming they have jurisdiction—and then he goes on (8):

> " The magistrates' court being an inferior court, any person served with a bad notice may apply for a prohibition on the ground that there is no jurisdiction, and that prohibition may now be granted by any judge of the High Court. If I can grant a prohibition I can of course grant an injunction between the parties."

Then he goes on, in effect, to say that an injunction would be speedier and cheaper than proceedings by way of prohibition where it involved a question of the jurisdiction of the magistrates. Of the choice of the two courses, prohibition or injunction, JESSEL, M.R., says (9):

> ". . . if I am to consider which is the more just and convenient, I have no hesitation in saying that it is both more just and more convenient that I should decide subject to two appeals only [that is, to the Court of Appeal and the House of Lords] which I think are amply sufficient for such a case as this. Therefore on that ground I should decide that this court should exercise jurisdiction."

He pointed out that in the case of proceedings taken before the magistrates there would be a larger number of appeals which might be taken.

In *Stannard* v. *St. Giles, Camberwell Vestry* (10), JESSEL, M.R., commented on what he had said in *Hedley* v. *Bates* (11) and said this (12):

> " Where the legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another court to interfere to stop that proceeding by injunction. I refer to that more particularly because the case of *Hedley* v. *Bates* (11), which I decided when sitting at the Rolls, was cited as an authority for the exercise of such a jurisdiction."

Then he comments on *Hedley* v. *Bates* (11). I need not read what follows immediately, but subsequently he says this (12):

> " But the whole doctrine which I laid down (as I thought clearly) in *Hedley* v. *Bates* (11) was dependent on the fact of the court having a case to try within its undoubted jurisdiction, if I may say so, over and above the question which the magistrates could decide."

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(7) (1880), 13 Ch.D. at p. 501.

(8) (1880), 13 Ch.D. at p. 502.

(9) (1880), 13 Ch.D. at p. 503.

(10) (1882), 20 Ch.D. 190.

(11) (1880), 13 Ch.D. 498.

(12) (1882), 20 Ch. D. at p. 196.

I confess that I do not quite follow what the learned Master of the Rolls meant when he said " over and above the question which the magistrates could decide ". I understand the principle to be that if there are two courts which are faced with substantially the same question, it is desirable to be sure that that question is debated in only one of those two courts, if by that means justice can be done. It does not appear to me, with all respect to JESSEL, M.R., that it would make any difference whether the problems which confronted one court were of a wider and more general nature than the problems which confronted the other court. I can see that there would be a fair matter of argument if there were two proceedings going on in court " A " and court " B ", the proceedings in court " A " relating to a number of questions, only one of which was raised in the proceedings in court " B ", and was the only question raised in that court. That would be a very strong argument for saying that the convenient course would be to allow that question to be dealt with in the proceedings in court " A " which would dispose of the matter raised in the proceedings in court " B ", whereas if the reverse course were taken the same would not apply. The problem whether a particular question which is raised in substantially identical terms in court " A " and court " B ", should be allowed or should not be allowed to proceed in both courts, is one which ought to admit of a solution which prevents the matter being pursued in two separate proceedings; notwithstanding that the question raised in one court or the other may involve problems of a wider character. It is quite true that in proceedings before magistrates questions of fact would be involved which would not arise in proceedings in the Chancery Division. The prosecution would have to establish, unless it were otherwise admitted, that the person prosecuted had in fact committed the offence in respect of which he was prosecuted. But the question of substance to be decided in both these cases is whether or not the use which was being made of the motor vessel Viscountess was one which involved in law compulsory pilotage. That is precisely the question raised in the originating summons. I do not expect that there would really be any issue of fact in the magistrates' court, though, of course, I cannot be sure of that. The question would be one of law: whether or not the circumstances were such as to be struck at by s. 11 and s. 43 of the Pilotage Act, 1913. That, as I say, is precisely the question which the proceedings in the Chancery Division raise today. It seems to me, in those circumstances, that this case is one which comes within the principle to which I have referred in which it would be proper to say that the criminal proceedings should not be proceeded with until the question of construction has been decided in the Chancery Division, the Chancery proceedings having been on foot before the criminal proceedings were instituted and, indeed, before the offence was committed in respect of which the criminal proceedings were taken.

Counsel who appears for the defendants has contended on three grounds that the case does not come within the principle that I have stated. He says, first of all, that the parties to the two sets of proceedings are not the same. In the Chancery Division the parties are Thames Launches, Ltd. and Trinity House. In the criminal proceedings the parties are the person by whom the information was laid, that is to say, Sydney Rawlings Smith, the prosecutor, and J. Watson, the master of the vessel. I do not think, with respect to counsel, there is really any substance in that point. It is not disputed that in the prosecution which Mr. Smith is promoting in the course of his duties as an employee of Trinity House he is acting as their agent, and the matter in respect of which the prosecution is brought is something which Mr. Watson did in the course of his employment by Thames Launches, Ltd. Looking at the reality of the situation, the parties are the same in both sets of proceedings.

Then counsel says that in any case Trinity House is not here as a person who is seeking to obtain a remedy in two different courts in respect of the same subject-matter, because in the Chancery proceedings it is not Trinity House which is seeking any relief at all—they are the defendants. In that connexion he referred me to *Saull* v. *Browne* (13), where Lord Cairns, L.C., said this:

> "I should be unwilling to express any doubt that there may be cases in which criminal proceedings instituted by a party to a suit in this court are so identical with the civil proceedings as to induce this court to order that the same person shall not at the same time pursue his remedy in this court and pursue another remedy which ranges itself under the head of criminal jurisdiction. No doubt there may be such a case, and the authorities which have been referred to, when properly understood, entirely come under the description which I have given."

The authorities referred to include *York Corpn.* v. *Pilkington* (14), to which I have made reference. Counsel for the defendants says that the principle is that a man should not pursue a remedy in respect of the same matter in more than one court. In my judgment, the principle is rather wider than that. It is that no man should be allowed to institute proceedings in any court if the circumstances are such that to do so would really be vexatious. In my judgment, it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject-matter where exactly the same issue is raised by his opponent in proceedings already instituted in another court in which he is not the plaintiff but the defendant. The following will illustrate what I mean. Supposing a question of construction were to arise on a will in respect of which the High Court and the Palatine Court had concurrent jurisdiction. If one party affected by that question started proceedings in the High Court making another party a defendant, in my opinion it would be grossly vexatious for that defendant subsequently to start proceedings in the Palatine Court raising precisely the same question. I do not think that the way in which the proceedings are constituted from the point of view of who is the plaintiff and who is the defendant can be the test to be applied.

Then counsel said that there are questions which would arise before the magistrate which would not arise in the Chancery proceedings. As I have already mentioned, there may be questions of fact which may have to be brought before the magistrate which do not arise in the Chancery proceedings which are asking for declarations and do not relate any particular event. But the substantial point in these proceedings, in my view, is the same. In those circumstances, I think that the right course for me to take is to grant an injunction restraining the defendants from proceeding on the two summonses in the Thames Magistrates' Court until the final determination of the questions raised on the originating summons or until further order.

The notice of motion also asks for further relief in a much wider form, which I should not be prepared to grant, but I think that it will be right in the circumstances for me to grant the injunction that I have mentioned.

Injunction granted.

Solicitors: *J. A. & H. E. Farnfield* (for the plaintiffs); *Freshfields* (for the defendants).

[*Reported by* Jenifer Sandell, *Barrister-at-Law.*]

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(13) (1874), 10 Ch. App. at p. 65.

(14) (1742), 2 Atk. 302.

FREDCO ESTATES, LTD. *v.* BRYANT AND ANOTHER.

[COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), November 7, 8, 9, 1960.]

Rent Restriction—Increase of rent—Notice of increase—Rates—Error in stating amounts of rates in notice—Error in using wrong prescribed form—Signed by landlord's agents without stating that they were his agents—Increase of weekly rent correctly stated—Errors in stating rates de minimis—Admission of facts as to rates given under misunderstanding as water rate not included—Appeal decided on true figures—Rent Restrictions Regulations, 1940 (*S.R. & O.* 1940 *No.* 238), *Sch.* 1—*Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 3 (2).

In 1945 chartered surveyors who had collected the rent of a dwelling-house since 1922 and who were known to the contractual tenant as agents for the landlords served notice of an increase of rent in respect of rates on the tenant. The house was subject to the pre-1939 control. The notice was in a prescribed form (prescribed in Part 2 of Sch. 1 to the Rent Restrictions Regulations, 1940) appropriate to the 1939 control houses, not to the pre-1939 control houses. The appropriate prescribed form (prescribed in Part 1 of Sch. 1 to the Regulations of 1940) referred to certain additional particulars which were inapt to the increase that was sought, as it related only to increased rates. The surveyors signed the notice with their own firm name without describing themselves as agents for the landlords. The notice, which claimed an increase in respect of increases of rates between 1939 and 1945, not between 1914 and 1945, mis-stated the yearly rates payable, viz., stated a figure higher by 3d. for 1939 and by 2d. for 1945. The difference between the 1939 and 1945 figures, being the increase payable, was stated in the notice to be £2 6s., whereas on the true amounts it should have been £2 6s. 1d. This error would make no difference to the increase in the weekly rent, which was correctly shown at 10½d., and was an error against the landlords.

Pursuant to a notice to admit facts served in March, 1960, the landlords admitted rates payable and rateable values for the years 1914-1959. These showed increases in rates for the period relevant to the notice of increase which would not justify the amount of the increase of rent specified in the notice. The discrepancy was due to failure to take into account water rates, increases in which were proper to be included in computing the increase of rent. The figures for the water rates were not before the county court judge but, on appeal, were before the Court of Appeal.

Held: notwithstanding the admission as to rent increases, in regard to which there had been mutual misunderstanding by overlooking the water rates, the appeal would be decided on the true figures (see p. 40, letter I, post); accordingly the notice of increase was a valid notice under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 3 (2)* for the following reasons—

(i) the notice was in a form substantially to the same effect as the appropriate prescribed form within the meaning of s. 3 (2), the omissions being immaterial (see p. 42, letter A, post).

(ii) the errors in the figures were not false or misleading in a material respect, within s. 3 (2), as complete accuracy to the last penny in stating figures on which the calculation of increase was based was not essential to the validity of a notice of increase where the final figure (the amount of the increase) would not be affected and the errors were due to misunderstanding, inadvertence or some like reason (see p. 41, letters B and E, post).

Dictum of SCRUTTON, L.J., in *Bourne* v. *Litton* ([1924] 2 K.B. at p. 19) explained and distinguished.

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* The relevant terms of s. 3 (2) are set out at p. 38, letter I, post.

(iii) in the circumstances, although the notice of increase did not state that the surveyors who had signed it were agents of the landlord, it would be inferred that they were (see p. 42, letter E, post).

Appeal on these points dismissed.

Rent Restriction—Shared accommodation—Sole use of one living room—Scullery shared—Right to use scullery for cooking—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 12 (2).

Landlord and Tenant—Surrender of tenancy—Sub-letting of room subject to Rent Acts—Subsequent taking over of three other rooms—Three other rooms not let and not subject to Rent Acts—Whether implied surrender of one room.

In 1935 the contractual tenant of a dwelling-house subject to the Rent Acts lawfully sub-let to his daughter and son-in-law a single upstairs room at a rent of 8s. a week with the use of a scullery for cooking. There was no evidence that the scullery was used for any living purpose other than cooking; and it appeared also that there was a kitchenette, but there was no evidence that the scullery and kitchenette were the same place. In 1945 the contractual tenant became statutory tenant of the dwelling-house. On the death of the statutory tenant subsequently in 1945 the daughter and son-in-law continued to reside in the house with the daughter's widowed mother, retaining the original room and the right to cook in the scullery and taking over three more rooms under an arrangement which was not a sub-letting and involved no additional payment by the daughter and son-in-law. On the death of the mother the landlords sought possession of the dwelling-house.

Held: the daughter and son-in-law were entitled to retain possession of the one room sub-let to them because—

(i) there was no sufficient evidence that there had been in 1935 anything other than a sub-letting of a separate part of the dwelling-house for the purposes of the Rent Acts, as distinguished from a mere sharing of living accommodation with the contractual tenant by virtue of the use of the scullery (see p. 44, letter D, post).

Cole v. *Harris* ([1945] 2 All E.R. 146) applied.

(ii) there had not been a surrender by operation of law of the sub-tenancy of the one room by the arrangement in 1945 for taking over the three additional rooms (see p. 43, letter B, post).

Appeal, as regards (ii) above, allowed.

[**Editorial Note.** On the point concerning sharing of the scullery (see holding (i) above, on which there was no decision in the proceedings in the county court) the decision in the present case should be considered with that of the Court of Appeal in *Winters* v. *Dance* ([1949] L.J.R. 165). It is material that in the present case there was not evidence that the kitchenette and the scullery were the same place (see p. 44, letter C, post), but in *Winters* v. *Dance* a small kitchenette was held to constitute a living room within the meaning given to that description in *Cole* v. *Harris* ([1945] 2 All E.R. 146).

As to notice of increase of rent under the Rent Acts, see 23 Halsbury's Laws (3rd Edn.) 777, para. 1540, p. 792, para. 1567, note (g); and for cases on the subject, see 31 Digest (Repl.) 681-683, *7733-7750*.

As to sharing of accommodation in dwelling-houses subject to the Rent Acts, see 23 Halsbury's Laws (3rd Edn.) 744-746, paras. 1499, 1500, and 829-831, paras. 1613-1617; and for cases on the subject, see 31 Digest (Repl.) 646, 647, *7508-7516*.

For surrender of a tenancy by grant of a new lease, see 23 Halsbury's Laws (3rd Edn.) 686, para. 1415; and for cases on the subject, see 31 Digest (Repl.) 571-576, *6913-6971*.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 3 (2) and s. 12 (2), see 13 Halsbury's Statutes (2nd Edn.) 988 and 1004.]

Cases referred to: A

Bourne v. *Litton*, [1924] 2 K.B. 10; 93 L.J.K.B. 553; 131 L.T. 169; 31 Digest (Repl.) 682, *7741*.

Cole v. *Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50; 31 Digest (Repl.) 646, *7509*.

Moodie v. *Hosegood*, [1951] 2 All E.R. 582; [1952] A.C. 61; 3rd Digest Supp.

Neale v. *Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. B 138; 172 L.T. 65; 31 Digest (Repl.) 646, *7508*.

Penfold v. *Newman*, [1922] 1 K.B. 645; 91 L.J.K.B. 528; 126 L.T. 697; 31 Digest (Repl.) 683, *7749*.

Appeal.

The defendants appealed against an order of His Honour JUDGE REID, made C in Kingston-upon-Thames County Court on Apr. 6, 1960, ordering the defendants to give up possession of a dwelling-house, 24, Laburnum Road, London, S.W.19, to the plaintiffs. The grounds of appeal were: (i) that there was no evidence on which the judge could find that there had been a surrender by the defendants of one room in the dwelling-house followed by a request for a new tenancy of four rooms; (ii) that the judge was wrong in law in holding that a notice of increase D of rent dated Apr. 16, 1945, was a valid notice of increase; (iii) that he was wrong in holding that the notice of increase was substantially to the same effect as the notice of increase set out in Sch. 1 to the Rent Restrictions Regulations, 1940*; (iv) that he misdirected himself in finding that the admitted discrepancy in the calculation of rates in the notice of increase was due to the water rates not having been included in the notice, that there was no evidence relating to E water rates before the judge on which he could make such a finding and no facts from which he could so infer; and (v) that there was no evidence to support the judge's finding that the contractual tenancy of the dwelling-house of a Mr. Gilbert had been determined before his death on Aug. 4, 1945.

C. W. G. Ross-Munro for the defendants.

A. H. Tibber for the plaintiffs. F

ORMEROD, L.J.: This is an appeal against a decision of His Honour JUDGE REID given at Kingston-upon-Thames County Court on Apr. 6, 1960, when he ordered the defendants to give up possession of 24, Laburnum Road, London, S.W.19, and also dismissed a counterclaim by the defendants against the plaintiffs for rent which the defendants alleged they had overpaid to the G plaintiffs in respect of that house. In 1922 a Mr. Gilbert was the contractual tenant of this house; he had the whole house, and he paid for it a rent of 12s. 4d. per week. Mrs. Bryant, the second defendant, was his daughter, and Mr. and Mrs. Gilbert and the daughter lived together in the house. In 1935 the daughter married the first defendant, Mr. Bryant, and the two Bryants continued to live in the house with her parents. Mr. Gilbert sub-let one room to his daughter H and son-in-law, the defendants, for the sum of 8s. per week. The evidence is somewhat scanty on this subject, but it appears from the evidence that the defendants had the exclusive use of that one room and in addition the right to use the scullery for the purpose of cooking jointly with Mr. and Mrs. Gilbert. It is not disputed that the sub-tenancy of this room which was let to the first defendant was a lawful sub-tenancy. I

On Aug. 4, 1945, Mr. Gilbert died, and his widow continued to live in the house together with the defendants. Mrs. Gilbert, being the widow of Mr. Gilbert, was then a statutory tenant by virtue of the provisions of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. By reason of the provisions of that section, she was entitled after her husband's death to continue to live in the house as a statutory tenant. After her husband's death, Mrs. Gilbert, who was an invalid and very largely confined to bed, allowed the defendants to have the use of three other rooms in the house in addition to the room which had already been sub-let to the first defendant, and she charged no extra rent for the use of those additional rooms, the rent being still 8s. per week. According to the evidence, the bulk of the cooking for the three people then living in the house was done by the second defendant, because Mrs. Gilbert was not well enough to do it. The second defendant did the cooking for her mother, but from time to time Mrs. Gilbert did use the scullery, as she was entitled to do, and the position appears to have been that both the second defendant and Mrs. Gilbert had a joint use of the scullery for cooking purposes.

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* Part 1 of Sch. 1 to the Rent Restrictions Regulations, 1940, prescribed forms for use where the house was subject to pre-1939 control and Part 2 of the Schedule prescribed forms for use where 1939 control applied. The form used in the present case was the form in Part 2, but the house was subject to pre-1939 control.

On Apr. 24, 1959, Mrs. Gilbert died, and the defendants continued to live in the house. The rent had been paid fortnightly, and a fortnight after the death of Mrs. Gilbert the second defendant offered to the rent collector the rent for that period and he accepted it, but at a later date he returned it, and no further rent was accepted by the plaintiffs' agent in respect of the premises.

On Oct. 7, 1959, the plaintiffs took out a summons in the county court claiming possession of the premises and arrears of rent, and on Jan. 12, 1960, the defendants put in their first defence, which alleged that there was a contractual tenancy in Mr. Gilbert and, therefore, they were entitled to remain. The second defendant took out letters of administration of the estate of her mother in January, 1960, and of the estate of her father in February, 1960, both her parents having died intestate. On Mar. 3, 1960, an amended defence was filed setting out that in consequence of that administration the contractual tenancy in the premises was vested in the second defendant, and counterclaiming for rent which she alleged had been paid in excess since 1945.

On Mar. 3, 1960, the defendants' solicitors served on the plaintiffs' solicitors a notice to admit facts. The part of that notice which is relevant is that it was a notice to admit the rateable values and the rates payable in respect of this house from 1914 to 1959, both inclusive. In that notice to admit facts the rates payable and the rateable values were set out against each respective year. On Mar. 22, 1960, the plaintiffs' solicitors replied to the defendants' solicitors admitting the facts set out in the defendants' solicitors' notice.

It becomes necessary to consider the position as it was at the death of Mr. Gilbert, because that is the time which is important for the decision of this case. If Mr. Gilbert was a contractual tenant at the time of his death, then by s. 9 of the Administration of Estates Act, 1925, the contractual tenancy in the premises became vested in the President of the Probate, Divorce and Admiralty Division; Mr. Gilbert's widow, by virtue of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, had a statutory tenancy of the house, and on the authority of *Moodie* v. *Hosegood* (1) the contractual tenancy vested in the President remained in a state of suspense during the lifetime of the widow, she being a statutory tenant. On the death of Mrs. Gilbert, if Mr. Gilbert was a contractual tenant at the time of his death, letters of administration having been taken out by the second defendant, the contractual tenancy then vested in her, and she would in those circumstances be entitled to possession. Clearly, if that were the position, the plaintiffs would have no right to sue for possession.

In this case, of course, the proceedings were started before the letters of administration were taken out by the second defendant, and presumably, if this was a contractual tenancy at the date of the death of Mr. Gilbert, such contractual tenancy was vested in the President. In those circumstances, it would seem that the plaintiffs could not recover possession because they would have no right to sue for or gain possession. On the other hand, if the tenancy of

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(1) [1951] 2 All E.R. 582; [1952] A.C. 61.

Mr. Gilbert was not a contractual tenancy at the time of his death, i.e., if that tenancy had been terminated before he died, and at the time of his death he was a statutory tenant only, then that statutory tenancy would be transmitted to his widow by virtue of s. 12 (1) (g) of the Act of 1920, but could not be further transmitted on her death. Then, subject to the question of the one room which was sub-let—with which I will deal later—the plaintiffs would be entitled to possession of the premises.

The fundamental question in this appeal, therefore, is whether the contractual tenancy of Mr. Gilbert was terminated before his death. The rents of the premises at all material times were collected by a firm of chartered surveyors, Messrs. C. L. Tebbit & Co. They appear certainly to have collected the rents from a period well before the material date of 1945, and for some considerable time afterwards. Their name appeared on the rent books as chartered surveyors, and on at least one rent book prior to 1945 the name of the plaintiffs as landlords appeared in addition to the name of the agents. The name of the agents appeared in the majority of the rent books, all of which were found amongst the papers of Mrs. Gilbert after her death.

From Apr. 30, 1945, an increased rent was paid first by Mr. Gilbert, and after his death by Mrs. Gilbert, in respect of these premises. I have said that the original rent was the sum of 12s. 4d. per week, but from Apr. 30, 1945, the rent was increased to 13s. 2½d. per week, as appears from the rent books. There were further increases at later dates, but they are not relevant to this discussion.

As I understand it, the plaintiffs' contention before the learned county court judge was, first of all, that it must be assumed that, because that rent had been increased, and the increased rent had been paid since 1945, due notice of increase had been given in accordance with the terms of the Rent Restrictions Acts, and that in consequence the contractual tenancy must have been terminated. That is the argument which was put forward on behalf of the plaintiffs before the learned county court judge, but it transpired on discovery of the defendants' documents that there was in existence a notice of increase of rent which purported to have been signed by Messrs. C. L. Tebbit & Co., which was dated Apr. 16, 1945. It was a notice that the rent of the premises would be increased as from Apr. 30, 1945 to 13s. 2½d. per week, and then were set out the particulars on which that increase was based. At the hearing counsel for the plaintiffs objected to that document being put in, but the learned judge allowed it to go in. Then the question arose whether the notice was a valid one. If it was, the contractual tenancy was terminated before the death of Mr. Gilbert, and he could only transmit a statutory tenancy on his death. If it was not, Mr. Gilbert was still a contractual tenant at the date of his death, and for the reasons I have stated that contractual tenancy would now be vested in the second defendant. Therefore, it became necessary before the learned judge, and it becomes necessary in this appeal, to consider whether the notice dated Apr. 16, 1945, was a valid notice.

Counsel for the defendants took three points of objection to this notice. The first was that the figures in the notice on which the increase was based were not correctly stated, and that in those circumstances it could not be said that the notice was valid having regard to the provisions of s. 3 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. That subsection reads as follows:

> " Notwithstanding any agreement to the contrary, where the rent of any dwelling-house to which this Act applies is increased, no such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks, or, where such increase is on account of an increase in rates, one clear week, after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in Sch. 1 to this Act, or in a form substantially to the same effect. If a notice served as aforesaid contains any statement or representation which is false or misleading in any material respect, the landlord shall

> be liable on summary conviction to a fine not exceeding £10 unless he proves that the statement was made innocently and without intent to deceive."

It was submitted on behalf of the defendants that the section must be construed strictly, and, if the notice and the information given in the notice was inaccurate or incorrectly stated, then the notice must be regarded as invalid. In support of that submission we were referred to some words of SALTER, J., in *Penfold* v. *Newman* (2). SALTER, J., there said:

> "That provision [s. 3 (2) of the Act of 1920] increases the stringency of the legislation in two respects, first, by requiring that the notice shall be a 'valid' notice, and, secondly, by providing a statutory form of notice and requiring that the notice shall be in accordance with that form. As to the first of these requirements, it is to be observed that the word 'valid' means more than correct in form. It means correct not only in form but also in substance. If it had only been intended that the notice should be correct in form there would have been no reason why the present Act should not have contained the same provision as the earlier Act contained. There must have been some reason for the insertion of the term 'valid' in the amending Act. I think the term was inserted because it was intended that the notice should be correct in substance as well as in form, and should accurately state all material facts, including the amount of the increase of rent which the landlord has a legal right to claim. As to the requirement that the notice should be in accordance with the statutory form, it is to be observed that the form makes provision for the accurate statement of the percentage of increase under s. 2 (1) (c)."

That decision was followed in *Bourne* v. *Litton* (3), and reference was made both to a passage from the judgment of BANKES, L.J., in which he agreed with the words of SALTER, J., in the previous case, and also to a passage in the judgment of SCRUTTON, L.J. (4), in which he used the expression that the information contained in the notice must be accurate down to the nearest penny. Counsel for the defendants pins very considerable faith—and, of course, rightly so—to the dicta expressed in those two cases. The position, on the face of it, is this: counsel for the defendants contended that the notice must be invalid because, according to the notice, the figures given were that the rates in 1939 were £8 13s. 4d. and that the rates in 1945 were £10 19s. 4d.—a difference of £2 6s.—which justified, and admittedly would justify, an increase in the rent of 10½d. per week. According to the notice to admit facts the sums for rates in respect of those two years were for 1939 £7 14s. 8d. and for 1945 £9 12s., a difference of £1 17s. 4d., which, of course, would justify an increase of rent of a smaller sum than 10½d. per week.

That was the position as disclosed by the evidence, and for my part I would say that, if that were the true position I should find it difficult to say that the notice stated with the proper precision the facts on which the increase was made, and I would have felt bound to hold that the notice was invalid; but that is not the true position of affairs. No evidence was called by the plaintiffs as to what the rates were, and the matter was considered by the learned county court judge solely on the facts as they were admitted in the notice to admit facts. As I understand the statements that have been made to us by both counsel in this case, the learned county court judge asked counsel for the plaintiffs at the end of the case if there was an explanation for the discrepancy between the figures as given in the notice to admit facts and the figures on the notice in question, and he replied that it might be due to the fact that the water rate was not included in the figures in the notice to admit facts; but he very fairly and properly said that he had no evidence of that, and that it was nothing more than a surmise—and I am not sure whether he did not use the word "guess". I should add that counsel for the defendants at the time made no comment on that statement, and there was no real reason why he should, and the learned judge then reserved his judgment. In his judgment he said this: A

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(2) [1922] 1 K.B. at p. 654. (3) [1924] 2 K.B. 10. (4) [1924] 2 K.B. at p. 19.

> "Counsel for the plaintiffs said, however (without being challenged), that these figures were for general rates levied by the local authority and did not include water rates and charges which are included in the definition of rates in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (d)." B

Counsel for the defendants has very properly urged in this appeal that the learned county court judge was in error in attaching the importance which apparently he did to what counsel for the plaintiffs had very fairly said was nothing more than a guess.

However, it appears that after the trial this matter was investigated by both parties, and it does appear that the figures which were included in the notice to admit facts served by the defendants' solicitors were the figures of the general rate only, and did not include a sum for the water rate. It is equally plain that, when the plaintiffs' solicitors were asked to admit these figures, they checked them with the rate books and they found they did coincide with the general rate, but they overlooked the fact that the figures should have been for the general rate plus the water rate; and in those circumstances they accepted the figures submitted by the defendants' solicitors and admitted they were the proper figures. The result was that there was a mutual misunderstanding. The defendants' solicitors had put forward a set of figures which they said were the rates, but which referred only to the general rate and, as they well knew, did not include anything for water rate, they presumably overlooking that the water rate should have been included; and the plaintiffs' solicitors accepted those figures as being the figures for the general rate, as in fact they were, and again they themselves overlooking the fact that the water rate should have been included. C D E

Therefore, the position before the learned county court judge was that these figures of the actual rates were correct in the sense that they were the general rate, but were the general rate only and did not bear a proper relation to the figures which were contained in the notice of increase of rent. No application was made to this court to call additional evidence, and both counsel appeared to take the view that had such an application been made this court would have refused it, the correct figures being available and obtainable by reasonable diligence at the time of the hearing. But the real figures were in fact in the possession of learned counsel in this court, and during the course of the hearing those figures have been disclosed to us. The fact is that so far as 1939 is concerned the figure shown on the notice, which was £8 13s. 4d., was 3d. too much, because the general rate of £7 14s. 8d. plus 18s. 5d. water rate came to a total of £8 13s. 1d. Whereas the 1945 figure shown on the notice to admit was £9 12s., to which had to be added £1 7s. 2d. for water rate, gives a total of £10 19s. 2d., which was 2d. less than the figure shown in the notice of increase of rent. The difference between those two figures, being the difference on which the increase should be based, on the correct figures amounted to £2 6s. 1d. and not £2 6s. as shown on the notice of increase. Of course, that could make no difference to the weekly payment of rent, which was increased by the sum of 10½d., and, if this difference had been taken into account, it could only have been increased by a further sum of 1/52nd part of 1d., which is a matter which could not be included in the notice. F G H I

Counsel for the defendants argued that, although the court was now in possession of the real figures, the case should be decided on the figures as they were put before the learned county court judge. I have come to the conclusion that that is not the way in which this case should be considered. Counsel have very properly put before us the true figures, the figures contained in the notice to admit facts and the admission of facts being based on a mutual misapprehension of the real position, and in my view it would be entirely unreal and a denial of justice if we did not now take into account those figures and decide the case on the basis of the figures which have been presented to us in this court, and that is how I propose to deal with the matter.

It is further argued by counsel for the defendants that, even if we dealt with the figures on that basis, they still are not precisely the correct figures, there is an error of 3d. in the 1939 figures, there is an error of 2d. in the 1945 figures, and there is a difference of 1d. between the two figures, although there is no difference and there could be no difference in the increase which could be applied in those circumstances. It is argued that, in view of the dictum of SCRUTTON, L.J., that these matters must be precisely stated down to the last penny, the notice must be invalid. I do not accept that contention. I appreciate that SCRUTTON, L.J., in using the language he did use was pointing out that these matters must be so accurately stated as to be carried down to the last penny, but I think he was using that language to emphasise the strictness with which the subsection should be construed, and was not laying down that, if in fact, by inadvertence or by a mutual misunderstanding, or for some other like reason, there was an error of 1d. in the figures on which the calculation was based, which would not affect the final figures, therefore the notice should be invalid.

It is said that one must pay attention to the words of s. 3 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which says:

> " If a notice served as aforesaid contains any statement or representation which is false or misleading in any material respect, the landlord shall be liable on summary conviction to a fine . . ."

My view is that this small error, which could have no consequence at all, cannot be regarded as being false or misleading in a material respect, and for my part I would not hold that this notice was invalid on the ground of that very slight error—almost a trivial error—in stating what the rates were. Therefore, in my judgment counsel for the defendants cannot successfully contend that the notice to increase rent was invalid on that first ground.

The second submission which he made was that in any event the notice was not in the prescribed form. Section 3 (2) of the Act of 1920 says that the

> " notice shall be in the form contained in Sch. 1 to this Act, or in a form substantially to the same effect."

It is common ground that the proper form of notice in this case should have been the one contained in the Rent Restrictions Regulations, 1940 (S.R. & O. 1940 No. 238). This was an old controlled house, i.e., a house that was controlled under the original Rent Act, and the standard rent was based on the 1914 rent. The form of notice which should be used in such cases is the one set out in the schedule to this order. That notice does contain other reasons for increasing the rent than the payment of rates; there are four matters set out of which particulars should be given under (a), (b), (c) and (d), but of course particulars should only be given relating to the rent being sought to be increased. In this case the increase was on account of the increase in rates, whereas the form provides also for amounts spent on improvements and structural alterations, and so on. The submission is that, because the form which was served on Mr. Gilbert did not contain the paragraph relating to amounts spent on improvements and structural alterations, either with " nil " against them or the words struck out, and because it did not contain other similar words, it was not in the form prescribed by the subsection, nor in a form substantially to the same effect. It was also argued that the standard rent was based on the 1914 rent and the 1914 rates. The difference in rates on which the increase of rent was claimed was not between 1914 and 1945, but the difference was between 1939 and 1945, and in those circumstances the landlord was entitled to a greater increase than he had claimed, and, as he had only claimed the difference from 1939 and not from 1914, I need say no more than that in my view that cannot be a valid objection to this notice. The notice may not be precisely in the prescribed form; it is clear that the wrong form has been used and the form which was used related to new controlled houses and not to old controlled houses, but in my judgment it is in a form substantially to the same effect as the prescribed notice. It has all the essential matters in it for calculating the increase in rent and giving the reason why the rent has been increased. In those circumstances, I can see no substance in the submission that this notice was not substantially to the same effect as the prescribed form. A B

The third objection to the notice of increase was that it was not served by the landlord. The section (s. 3 (2) of the Act of 1920) provides that, where the increase is on account of an increase in rates, it can be made

> ". . . one clear week, after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent . . ."

It does not provide that the notice must be signed by the landlord; it provides only that the notice must be served by the landlord. In this case the notice was signed by " C. L. Tebbit & Co., Chartered Surveyors, 35, Corringway, Ealing, W.5 ". They did not state on the notice that they were agents for the plaintiffs. Clearly, it would have been better if they had, but all it contained was the signature of those chartered surveyors. It was well-known to the tenant at that time that Messrs. C. L. Tebbit & Co. were the agents of the landlords for this property. Their name had appeared on the rent books since 1922, and their name had appeared on at least one rent book as agents with the names of the landlords, the plaintiffs, and the rent had been paid by the tenant to those agents fortnight after fortnight since 1945. There is no doubt—and the rent books show it beyond question—that the increased rent in accordance with this notice was paid from Apr. 30, 1945, when this notice expired. After this lapse of time, although it is true that no evidence was called by the landlords to show that Messrs. C. L. Tebbit & Co. had authority to serve that notice on their behalf, it would be idle to suggest that Messrs. C. L. Tebbit & Co. had no authority to serve the notice on the tenant on behalf of the landlords. They were well recognised by the tenants as being the agents of the landlord, and it is not until fifteen years later that their authority is doubted. In my judgment, there is no substance in that argument. C D E F

If that be so, it follows that the notice is a valid notice. If it is a valid notice, it means that at the time of his death Mr. Gilbert was not a contractual tenant of this house. If he was not a contractual tenant, as I have said earlier, the second defendant is not the contractual tenant and the landlords are entitled to an order for possession. G

The question still remains, however, of the tenancy of the one room which was sub-let in 1935 by Mr. Gilbert to the first defendant, when Mr. Gilbert was a contractual tenant of the house, and there is no doubt that the sub-letting was a proper one. On that point, the learned county court judge said this:

> " As to that, in my view the tenancy of the one room must be taken to have been surrendered and superseded by the arrangement for the occupancy of the four rooms after Mr. Gilbert died. Counsel admitted that, assuming that Mr. Gilbert became a statutory tenant, this arrangement would not enable the defendants to resist the plaintiffs' claim to possession." H

Clearly that would be so, because Mrs. Gilbert as statutory tenant could not give them any better tenancy than she herself had. Counsel for the defendants has, however, questioned the finding of the learned county court judge on the ground that there was no evidence on which he could come to this decision. The evidence was simply this, that in 1935 one room with the use of the scullery for cooking was sub-let to Mr. Bryant; after Mr. Gilbert's death, the defendants were allowed to use a further three rooms and still to have the use of the scullery for cooking. What evidence is there of a surrender of the tenancy? There is certainly no evidence of an express surrender, which would have to be in writing to be effective, and there is no evidence or suggestion by anybody that such a I document was ever in existence. Is there anything by which such a surrender could be implied? Clearly, the surrender of a tenancy can be implied if it is replaced by another tenancy. This tenancy was never replaced by another tenancy. Would it be right to imply here that the first defendant surrendered a contractual tenancy which he had of this one room in order that he could have what could be nothing more than the right to use four rooms during the time that Mrs. Gilbert was the statutory tenant of the rooms? In my judgment, the evidence does not give rise to such an implication, and I find nothing to suggest that this contractual tenancy was abandoned because a further three rooms were allowed to be occupied by the defendants. Therefore, subject to the last point which has been raised by counsel for the plaintiffs on this question, in my judgment that tenancy of the one room is still vested in the defendants.

A further point has been taken by counsel for the plaintiffs, and that is that in the circumstances there was never a separate letting of any part of the house to the defendants, and therefore they cannot be regarded as being protected by the relevant section of the Act of 1920. The argument is that they certainly had the exclusive use of one room but they had in addition the joint use of other living accommodation in the house, and in those circumstances—following the decision in such cases as *Neale* v. *Del Soto* (5)—they cannot be said to have had a tenancy which would be a protected tenancy.

We were referred to *Cole* v. *Harris* (6), in which the defendant, in June, 1943, let to the plaintiff three rooms, consisting of bedroom, living room and kitchen, on the first floor of a dwelling-house, together with the joint use, with the plaintiff and the tenant of the second floor, of a bathroom and w.c., at a rent of 32s. a week. On Sept. 1, 1930, the plaintiff's three rooms were let to a tenant at 22s. a week. The house as a whole was freed from control by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and while so free was let in 1936 at £75 a year. It had not been let on or since Sept. 1, 1939, the defendant being the owner in fee simple. It was held by MacKinnon and Morton, L.JJ. (Lawrence, L.J., dissenting), that there was a demise of the three rooms as a separate dwelling and not a mere sharing of the whole house. It was difficult to define, as a matter of legal principle, the dividing line between the two classes of case, but the most satisfactory formula seemed to be to say that if there was a sharing of essential living rooms (which would include the kitchen) there would not be a demise of the premises as a separate dwelling-house. Sharing of other than living accommodation, though such accommodation may be of a kind essential according to modern standards, would not necessarily prevent the letting being a demise of the premises as a separate dwelling, and it must be decided as a question of fact in each case. I think that if reference is made to a passage in the judgment of Morton, L.J., the position is sufficiently clearly stated. He is there referring to the possible construction of " use of bathroom and lavatory accommodation ", and then goes on to say (7):

> " If the legislature had used words which would only bear this construction, if fairly construed, we should have had to give the words this construction, and leave it to the legislature to pass fresh legislation if it thought fit. In my view, however, the words are fairly open to another construction. I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as ' living rooms ' or ' dwelling rooms '. To my mind a kitchen is fairly described as a ' living room ', and thus nobody who shares a kitchen can

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(5) [1945] 1 All E.R. 191; [1945] K.B. 144.
(6) [1945] 2 All E.R. 146; [1945] K.B. 474.
(7) [1945] 2 All E.R. at p. 152; [1945] K.B. at p. 485.

> be said to be tenant of a part of a house let as a separate dwelling. In many households the kitchen is the principal living room, where the occupants spend the greater part of the day. Very often it is the warmest part of the house and the family tend to congregate there for that reason . . ."

Then he goes on to discuss the position of the bathroom and the w.c. Applying that test here, counsel for the plaintiffs would have us hold that on the evidence there was not a letting of a separate part of the house, but a joint use of the house, because he says that what was described by the witnesses as a scullery, and what was described by the learned judge as a kitchenette, was a part of the living or dwelling accommodation of the house, and therefore took the sub-letting of this one room out of the category of a separate letting.

The learned county court judge did not address his mind to this question at all; he had no need to do so, having regard to the view he had formed that the sub-tenancy had been abandoned, but the only evidence is that the scullery was used for cooking. There is no suggestion that the scullery and the kitchenette were the same place; there is no suggestion that the scullery was used for any living purposes, other than cooking. Applying the test laid down by MORTON, L.J., in *Cole* v. *Harris* (8), as I think that it is the duty of the court to do, all I can say is that there is no sufficient evidence on the case put before us to justify a finding that this was other than a letting of a separate part of the house. In these circumstances, the sub-tenancy of the one room which was let in 1935 is still subsisting, and it follows that the appeal must be allowed so far as that room is concerned, but thus far only.

I have said nothing about the counterclaim, but it follows that, if the notice was in order, there has been no excess payment of rent, and therefore the counterclaim cannot stand. In my judgment there should be an order allowing this appeal to the extent that the order for possession should be varied to exclude possession of the one room which was sub-let to the defendants in 1935.

WILLMER, L.J.: I agree. The principal question which has been debated before us is whether the contractual tenancy of the premises which Mr. Gilbert, the father of the second defendant, undoubtedly had at one time was determined before his death in August, 1945. As my Lord has said, that depends on whether there was a valid notice of increase of rent served on him in his lifetime, and in particular on whether the notice of Apr. 16, 1945, was a valid notice.

As my Lord has pointed out, counsel for the defendants has put forward three grounds on which he has criticised that notice, and on which he has invited us to say it was not a valid notice. I agree with my Lord that none of those three grounds can prevail, and I say a few words only on the argument based on the discrepancy in the figures for rates as between the notice itself and the notice to admit facts served by the defendants on the plaintiffs and accepted by the plaintiffs, because I feel it was largely in consequence of a question of mine that the true facts regarding the situation came to light as my Lord has described.

Notwithstanding that we have now been informed of the true facts with regard to those figures, it has nevertheless been contended that we still ought to proceed on the basis of what was before the learned county court judge, and to regard the discrepancy in the figures as between the two respective documents as an unexplained discrepancy. To my mind that would be to proceed in a world of make-believe, and we should not be dealing with what is the real issue between the parties. I think it is unfortunate that some effort was not made on behalf of the defendants at the trial, seeing that it was their intention to rely on the discrepancy in the figures, as a ground for impugning the validity of the notice, to find out and, if possible, to put before the learned judge what was the reason for the discrepancy. However, that was not done, and it has been left for investigation subsequent to the hearing of the case to find out what the reason was.

Now that we know the true facts, it emerges that the real discrepancy is a

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(8) [1945] 2 All E.R. at p. 152; [1945] K.B. at p. 485.

A discrepancy of only 3d. in the case of the 1939 rates, and a discrepancy of 2d. in respect of the 1945 rates. The resulting calculation as to what would be the appropriate increase of rent is left entirely unaffected by such a minute discrepancy in the rating figures. In those circumstances, counsel for the defendants is driven to contend that we are literally bound by the dictum of SCRUTTON, L.J., in *Bourne* v. *Litton* (9), to which my Lord has already referred. I think, however, B that it is as well to have in mind exactly what the learned lord justice did say. He said this (10):

> "He [the landlord] must state to the tenant, some time before the increased rent becomes payable, clearly and exactly what he proposes to do, and the form in Sch. 1 to the Act specifies with minute particularity what the landlord must tell the tenant before he can increase the rent. He must tell C him the exact amount down to a penny."

It seems to me that, read grammatically in its context, what the learned lord justice was saying was no more than that the landlord must tell the tenant the exact amount of the new rent down to a penny. I doubt whether the learned lord justice had in mind a possible discrepancy in the figures, whether of rates or cost of repairs, which are put forward as the basis on which it is sought to D increase the rent. What the landlord has got to do is to tell the tenant down to the last penny what he, the tenant, will have to pay. In those circumstances, I think it would be pressing what SCRUTTON, L.J., said too far to contend that, because there was a wholly irrelevant discrepancy of 2d. or 3d. in the rates stated for the respective years, therefore this was an invalid notice, even though the resulting figure for rent was left entirely unaffected. I cannot read the E dictum of SCRUTTON, L.J., as going quite so far as to say that there is no room at all for the application of the de minimis rule. In my judgment the discrepancy which has now emerged is an entirely irrelevant one and is not such as can be held to render this an invalid notice.

It remains to deal with the question of the sub-tenancy, the only matter in respect of which we are being sympathetic towards the defendants' case. On F that I desire to express my agreement with what my Lord has said. It seems to me that the learned judge's finding that there was a surrender of the sub-tenancy of one room, by reason of the subsequent arrangement after Mr. Gilbert's death for the occupation of four rooms, is a finding that cannot stand for the reasons stated by my Lord. I would venture to add one further reason of my own. It strikes me as a significant fact which appeared from the evidence that after the G arrangement was changed the rent which the defendants were paying remained the same as it was before, viz., 8s. a week.

With regard to the further argument addressed to us this morning by counsel for the plaintiffs, I agree with what my Lord has said, and I find myself unable to accept the submissions which have been made to us.

For these reasons, I agree that so far as the main point is concerned the appeal H should be dismissed, but that it succeeds so far as concerns the subsidiary point with regard to the sub-tenancy.

UPJOHN, L.J.: I agree. I only desire to add a few words on two topics. The first is with regard to the admission made as to the rates payable in respect of the premises. I was very doubtful at one stage whether it was right for this I court to go behind that admission and to look at the true figures which had not been put before the learned county court judge. But, having heard full argument, I can only say that I am very glad that we did so. It seems to me that the true position is this: The admission that was asked for by the notice to admit facts was that the rates payable in respect of the premises were as thereinafter stated. The figures in fact given were those of the general rate and did not include the water rate. In my judgment those figures were rightly admitted for the reason that, if a party is asked to admit that certain rates are payable, the party so asked to make the admission is entitled to suppose that he is being asked about rates strictly so called, i.e., the general rate which is paid to the local authority. Although a water rate is colloquially called a water rate, it is not in fact a rate strictly so called; it is a statutory charge made by the water authority, in this case I suppose the Metropolitan Water Board, which they are entitled to make for supplying water. A water rate is not a true part of the rates payable in respect of the premises. The real truth of the matter is that the defendants were asking for the wrong admission and that, I think, was the view taken by the learned county court judge if his judgment is read carefully.

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(9) [1924] 2 K.B. 10.

(10) [1924] 2 K.B. at p. 19.

The admission which was obtained formed no foundation whatever for the argument of counsel for the defendants that there was a discrepancy in the notice of increase. If he desired to found an argument based on discrepancy, the proper admission that should have been asked for was an admission which related to rates including the water rate, because for the purposes of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, rates include " water rents and charges ". Therefore, when he came to develop his point before the learned county court judge he was starting altogether on the wrong foundation, because he had to show that there was a discrepancy in the rates as defined by the Rent Acts, and he started from a foundation which omitted the essential element of the water rate. It follows, therefore, that his argument based on the admission in my judgment must necessarily have failed, because he was trying to compare like with unlike. It was really essential for him to produce the correct figures in this court if he desired to make anything of the point at all. As counsel for the plaintiffs did not object, I think that it was proper for us to look at the figures.

When the figures are looked at, then I hope counsel for the defendants will forgive me if I say that the point disappears altogether. The notice of increase was one which asked for an increase in rent because of an increase in rates; that was the vital figure which the tenant wanted to know: What was the increase in rates and what, spread over fifty-two weeks, did that mean he would have to pay in addition? The net increase in rates was stated by 1d. per annum too little and that, of course, could have no effect whatever on the weekly sum representing the increase. It seems to me that such a discrepancy must be subject to the de minimis rule, and it could not possibly render a notice invalid for the purposes of s. 3 of the Act of 1920.

On the second topic I only desire to add one sentence, i.e., on the question of the surrender of the sub-tenancy. It has not been suggested in this case that there has been any express surrender, i.e., a surrender by agreement of the parties when the arrangement was made shortly after Mr. Gilbert died for the defendants to occupy three further rooms. If there was a surrender, it must be by operation of law. A surrender by operation of law takes place when the parties so act, in relation to some existing tenancy or lease, that it is quite inconsistent with their acts to suppose that the existing tenancy is continued. The ordinary and obvious case is where two parties in the middle of some tenancy agree on new terms to take effect during the continuance of the old term, i.e., new terms as to the demised premises. In such a case the old tenancy must be surrendered by operation of law, because the parties have agreed on new terms relating to those very demised premises. In this case I can see no room for the application of the principle. All that the parties were arranging was with regard to the occupation of some additional rooms not included in the old tenancy, and I cannot see how as a matter of law that necessarily operates to surrender an existing tenancy. Accordingly, for these reasons, I agree with the order which has been proposed.

Appeal allowed to the extent that the order of the county court judge be varied to exclude possession of one room. Leave to appeal to the House of Lords refused.

Solicitors: *Gregsons* (for the defendants); *Friedman, Fredman & Co.* (for the plaintiffs).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

JEWISH BLIND SOCIETY TRUSTEES *v.* HENNING (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Pearce and Harman, L.JJ.), March 23, 24, 25, October 17, November 10, 1960.]

Rates—Exemption—Structure—Blind persons' home—Whether for prevention of, or care in, illness, mental defectiveness, etc.—Whether welfare arrangements—Whether structure similar to those for such purposes—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 9 (1) *—National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6 *c.* 81), *s.* 28 (1), *s.* 79 (1) *—National Assistance Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 29), *s.* 29 (1).

A hereditament comprising a three-storey dwelling-house in 10½ acres of grounds adapted for the accommodation and treatment of blind persons was occupied by a voluntary society formed to provide assistance to indigent Jews who were blind or virtually blind. The hereditament provided accommodation for sixty-four persons, twenty being chronic invalids and the remainder suffering from some disability additional to their blindness and occupational therapy being provided for their treatment. Of the inmates only four were there in pursuance of arrangements made with local authorities under s. 28 (1) of the National Health Service Act, 1946, and no arrangements had been made under s. 29 of the National Assistance Act, 1948, with a local authority for the provision or use of the dwelling-house. The society claimed relief against rates on the ground that the dwelling-house was a structure within s. 9 (1)* of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Held: assuming that the premises were a structure within s. 9 (1) of the Act of 1955 the society was not entitled to relief from rates for the following reasons—

(i) as regards para. (b) of s. 9 (1), because, first (per LORD EVERSHED, M.R., and, semble, per PEARCE, L.J.) blindness was not an illness within s. 28 (1) and s. 79 (1) of the National Health Service Act, 1946, and, secondly, in any case the society was not formed for any purposes mentioned in s. 28 (1), so that the society could not bring itself within the description of voluntary organisation mentioned in para. (b); moreover, the dwelling-house was not supplied for the use of persons in pursuance of arrangements made under s. 28 (1), as only four out of sixty-four persons were inmates as a result of anything that could be called such an arrangement (see p. 50, letters E and G, and p. 53, letter E, post).

(ii) as regards para. (c) of s. 9 (1), because the premises had not been supplied in pursuance of arrangements made under s. 29 of the National Assistance Act, 1948, which was an enactment directed to the provision of welfare services as distinct from accommodation (see p. 51, letter D, p. 52, letter A, and p. 54, letter B, post).

(iii) as regards para. (d) of s. 9 (1), because the premises were not " of a kind similar to " those mentioned in paras. (a), (b) or (c) of s. 9 (1) as the purposes of the society's premises were not similar to those referred to in paras. (a) to (c), the structures referred to in para. (c) in particular being such as were for the provision of welfare services, not residential homes (see p. 52, letters E and F, and p. 54, letters C and D, post).

Per CURIAM: the premises were not a " structure " within s. 9 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, for structures within that enactment were such as were adjuncts or appendices to main buildings, not whole hereditaments (see p. 49, letter I, to p. 50, letter A, p. 53, letters B and C, and p. 54, letter F, post).

Appeal allowed.

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* Section 9 (1) is printed at p. 49, letter F, post.

[As to structures required not to be taken into account in valuations for rating purposes, see 32 HALSBURY'S LAWS (3rd Edn.) 53, para. 71.

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 9 (1), see 35 HALSBURY'S STATUTES (2nd Edn.) 396.]

Case Stated.

The valuation officer appealed by way of Case Stated against a decision of the Lands Tribunal (ERSKINE SIMES, ESQ., Q.C.), given on May 11, 1959, and reported (1959), 5 R.R.C. 103, allowing an appeal by the ratepayers, the trustees of the Jewish Blind Society, against a decision of a local valuation court of Southern Surrey Local Valuation Panel given on July 16, 1958. The Lands Tribunal held that a building comprised in a hereditament described as house for the blind, " Rokefield ", Westcott, near Dorking, Surrey, owned and occupied by the ratepayers, was a structure within the meaning of s. 9 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and so was required not to be taken into account in arriving at the value of the hereditament. The tribunal therefore reduced the assessment of the hereditament from £1,250 gross value, £1,038 rateable value, to £20 gross value, £12 rateable value. The valuation officer contended that the building was not a structure within the meaning of s. 9 of the Act of 1955 or a structure to which s. 9 (1) applied, that it was not " supplied for the use of any person " and that there was no evidence on which it could be held that the ratepayers had entered into " arrangements " of the kind referred to in para. (b) and para. (c) of s. 9 (1). He also contended that in any event the building was not " of a kind similar to structures such as are referred to in " para. (a), para. (b), and para. (c) of s. 9 (1), and that on the true construction of s. 9, and on the evidence before the Lands Tribunal, account should have been taken of the value of the building in arriving at the value of the hereditament.

Anthony Cripps, Q.C., and *J. R. Phillips* for the appellant, the valuation officer.

W. L. Roots, Q.C., and *J. C. Taylor* for the respondents, the ratepayers.

Cur. adv. vult.

Nov. 10. The following judgments were read.

LORD EVERSHED, M.R.: This appeal relates to certain premises known as " Rokefield ", Westcott Street, Westcott, near Dorking, being a home for blind persons maintained by the Jewish Blind Society, the respondent ratepayers. The case turns on the effect, as applied to this case, of s. 9 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

The facts are set out in the decision of the Lands Tribunal and from that decision I will quote shortly (1):

> " The hereditament comprises a large three-storey house standing in 10½ acres of grounds. The house, which was originally built as a private house, has been extended and adapted for its present use for the accommodation and treatment of blind persons. Accommodation is provided for sixty-four blind persons, twenty of whom are chronic invalids and the remainder all suffer from some disability in addition to blindness for whose treatment occupational therapy is provided."

The decision goes on to refer to the resident nursing and medical staff and the outside and domestic staff. Then it states that the ratepayers (2)

> " have arrangements with local authorities in regard to the home both under the National Health Service Act, 1946, and the National Assistance Act, 1948 ",

although it is later stated " I had no evidence of the terms of any arrangements " under the Acts. On the assumption (as I suppose) that there were such arrangements, the Lands Tribunal decided that the case did fall within paras. (b) and (c) of s. 9 (1) of the Act of 1955.

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(1) (1959), 5 R.R.C. at p. 104.

(2) (1959), 5 R.R.C. at p. 105.

When the case first came before this court, in March, 1960, it appeared desirable that we should know what in truth the facts were about those so-called arrangements. The case was therefore adjourned on Mar. 25, 1960, and an agreed statement of facts was prepared, to which I shall make some allusion later, which makes it quite plain that, save and except to some small extent under one of the sections, there are in fact no arrangements properly so called at all.

As appears from the decision, the argument for the appellant valuation officer before the Lands Tribunal was that the word " structure " which is used in the subsection meant something different from, something less extensive than, the entire hereditament which would or might be the subject-matter of rating. The Lands Tribunal rejected this argument, applying the general definition of " structure " which had been pronounced, in a case quite different from this case, by the former Lord Chief Justice, LORD GODDARD (3). For my part, I think that this hereditament is, in truth, not a structure within the meaning of that subsection, although that view is not necessarily decisive in the present case for reasons which will later appear.

It will at this stage be desirable that I should make the necessary reference to the Act of 1955. It is relevant to observe that s. 7 of the Act deals with cases where " hereditaments ", being used as places of religious worship, are entitled to relief from rates. Section 8 is expressed to apply to " the following hereditaments, that is to say "—and in para. (a) there is a well-known class of case,

> " any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit ",

etc., and other " hereditaments " are referred to later in the subsection. Section 9 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides:

> " For the purpose of ascertaining the gross value of a hereditament for rating purposes, no account shall be taken—(a) of any structure belonging to the Minister of Health and supplied by that Minister, or (before Aug. 31, 1953) by the Minister of Pensions, for the accommodation of an invalid chair, or of any other vehicle (whether mechanically propelled or not) constructed or adapted for use by invalids or disabled persons; or (b) of any structure belonging to a local health authority, or to a voluntary organisation formed for any of the purposes mentioned in s. 28 (1) of the National Health Service Act, 1946 (which relates to the prevention of illness, and to the care and after-care of persons suffering from illness or mental defectiveness), and supplied for the use of any person in pursuance of arrangements made under that subsection; or (c) of any structure belonging to a local authority, within the meaning of s. 29 of the National Assistance Act, 1948 (which relates to welfare arrangements for blind, deaf, dumb and other handicapped persons), or to such a voluntary organisation as is mentioned in s. 30 of that Act, and supplied for the use of any person in pursuance of arrangements made under the said s. 29; or (d) of any structure which is of a kind similar to structures such as are referred to in para. (a), para. (b) or para. (c) of this subsection, but does not fall within that paragraph by reason that it is owned or has been supplied otherwise than as mentioned in that paragraph."

I draw attention to the opening words of the subsection, and I further note that para. (a) is clearly limited to structures which are merely adjuncts to some other building, and it would, I should have thought, have been most unusual and unnatural as a matter of drafting for a section to begin by first illustrating an

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(3) In *Mills and Rockleys, Ltd.* v. *Leicester Corpn.*, [1946] 1 All E.R. at p. 427; [1946] K.B. at p. 319.

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obviously limited nature of edifice and then to go on gradually to expand the significance of the word " structure " until it had become synonymous with the hereditament as a whole.

I therefore think that the argument which the valuation officer presented to the Lands Tribunal, and which was presented to this court, is a very cogent argument, and for my part I would be prepared to hold that " Rokefield " is not a structure within this section at all. It is not, however, necessary to decide that point in this case, and I therefore refrain from attempting any definition of the word " structure " as it is used in this subsection. I will proceed on the basis that I am not right in my limitation of the word so as to exclude the premises here in question.

I turn therefore to para. (a) of s. 9 (1). I do not re-read the paragraph, but it is quite plain that this house " Rokefield " is not a structure within the terms of para. (a). Next comes para. (b), and the first question which arises is: Are the ratepayers " a voluntary organisation formed for any of the purposes mentioned in s. 28 (1) of the National Health Service Act, 1946? ". I think that the answer to that question is in the negative. The purposes which are mentioned in s. 28 (1) of the Act of 1946 are threefold; they are first " the purpose of the prevention of illness ", second " the care of persons suffering from illness or mental defectiveness " (4), and third " the after-care of such persons," i.e., persons suffering from illness or mental defectiveness. The present case can only, as I see it, be brought within that catalogue by treating the blindness from which the unfortunate inmates of " Rokefield " suffer as being an illness within the meaning of that subsection. The word " illness " is interpreted in s. 79 (1) of the Act of 1946 as follows (5):

> " ' illness ' includes mental illness and any injury or disability requiring medical or dental treatment or nursing."

It is true from the facts which I have stated that a great number of these unfortunate people do require medical treatment or nursing; but that is not because they are blind; it is because, as the decision states, they suffer also from some other additional disability. The main object of the ratepayers, as stated in their constitution, is that of providing assistance to indigent Jews who are blind or virtually blind. I therefore think that this organisation is not one which falls within the words I have quoted from para. (b), and if that conclusion is right it follows that the case cannot be brought within that paragraph.

If I am wrong as to that point, and if in truth it was proper to hold that the organisation was one formed for any of the purposes mentioned in the paragraph, then it is still necessary for the ratepayers to satisfy the court that the premises were supplied for the use of persons in pursuance of arrangements made under s. 28 (1) of the National Health Service Act, 1946. It is at this point that I feel the new evidence is decisive, because it is quite plain that at the most only four of the sixty-four inmates of this home are there as a result of anything which could be called in any sense an " arrangement " with a local authority. It seems to me that that is insufficient to enable one to predicate of this structure (if I may so describe it) that it has been " supplied for the use of any person in pursuance of arrangements made under " s. 28 (1) of the Act of 1946.

There then follows para. (c), and that opens (6) with the Delphic remark:

> " of any structure belonging to a local authority, within the meaning of s. 29 of the National Assistance Act, 1948."

The Lands Tribunal, when the matter was before it, made the pertinent observation (7) that: " The subsection lacks that clarity which usually distinguishes the work of Parliamentary draftsmen ", and it is indeed a problem to discern what can possibly be, as a matter of English, the sense of the phrase " within the meaning of s. 29 of the National Assistance Act, 1948." One would expect to find words to this effect:—of any structure belonging to a local authority in pursuances of its powers under that section of the Act. But that does not appear to be what the paragraph says. It is, however, fortunately unnecessary to pursue that problem, because clearly this structure—and again I use the word without prejudice—does not belong to any local authority, it belongs to a voluntary organisation. So the next question is: " Is the voluntary organisation—the Jewish Blind Society, the ratepayers—one which is mentioned under s. 30 of the Act of 1948? " Section 30 (1) of the Act of 1948 refers to

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(4) The words " or mental defectiveness " have subsequently been repealed by the Mental Health Act, 1959, s. 149 (2), Sch. 8, Part 1. See also s. 6 of that Act.

(5) The definition has subsequently been amended by the Mental Health Act, 1959, s. 149 (1), (2), Sch. 7, Sch. 8, Part 1.

(6) See p. 49, letter F, ante, for the terms of s. 9 (1) of the Act of 1955.

(7) (1959), 5 R.R.C. at p. 105.

> "... any voluntary organisation for the time being registered in accordance with this Act being an organisation having for its sole or principal object or among its principal objects the promotion of the welfare of persons to whom the last foregoing section applies."

It is a fact that the ratepayer society has been so registered, and I think that there can be little doubt that the ratepayers are a voluntary organisation such as is mentioned in s. 30 (1) of the Act of 1948.

That, however, is not enough, because it still remains to be established on the ratepayers' behalf that the premises, assuming them to be a structure, have been " supplied for the use of any person in pursuance of arrangements made under " s. 29 of the National Assistance Act, 1948. The answer to that problem, on the fresh evidence, is, I think, quite plainly in the negative. One of the exhibits now before us, which is called exhibit 13, is a letter written by or on behalf of the Ministry of Health to the Inland Revenue Department, and it is there stated quite plainly that there are no arrangements in relation to this house within the meaning of that section. The writer of the letter points this out with, I think, cogent force and says:

> " Residential accommodation for the handicapped is not provided under s. 29 of this Act except for people working in sheltered workshops or for whom work or training is being provided under the Disabled Persons (Employment) Act, 1944. Surrey County Council have a scheme for the welfare of the blind and the partially sighted which was approved by the Minister under s. 29 of the National Assistance Act on May 30, 1949, but since ' Rokefield ' is a home for the elderly blind it is not the type of accommodation which would be used by the local authority in exercising their powers under this scheme, and is not therefore mentioned in the scheme, or in any subsequent variation."

The writer goes on to contrast s. 29 with s. 21 of the Act of 1948, and the letter also makes it quite plain in terms that there are no arrangements under that Act which would be necessary to enable these premises to qualify. I might add that arrangements, by s. 29 (3), must be made and carried out in accordance with what is there described as a scheme, and I have already said that it is now quite plainly established that there is no such scheme in fact.

I have already indicated by my reference to exhibit 13 a second answer to the claim on behalf of the ratepayers under this paragraph. Section 29 of the National Assistance Act, 1948, is the first of a number of sections under the heading of " Welfare services " and it provides by sub-s. (1):

> " A local authority shall have power to make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons who are blind, deaf or dumb, and other persons who are substantially and permanently handicapped by illness, injury, or congenital deformity . . ."

That is by way of contrast, as the writer of exhibit 13 points out, with the earlier s. 21, which imposes on a local authority a duty to provide accommodation for afflicted persons of various kinds. I do not forget that in s. 29 (4) (c) there is reference to the provision of workshops, and, in connexion with such workshops, hostels where persons engaged in the workshops may live; but, notwithstanding that reference, for my part I am satisfied that a place of this kind, the object of which is to provide a home for blind persons, is not within the scope of s. 29 of the Act of 1948 applying, as it does, to welfare services. On the evidence I take the view without hesitation that, even if "Rokefield" be a structure, it cannot bring itself within either para. (b) or para. (c) of s. 9 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

There remains, however, the one difficult question presented by the case, viz., whether (assuming again that the premises are properly a "structure") the ratepayers can bring the case within the broad terms of para. (d) of s. 9 (1) of the Act of 1955. It was the view of the Lands Tribunal (8) that, if the premises here in question had been "supplied otherwise than as mentioned in para. (b) or para. (c)" still they were "structures of a kind similar to those referred to in those paragraphs". With all respect to the tribunal and in light of the evidence now before us I have felt compelled to a different conclusion.

Paragraph (d) of s. 9 (1) of the Act of 1955 presents by its language considerable difficulties. The first is: What is meant by the formula "any structure which is of a kind similar to structures", etc.? Is it intended by this phrase to refer to structures which are, physically, similar to those previously mentioned? If the right answer to this last question were in the affirmative, then it would to my mind lend appreciable support to the view that the word "structure" was not intended to mean the entire edifice which would in the ordinary case be the hereditament to be rated, but would indicate some part or adjunct of the principal building; for, if the word had the former meaning, then it would be difficult to see what possible or sensible limit could be placed on the comprehension of para. (d). On the whole, I think that the phrase "a structure . . . of a kind similar to" means a structure the purposes or adaptability of which are similar to those previously mentioned. If this is the right view, then my conclusion is that the structure here in question cannot be said, within the meaning of the paragraph, to be similar to the structures indicated in para. (b) or para. (c).

As regards para. (b), I have already indicated that I think the structures there intended are limited to structures supplied in pursuance of arrangements relating to the prevention of illness and to the care and after-care of persons suffering from illness, or of persons suffering from mental defectiveness, and are not, therefore, apt to cover structures supplied as residential homes for blind persons. As regards para. (c), I have also earlier given my reasons for thinking that the structures there intended are limited to those adaptable and adapted for the provision of welfare services and again do not contemplate structures for use as residential homes.

If these views are right, it follows in my judgment that the structure here in question is not, tested by its purposes or adaptability, similar in kind to those indicated in the previous paragraphs; and, if that is right, it is unnecessary to consider further the precise significance of the final words in the paragraph "by reason that it is owned or has been supplied," etc. Put quite broadly and by way of illustration, I think that what para. (d) is intended to comprehend is the case where you have, say, a distinct "structure" equipped for giving inoculation against some disease (analogous to a para. (b) case) or as a rehabilitation workshop for the blind (analogous to a para. (c) case) but owned by a private individual and made available by him for the use of persons desiring the inoculation for blind persons (as the case may be) and not so available pursuant to arrangements with a local authority. I conclude, therefore, that para. (d) cannot be so construed as to cover the premises here in question. The result is that the valuation officer's appeal ought in my judgment to succeed.

PEARCE, L.J.: I agree. Section 7 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, contains a complete exemption of certain hereditaments from rates and s. 8 provides a limitation of rates chargeable on certain hereditaments. Then s. 9 (1) sets out certain structures of which no account shall be taken for the purpose of ascertaining the gross value of a hereditament for rating purposes. That section, therefore, seems to anticipate that, even when no account is taken of such structures, there will still be left a hereditament capable of assessment; it purports to deal with something that is a part rather than the whole of the hereditament. It is to be noted that the first of such structures (para. (a)) is a structure for the accommodation of an invalid chair, such structure having been supplied by the Minister of Health. There follow in para. (b) and para. (c) other structures which have been " supplied ". The use of the words " structure that has been supplied " and the nature of the structure specifically referred to in para. (a) give the impression that the structures contemplated are something of the nature of appendices to substantial buildings rather than the substantial buildings themselves. And the word " supply " gives an impression of prefabrication or impermanence. For it is not usual to speak of " supplying " a normal substantial house; the words " provide " or " build ", or " construct " would be more normal.

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(8) (1959), 5 R.R.C. at p. 106.

Paragraph (b) exempts from consideration any structure belonging to a voluntary organisation formed for any of the purposes mentioned in s. 28 (1) of the National Health Service Act, 1946 (which relates to the prevention of illness, and to the care and after-care of persons suffering from illness or mental defectiveness), and supplied for the use of any person in pursuance of arrangements made under that subsection. Whether the blind come within that section of the National Health Service Act, 1946, is at the least open to doubt. When one reads cl. 2 of the laws and regulations, which sets out the objects of the ratepayers, it is impossible to say that the ratepayer society was formed for any of the purposes mentioned in s. 28. In any event " Rokefield " was not supplied for the use of any person in pursuance of arrangements made under that subsection. For only four persons have been received into the institution. They were received under arrangements made in 1952; whereas " Rokefield " was taken over by the ratepayers in 1947 (if this can be said to be " supplied ") and extensively adapted from 1947 to 1949. There is no evidence to suggest that the alterations in 1953 were " supplied " in pursuance of arrangements made under that subsection. Clearly, therefore, para. (b) does not apply to this case.

Nor does para. (c) of s. 9 (1) of the Act of 1955 apply. For there is no evidence of any person going to " Rokefield " in pursuance of any arrangement under s. 29 of the National Assistance Act, 1948, and " Rokefield " was certainly not supplied for the use of any such person. It is significant that the reference in para. (c) is to s. 29 of the National Assistance Act, 1948, and not to s. 21. Section 21, together with the following sections up to s. 28, is headed " Provision of accommodation," and it relates to the duty of a local authority to provide (a) residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them; (b) temporary accommodation for persons in urgent need. The purposes of " Rokefield " would come within (a). Section 29, however, deals with quite a different kind of help. Both that and the following section are headed " Welfare services ". Section 29 expressly deals with the blind inter alia, and provides power to make arrangements for promoting the welfare of such persons. Subsection (4), without prejudice to the generality of the provisions, gives instances of arrangements that may be made. The furthest that any of these goes in providing accommodation is the provision under sub-s. (4) (c) of

> ". . . workshops where such persons may be engaged . . . in suitable work, and hostels where persons engaged in the workshops, and other persons to whom arrangements under sub-s. (1) of this section relate and for whom work or training is being provided in pursuance of the Disabled Persons (Employment) Act, 1944, may live."

The latter Act deals with vocational training for the disabled and industrial rehabilitation courses.

Although s. 29 of the National Assistance Act, 1948, does deal with the provision of hostels for those working in workshops provided under the section for taking courses under the Act of 1944, it is the workshops, not the residential accommodation, that are the object of the arrangements under s. 29. In this, it is in sharp contradistinction to s. 21. The fact that s. 29, and not s. 21, is mentioned in s. 9 (1) (c) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, shows that it is contemplating structures whose primary aim is welfare services rather than accommodation.

Therefore, it is within para. (d) of s. 9 (1) that " Rokefield " must come if it is to receive relief. If read sufficiently widely, that paragraph could include any private house which was of a kind similar in physical construction to structures such as are referred to in paras. (a), (b) or (c) of the subsection. That clearly is not intended. Mere physical similarity cannot be enough. The words used seem to indicate that the nature of the construction is some guide, and lend force to the argument of counsel for the valuation officer that the structures contemplated are in the nature of appendices to a building like the little sheds under para. (a) or structures like the workshops or hostels under para. (c), viz., structures aimed at service rather than permanent accommodation. I think that the words " of a kind similar " must mean compendiously " of a kind similar in the nature of their construction and used for similar purposes ". None of the paragraphs envisage anything in the nature of " Rokefield " either in its construction or in its purposes.

HARMAN, L.J.: I agree, and with satisfaction, for it is a comfort that the court, in construing so obvious a section as this one—s. 9 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955—does not feel itself constrained to come to a conclusion against which common sense revolts. I do not think that these are words too strong for a construction of this section of which it was said that, beginning with sheds for invalid chairs, it descended to a substantial mansion. Viewed in the absence of context, no doubt it is true that every building is a structure, but it seems to me monstrous to suggest that we should substitute the words " this is the structure that Jack supplied ", for the words " this is the house that Jack built ".

[After discussion concerning the form of order and whether the Court of Appeal should give a direction or make a declaration the court, at the instance of counsel for the appellant, and counsel for the respondents not objecting, made a declaration that the values at which the hereditament the subject of this appeal should stand in the valuation list were £1,250 gross value, £1,038 rateable value.

On the application of counsel for the respondents, the Jewish Blind Society, the court gave leave to amend the title of the proceedings, by substituting for the name of the society the names of Leonard Montague Alfred, George Norden and Desmond Adolph Tuck, the trustees of the general fund of the Jewish Blind Society.

After discussion on costs, the following was directed to be included in the order, as regards costs of or to be paid by the added parties " Without prejudice to the right of the named persons to recover their proper costs as trustees out of the trust fund."]

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the appellant, the valuation officer); *Rubinstein, Nash & Co.* (for the respondents, the ratepayers).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Re TAYLOR (*deceased*). TAYLOR *v.* TAYLOR AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), November 4, 7, 8, 9, 1960.]

Marriage—Presumption of marriage—Cohabitation as husband and wife—Reputation and acceptance by small community—Clear evidence necessary to rebut presumption.

Where a man and woman are proved to have lived together as man and wife, though there is no evidence of any marriage ceremony, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage (see p. 58, letters B and C, post).

Principle stated by SIR BARNES PEACOCK in *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* ((1881), 6 App. Cas. at p. 371) quoted by KEKEWICH, J., in *Re Shephard* ([1904] 1 Ch. at p. 463) adopted.

The plaintiff, who was born in 1911, claimed to be the legitimate son of John Taylor who died intestate in 1955, and to be entitled to a share in his residuary estate. In support of his claim the plaintiff adduced the following evidence—(i) evidence of reputation given by six witnesses who testified that John Taylor and one Izender had lived together as Mr. and Mrs. Taylor in a small community from 1908 until Izender's death in 1913 and were accepted by the community as husband and wife; (ii) certain certificates, viz. (a) birth certificates relating to the four children born to John Taylor and Izender between 1904 and 1911, (b) the death certificate of Izender, and (c) a certificate of marriage; (iii) evidence that Izender was buried in consecrated ground and was entered in the register of burials as the wife of John Taylor; and (iv) evidence of oral declaration made by John Taylor to the effect that he had married Izender. In the case of each birth certificate the informant's name was entered as Izender Taylor and the father's name was entered as John Taylor. In the death certificate Izender was described as the wife of John Taylor who was the informant and who described himself as her widower. The marriage certificate was of the marriage between John Taylor and one M.G. in 1914 and in that certificate he was described as widower. The plaintiff produced no certificate of any marriage between John Taylor and Izender, nor was any witness called who attended any ceremony of marriage between them. On appeal from a decision that the court should conclude that John Taylor and Izender were lawfully married,

Held: the evidence of cohabitation and acceptance as husband and wife by a small community for the period from 1908 until 1913 terminated by Izender's death gave rise to the presumption that John Taylor and Izender were lawfully married; on the evidence the defendants had not clearly proved that that inference was wrong, the latter question being one of fact for the trial judge from whose conclusion in the present case the Court of Appeal would not differ (see p. 60, letter H, and p. 62, letter G, post), and accordingly the presumption prevailed.

Appeal dismissed.

[As to the presumption of marriage from proof of cohabitation, see 15 HALSBURY'S LAWS (3rd Edn.) 347, para. 627; and 19 HALSBURY'S LAWS (3rd Edn.) 812, para. 1323; and for cases on the subject, see 27 DIGEST (Repl.) 70, 71, *485-493*.]

Cases referred to:

Morris v. *Davies*, (1837), 5 Cl. & Fin. 163; 7 E.R. 365; 3 Digest 359, *12*.

Piers v. *Piers*, (1849), 2 H.L. Cas. 331; 13 L.T.O.S. 41; 9 E.R. 1118; 27 Digest (Repl.) 75, *555*.

Sastry Velaider Aronegary v. *Sembecutty Vaigalie*, (1881), 6 App. Cas. 364; 50 L.J.P.C. 28; 44 L.T. 895; 27 Digest (Repl.) 69, *476*.

Shephard, Re, George v. *Thyer*, [1904] 1 Ch. 456; 73 L.J.Ch. 401; 90 L.T. 249; 27 Digest (Repl.) 70, *490*.

Stollery, Re, Weir v. *Treasury Solicitor*, [1926] All E.R. Rep. 67; [1926] Ch. 284; 95 L.J.Ch. 259; 134 L.T. 430; 90 J.P. 90; 22 Digest (Repl.) 315, *3279*.

Taplin, Re, Watson v. *Tate*, [1937] 3 All E.R. 105; 27 Digest (Repl.) 76, *568*.

Appeal.

This was an appeal by the defendants, the administrators of the estate of John Taylor, from an order of DANCKWERTS, J., dated Feb. 4, 1960, declaring that the plaintiff was one of the persons entitled to share in the distribution of the estate of John Taylor, deceased, and that the parties were at liberty to apply to have the estate of the said deceased administered by the court.

Michael Albery, Q.C., and *J. L. Harman* for the appellants, the defendant administrators.

R. W. Goff, Q.C., and *Charles Sparrow* for the respondent, the plaintiff.

LORD EVERSHED, M.R.: The plaintiff in this action claims that he is entitled to share in the estate of John Taylor deceased, who died intestate on Dec. 17, 1955, as being one of John Taylor's legitimate children. The defendants to the action are the administrators of John Taylor's estate and are two admittedly legitimate children by the intestate's marriage to Martha George. That marriage is recorded on a certificate which is before us as having taken place on June 23, 1914, and no question arises with regard to it. Before that marriage, however, there is no doubt that the intestate cohabited for an appreciable period of time with a lady of the somewhat unusual name of Izender, called sometimes Izender Amer, Izender Lucas or Izender Taylor. She was of Romany extraction and appears to have been illiterate. She died on June 13, 1913. It is not in doubt that she bore the intestate four children; the eldest, a daughter called Florence, was born on Oct. 1, 1904, and the youngest, called Horace, was born on Sept. 25, 1911, and is the plaintiff in this action.

The question raised in the action is whether the intestate and Izender were ever, and more particularly at the date of the birth of the plaintiff, lawfully married. No certificate of marriage has been found or produced. Nor is there any evidence of a ceremony of marriage. DANCKWERTS, J., concluded none the less that the evidence of reputation and of admissible declarations were such that he could and should conclude that John Taylor and Izender were lawfully married or were at least lawfully married at all relevant dates for the purpose of this action, and, therefore, that the plaintiff was entitled to claim as a lawful son and one of the next of kin of the intestate. I will say at once that on such a matter I am not prepared to say that the learned judge's conclusion was wrong. I do not think it necessary that I should go in detail through the evidence though I shall make some summary references to parts of it.

We were also referred to a number of cases and again I do not think it necessary to go at length through those cases though it is desirable that I should state in some form what I believe to be the law applicable in a case of this kind. It was emphasised on the defendants' part that this was not a case in which the parents of the plaintiff did go through and intended to go through some form of marriage ceremony, but where that ceremony has been shown to be, or to be perhaps in some degree, defective. Having looked at a number of these cases, it is also pertinent to observe that there appears to be a divergence, and it may be said to be a marked divergence, in the text-books as regards the emphasis which in a case of this kind should be placed on the fact of reputation. On the one side there are the statements in 19 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), at p. 812, para. 1323, entitled "Presumption from cohabitation" and in Powell on Evidence (10th Edn.), at p. 342, where the emphasis strongly favourable as to the effect of cohabitation is stated. On the other side in 15 Halsbury's Laws of England (3rd Edn.), at p. 347, para. 627, under the heading "Marriage and issue" and in Phipson on Evidence (9th Edn.), at p. 700, the text indicates a far less strong presumption arising from the facts of cohabitation and reputation. I will take as an example of the first two text-books the sentence in Powell on Evidence (10th Edn.), at p. 342:

> "As was said by Lord Lyndhurst in *Morris* v. *Davies* (1) and approved by Lord Cottenham in *Piers* v. *Piers* (2), this presumption of law [that they have been married if they have cohabited long together as man and wife and been so treated] is not lightly to be repelled, and the evidence for repelling it must be strong, distinct, satisfactory and conclusive."

If that is the test then it would obviously throw on the defendants in the present case a very heavy burden once the plaintiff had established the fact that there had been for an appreciable period of time cohabitation as man and wife and an acceptance by the neighbourhood of them in that capacity. The four adjectives occur in the speech of Lord Cottenham, L.C., in *Piers* v. *Piers* (2) which is there referred to. That was a case of the kind which I earlier mentioned, not parallel to this, where the question was whether Sir John Bennett Piers having clearly gone through a form of marriage, the presumption of marriage in fact could be drawn in the absence of any appropriate record of that marriage. Lord Cottenham's language, therefore, is strictly applicable to that kind of case where, the evidence being that the parties did go through a form of marriage, it is assumed that the marriage was in accordance with the law relating thereto. He quoted and approved in that connexion Lord Lyndhurst's statement in *Morris* v. *Davies* (3), which was again a very different case from this, and used the four adjectives "strong, distinct, satisfactory and conclusive". Lord Brougham in his speech in the same case (4) qualified the statement by saying that for his part he was not quite prepared to use the word "conclusive". As I have referred to the case it may be of assistance to record that from Lord Campbell's opening sentence it is clear what was being determined in *Piers* v. *Piers* (5). It was not the same problem as arises in the present case where, as I have said, there is no evidence whatever of there having in fact been a marriage ceremony. Lord Campbell said (5):

> "My Lords, it seems to me that this case depends entirely upon the effect to be given to the presumption of law in favour of the marriage. It is allowed that there is a presumption in its favour, and, until the contrary is proved, we are bound to draw the inference that everything existed which was necessary to constitute a valid marriage, and among other things, that there was a special licence from the Bishop of Sodor and Man. But it is likewise admitted on the other hand, that this is not a praesumptio juris, that it may be rebutted, and that it can only stand subject to the contrary being proved."

In spite, however, of the fact that the language to which I have referred in *Piers* v. *Piers* (2) was applied to a case different in an essential respect from the present case, I think that it is none the less true that during the century and more that has followed, something like a similar principle seems to have been adopted and treated as applicable in a case where, as here, the question, aye or no, were two people married, turns on evidence of cohabitation and reputation in the absence of any evidence of a ceremony. I have said that the principle has been applied in some degree, and for the purpose of stating what I now conceive the law to be in a case such as the present I will take a phrase cited by Kekewich, J., in *Re Shephard, George* v. *Thyer* (6), a case to which much reference was made in the argument but which in my judgment does not on the facts provide any very safe guidance for the present case. In *Re Shephard* (6) Kekewich, J., after referring to a Privy Council case, *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (7), quoted (8) the language used in that case by Sir Barnes Peacock (9):

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(1) (1837), 5 Cl. & Fin. 163.
(2) (1849), 2 H.L. Cas. at p. 362.
(3) (1837), 5 Cl. & Fin. at p. 265.
(4) (1849), 2 H.L. Cas. at p. 370.
(5) (1849), 2 H.L. Cas. at p. 379.

> " ' It appears from the authorities which he ' (Dr. Phillimore) ' cited that, according to Roman-Dutch law, there was a presumption in favour of marriage rather than that of concubinage. It does not, therefore, appear to their Lordships that the law of Ceylon is different from that which prevails in this country; namely [and this is the essential sentence] that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage '."

I take that passage as a statement of the law which ought to be applied in a case like the present, and I note the adverb " clearly ". It is, of course, not to be forgotten that in the hundred years that have gone by since *Piers* v. *Piers* (10) the law relating to the registration of marriages has been made more strict, communications are easier and the likelihood of people being married and nobody knowing about it and, indeed, not being able to find a record of it is no doubt much decreased.

Still as recently as 1937 *Re Taplin, Watson* v. *Tate* (11) came before Simonds, J., in which again the problem arose largely out of the circumstance that the parties had apparently gone through a marriage ceremony, the question being whether the ceremony was proved to have been effective. In that case the man and woman had lived together for ten years in a small community and Simonds, J., began his judgment as follows (12):

> " They were there received into society, which was not a society of loose and uncertain morals, but with proper views as to marital relations, and were at all times regarded as man and wife. This being so, the presumption of our law is that they were man and wife. This presumption is not to be disturbed except by evidence of the most cogent kind."

There the learned judge used the epithet " most cogent ", whereas in the citation which I have taken and which I adopt there is the less forceful " clearly ". At any rate for the purposes of the present case I will assume that granted the proof of cohabitation and acceptance, then it is required clearly to be shown that the two persons were living not as the result of lawful marriage but in concubinage.

If I have stated the principle correctly, then what is the evidence in the present case? I have, of course, no doubt that the onus in the first instance is on the plaintiff. The question is: Has he, in the light of the principle which I have stated, discharged it and, having done so, resisted the attempt on the other side to rebut the inference or presumption which flows from the evidence adduced on the plaintiff's side? The evidence consists first of reputation. On that matter there were six witnesses called for the plaintiff. As Izender died in 1913 it will be appreciated that we are dealing with things that happened more than half a century ago and there is no doubt that many of the witnesses were of considerable maturity, to put it no higher. Their recollections were at times obscure and confused, though I confess that I get the impression (having read the evidence but not of course having seen the witnesses) that they were all of them witnesses of truth. There is nothing which could possibly suggest that these witnesses had in any sense been drilled to come and give particular statements. Indeed, much of the most valuable material relied on by counsel for the plaintiff, emerged, as often happens with a nervous or uncertain witness, as the result of the stimulus of cross-examination. It is true, as counsel for the defendants emphasised, that none of these six witnesses—Mrs. Filkins, aged eighty-six, Mr. Filkins, her nephew, Mr. Allnutt, Mr. Brown, Mrs. Griffin and Mr. Timms—appears to have been on terms of any intimacy with John Taylor and Izender, though it is true that one of them said that he was, at any rate, on such terms with John Taylor that he was prepared to go with him and do what was necessary in order to help him to open a bank account, which is certainly not an office he would perform for somebody he barely knew, or so I should have thought. These witnesses do show to my mind, and as the learned judge held, that at least for the period from, say, the latter part of 1908 until Izender's death in 1913 in a small community in Harefield in Middlesex they, John Taylor and Izender, were undoubtedly accepted without any qualification as man and wife. They were known as Mr. and Mrs. Taylor, and there is no hint anywhere of any suggestion in anybody's mind in that community that they were ever suspected of being not married in fact. I have given the names and I think that it is in the circumstances unnecessary to elaborate this judgment by many instances but I take one which I pick at random from the evidence of Mr. Brown, who was a grazier. He said that during the time that they lived there " they were always called Mr. and Mrs. Taylor; everybody knew them as Mr. and Mrs. Taylor ". That is, in effect, what the other five of these six witnesses said. Indeed, it seems that they were generally regarded not only as married but as happily married and notoriously so. I do not forget instances of confusion, but I cannot attach any weight to them as disabling or qualifying the value of statements such as that which I have read, and in this respect I think that I am merely adopting the view which the learned judge, having seen the witnesses, took of their evidence. Nor do I forget that although John Taylor was to many of these people at any rate reasonably well known, it does seem that Mrs. Taylor was not herself so well known. Few knew her first name and in two cases they had at the first attempt got the name wrong, though when the name was put to them they at once recognised it as correct.

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(6) [1904] 1 Ch. 456.
(7) (1881), 6 App. Cas. 364.
(8) [1904] 1 Ch. at p. 463.
(9) (1881), 6 App. Cas. at p. 371.
(10) (1849), 2 H.L. Cas. 331.
(11) [1937] 3 All E.R. 105.
(12) [1937] 3 All E.R. at p. 108.

Then to that evidence of reputation there comes to be added the other material: first, the evidence supplied by the various certificates in front of us. The value and proper place in a case of this kind of certificates was dealt with in *Re Stollery, Weir* v. *Treasury Solicitor* (13) to which DANCKWERTS, J., referred and for present purposes I will assume that it should be treated no higher than this, that certificates are admissible as evidence of what they purport to record though their weight is a matter for the trial court. The certificates are not to my mind unimpressive. The first material one is that of the birth of Florence, the eldest daughter. From the evidence of the certificate the two parents were not then living at 15, Waterloo Cottages in Harefield to which they later moved. It is to be noted from the entry that the informant was Izender (her name being misspelt) the father stated as John Taylor, and she described herself as Izender Taylor. I accept it that that was what she, being the informant, caused to be recorded. I venture to think, however, that with a person of this background who was illiterate, it is at any rate highly improbable that John Taylor was unaware of the information which she was giving to the registration authorities. Then comes the next birth, Aubrey, or George Aubrey as he was called, in 1908, born in a caravan. There Izender, the person giving the information, describes herself as " Izender Taylor, formerly Lucas ", Lucas being the man with whom she had formerly lived and to whom she may or may not have been married. That is not a relevant fact. What is relevant is that beyond question Lucas had died before the association with Mr. Taylor began. Then comes the third child, the daughter Mary. Izender makes her mark and describes herself as

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(13) [1926] All E.R. Rep. 67; [1926] Ch. 284.

"Izender Taylor, formerly Amer", which was, we understand, her maiden A name. The birth of that child took place at Waterloo Villas, Harefield, as also did the birth of the plaintiff, Horace, born in September, 1911, and on that occasion Izender described herself as "Izender Taylor, formerly Hamer", the same name as before with the aspirate added.

To that list, however, two other certificates, which are I think of some appreciable weight, must be added. The first is that of the death of Izender which B occurred in June, 1913, at 15, Waterloo Cottages, and the information was given by her alleged husband, John Taylor. She is described as being the wife of John Taylor and John Taylor describes himself as "John Taylor, widower of deceased". Finally there is the certificate, to which I have already made a brief allusion, of John Taylor's marriage in June, 1914, to Martha George where John Taylor describes himself as a widower. There is no suggestion that he C had been married to anybody else unless it were to Izender.

Then, thirdly, there are statements made of declarations, particularly, of course, declarations of John Taylor himself, in the evidence of Mrs. Griffin, Mr. Timms and Mrs. Filkins, to whom I have already referred. All three gave evidence of that character. Again I take at random an instance or two. Mrs. Filkins, an old lady of eighty-six, recalls that John Taylor had said to Mr. Filkins, D the witness's husband, in her presence: "I am getting married again" and added that the person whom he was marrying was one whom he knew "before I married my late wife". Mr. Brown, to whom I have also already referred, said that he, John Taylor, always referred to Izender as Mrs. Taylor or "the missus". It was Mrs. Griffin who stated, thirdly, that John Taylor always said that his marriage to Izender was the happiest time of his life. Finally, E there was a witness of the name of Lucas, a child of Izender by her marriage or association with Lucas who was killed in 1901. The evidence of this witness certainly well illustrates what I earlier said, that passages most useful to the plaintiff emerged under the stimulus of a considerable cross-examination. The important passage is to this effect. The witness when he was about six years old, after his father's death, was living at Chalfont Mead in a caravan with his F mother. He recalled, and I assume that the judge undoubtedly accepted this as evidence of truth, that though his mother had been during the day-time out with John Taylor, John Taylor had not joined them in the caravan until the occasion, which he placed in the autumn of 1901, when she, that is the witness's mother, "brought John Taylor home and said: 'There you are; we have been and got married'". That was pursued on the following pages and the witness G was quite clear that both Izender and John Taylor on this occasion came back and told the children that they had "gone and got married".

Without going more into the detail of the evidence, that is a fair summary as led by the plaintiff, and I make this point for clarity that the evidence of reputation undoubtedly is limited to a period which I have placed as beginning somewhere in the latter part of 1908 and ending with Izender's death in 1913, a period H of five years or perhaps slightly less. During that period there seems no kind of qualification to what any of the witnesses said of the reputation which in that small community these two people had as being man and wife lawfully married. If that stood alone I would have thought that plainly, on the principles which I have indicated, the plaintiff had discharged the onus on him and it was then for the defendants to rebut it. I

On their side two witnesses were called, a brother and sister of the intestate, John Taylor. It was the view of the learned judge that the evidence of those two witnesses was not, as he said "very satisfactory or convincing". It is not altogether clear to me whether by that phrase the judge was indicating that these witnesses did not impress him in the witness-box as being reliable or trustworthy witnesses. Counsel for the defendants has naturally made the point that the meaning of the phrase which I have used is later shown by what the judge said a few lines lower down:

> "I regard it as rather unsatisfactory for this reason, that they were trying to make out that Izender was not received by the mother of John Taylor, and Izender was not regarded with any affection or interest by that Mrs. Taylor because she thought that John was not married to her."

Then the learned judge criticises that view as being the ground for the fact that the mother of John Taylor did not receive him and Izender. In a matter of this sort it is always difficult for the Court of Appeal to be sure, certainly from an ex tempore judgment, whether the learned judge when he used the phrase "satisfactory or convincing" was merely relying on this one reason that he gave or was expressing the view that these witnesses did not impress him. I have the feeling, I confess, when reading the judgment that he was not impressed by what these witnesses said, though he was by no means suggesting that they were deliberately giving false evidence.

David Taylor, a brother of John Taylor, stated that after John had left the home he was not thereafter received by his mother. The dates are not clear but it appears that the father of the witness and John died in 1896 or 1897 and that the intestate John was at the time of his father's death somewhere about sixteen or seventeen. The father was a greengrocer and John was left apparently in a responsible position to look after the business and his mother. Then, as David Taylor said, some six years thereafter or thereabouts he just went away and travelled about the country in a caravan with Mrs. Lucas. He said that there was never a marriage ceremony, but so far as his evidence was concerned that was simply the expression of his view though he nowhere stated that John had ever been asked whether he had married Izender; indeed, quite the contrary. [HIS LORDSHIP read an extract from the evidence and continued:] It becomes plain that although they [i.e., David Taylor and his mother] formed the view that John Taylor and Izender were never married, they appear carefully to have forborne from asking John about the matter. The witness Mrs. Butler did take the matter to this extent further. She also said that John left behind a feeling of some hostility because he had gone off and, as was said, left the family in the lurch. But in the course of examination she was asked by counsel for the defendants:

> "Did you ever hear this question of whether he was married or not married to Izender Lucas discussed in your home by members of your family? You must not tell my Lord what anybody who was not a member of the family said. A.—I understand. I remember my mother asking once if he was married. Q.—Asking who? A.—Asking my brother [John Taylor]. Q.—Can you tell us how long this was after he had left home? A.—Actually, as far as I can remember, only a week or two. Q.—That is very helpful. Just tell my Lord—I do not want to ask you questions—so far as you can remember the whole of that conversation. A.—My mother asked him if he was married to this woman, and he said: 'No'. So she said: 'then why don't you break away?'. That is all. Q.—Did he not answer anything? A.—He said he was not married to her."

There appears to have been no reply to the second question. Apart from that one passage it is again plain that later no question was ever asked of John Taylor whether he had married Izender. It appears to have been assumed from the way in which he had gone off that he had not married her. It is fair to observe that another brother had married, curiously enough, a sister of Izender, and when I say "had married", I mean exactly what I say because in that case there is available to us a certificate showing that Henry Taylor, then twenty-one, married Amelia Amer, who appears to have been accepted by everybody to have been the sister of Izender, on Apr. 18, 1897. The point is very forcibly made that the fact that Izender was a gipsy could not have accounted for the hostility of the family because, after all, one of the other brothers had married Izender's sister and there was no suggestion that on that account he ceased to be received in the family. But I do emphasise that, as seems to me to emerge from reading the evidence, what particularly offended the family, not unnaturally, was that he, John, after his father's death had been in effect the mainstay of the home and had suddenly walked out and deserted the home and his mother. Junior counsel for the defendants said that the proper inference from the evidence was that the conversation with the mother when John Taylor said that he had not married Izender was later in date than the occasion on which John and Izender had told the children in the caravan: " Well, we have gone and got married ". And so it was pressed on us by counsel that, if that were so, the value of the declaration in the phrase: " We have gone and got married " was disabled. I, for my part, having looked carefully at all this evidence, feel it to be impossible at this time to reach a conclusion on a matter of chronology of that kind. There is evidence that when John left home and left them all in the lurch, he was for a period roaming about on his own; indeed it was suggested in evidence that the cohabitation in the caravan with Izender did not by any means start as soon as association of some kind began between John Taylor and Izender. In the somewhat misty atmosphere which surrounds events from 1901 to 1904 I think it impossible to say or to infer properly that the conversation with the mother a week or so after John had left home was later in date than the statement to the children. I think it perhaps of some significance that after all Florence, the eldest daughter of the union, was not born until October, 1904. Izender was a fertile woman who had had six children by Lucas and I am inclined to think that the inference, if inference should be drawn, might be the other way. I do not think myself that what Mrs. Butler said can be shown to prove that what Mr. Lucas said was unreliable or to show that its value as a declaration should be thereby qualified, though I would add that, even were it otherwise, it would not follow (and there is plenty of authority to support this) that a later marriage should not be treated as established by reason of the circumstance that the union began irregularly.

The defendants' case, in summary, is why is there no certificate? We are now in the twentieth century. There is no suggestion that these two people, though they at this period lived a nomadic life, ever travelled any distance at all. How comes it that there is no record anywhere of a ceremony? Further, how is it that if they did get married no one appears to have been invited to the wedding or was told about it at the time? No one in the family ever was asked to come or to attend. Further and last, it is said that the period covered by the evidence of reputation is, after all, short and does not qualify as " permanent " in any sense. These are no doubt formidable points, but if I have stated the law correctly, then I think that the question really in the end of all is one of fact for the judge when he had seen the witnesses, weighing, after hearing their evidence, what they had said. Was it " clearly proved " that the inference to be drawn from the cohabitation was wrong? I am by no means satisfied that this court in such a matter should dissent from the view which the learned judge took. It is true that the period covered by the evidence of reputation is short by comparison with some of the cases; still it is not negligible. It was quite firm while it lasted and was terminated not by any kind of separation but by the death of Izender.

I add that in the present case we are, of course, only concerned with the parties to it and particularly with the plaintiff who claims to be, and I think must be taken to have established that he was, a lawful son of the intestate. The evidence of reputation does not, of course, as was pointed out, go back to the year 1904 when the eldest child of the union, Florence, was born, though it will be noticed that the certificates so far as they can be taken into account show a consistency throughout the whole period when all the children were born. I think for my part that the declarations which were made, apart from the certificates, give no ground for distinguishing the state of affairs before 1908, and, therefore, although in the present case we are only concerned with the plaintiff, I think it right to say that I must not be taken to be dissenting in any way from what DANCKWERTS, J., said about the other three children of the union. For the reasons which I have given I think this appeal fails and should be dismissed.

HARMAN, L.J.: No one could listen to the wild story unfolded to us in this case without suspecting at one stage or another that the intestate John Taylor never did marry Izender Amer or Lucas. The story is a strange one and with people who rotated on so small an axis, that is to say who lived within so comparatively confined an area, it is at least strange that if there was a marriage no documentary evidence nor any witnesses to prove or even suggest the existence of any ceremony of marriage has been forthcoming. It was for the plaintiff, Horace, who is the youngest son of the union between the intestate and Izender, to prove his case, and it appears from a perusal of the evidence that until the very end of that case, and indeed until after that case was closed, he had not proved it. But on the last day by the leave of the judge the witness Lucas, to whose testimony my Lord has referred, appeared, and he proved what was the first essential, namely, that Izender was free to marry at the time when she is said to have married John Taylor. All that had been proved up to that time was that she had been living with this man Lucas, but his son was able to prove that his father fell out of a cart and was kicked by a horse and died from that at an early age, leaving his widow or the lady with whom he had been associating with five children. It having been proved that there was no impediment to a marriage, it is I think now admitted by the defendants that on the evidence for the plaintiff standing alone the presumption would arise which does arise from continued cohabitation, from reputation in the neighbourhood and from such documentary evidence as exists.

To the evidence cited by my Lord perhaps one item ought to be added, namely, that a search in the cemetery at Vicarage Road, Watford, discloses the fact that Izender was buried there and was registered in the register of burials as the wife of John Taylor. That is one more small piece of evidence. One does not know who provided that information but it seems very likely that John Taylor did himself.

The presumption, therefore, admittedly arises. I need say no more about it than that it is clear that the evidence can be rebutted, but that the evidence in rebuttal must be firm and clear. I confess to a dislike of the word " conclusive." I share LORD BROUGHAM'S view (14) about that. But to prove a negative is always very difficult. Whether sitting in first instance I should have come to the same conclusion as the learned judge, I do not feel at all sure, but that is no reason why an appellate court should reject his conclusion. It does in the end, although this was denied, turn on the credibility of the witnesses. I do not mean their honesty here, but on their demeanour and on the trustworthiness which the judge felt he ought to give to their testimony. David Taylor, of course, who was the prime witness for the defendants, was an interested person and his evidence to that extent needs careful scrutiny. The judge was not very satisfied with his evidence, nor with that of his sister, Mrs. Butler. It would not in my judgment be right for an appellate court to substitute its own estimate of that evidence for that of the learned judge, who, apart from being a very experienced judge, saw the witnesses and considered the matter for three days while they were arguing to and fro. The crucial point, it seems to me, was reached in the present case when enough evidence was given to set up the presumption. Evidence of reputation extended over only a short time and one may well ask why the neighbourhood should not accept these two people when they came into the village to live after having associated for seven years in a quasi-nomadic life outside. It was natural that they should call themselves Mr. and Mrs. Taylor and it appears that the neighbourhood accepted them as such. As the defendants admitted that there was enough evidence of that sort to justify the presumption, the rest seems to me to follow, and therefore I concur with my Lord in thinking that this appeal must be dismissed.

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(14) (1849), 2 H.L. Cas. at p. 370.

DONOVAN, L.J.: I also agree that the appeal should be dismissed and I add a few words only on one aspect of it. As LORD EVERSHED, M.R., indicated, it was urged for the defendants, among other things, that the learned judge seemed to have understood certain evidence as establishing the opposite of what in fact it did establish; namely, that he thought that the real objection of the intestate's own family to Izender was based on her gipsy stock and not on the absence of marriage. It is true that there is evidence here that the family thought that there had been no marriage and were offended by that supposed fact. Yet it is indeed curious that when asked why Izender was not received by the intestate's mother, the two witnesses concerned, Mr. David Taylor and Mrs. Butler, did not say outright that it was the absence of marriage but first gave other reasons including the one that Izender was a gipsy. Only later in their evidence did they say that Izender was not received because it was thought that the couple were not married; and Mrs. Butler said this only after being asked in examination-in-chief: " Was he not married to Izender Lucas? ". It may well be that the learned judge was referring to this aspect of the witnesses' evidence when he said he did not find it very satisfactory or convincing. If that is so, then I think that the criticism which has been made of this part of the judgment goes.

Appeal dismissed.

Solicitors: *Lucien Fior* (for the defendants); *Bell, Brodrick & Gray*, agents for *W. Norris Bazzard & Co.*, Amersham (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

Legal Aid—Costs—Bill of costs—Form—Work done partly before and partly after Jan. 1, 1961—*Composite fee—Rules of the Supreme Court* (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2—*Legal Aid* (*General*) (*Amendment No.* 4) *Regulations*, 1960 (*S.I.* 1960 *No.* 2369).

The following Practice Direction was issued by the Chief Master of the Supreme Court Taxing Office:—

The Legal Aid (General) (Amendment No. 4) Regulations, 1960, affect costs of all work done on or after Jan. 1, 1961. Where bills relate to work done partly before and partly after that date they must be drawn in separate parts relating to each period, and each part separately summarised. The certificate of taxation will set out separately the profit costs, counsel's fees, and other disbursements relating to each period.

The charge for instructions for trial or hearing or for appeal (item 26 or item 27) will be apportioned where necessary between the two parts of the bill.

Where Appendix 2 to the Supreme Court Costs Rules, 1959*, provides a composite fee for work some of which may have been done before and some after Jan. 1, 1961 (e.g., item 1), apportionment between the two parts of the bill would strictly be necessary, but there is some doubt as to splitting individual items in the Appendix, moreover the amounts involved will generally be small. Whereas apportionment is a matter for discretion it is proposed normally to avoid the complications involved save as to items 26 and 27 by adopting the following guide as to the date which will decide the part into which the item will be placed:—

(i) As to writ, pleadings and other matters covered by Part 1 of Appendix 2, the deciding date will be the date of issuing, filing or delivery as the case may be.

(ii) As to summonses covered by Part 2 of Appendix 2, the deciding date will be the date of issue of the summons.

(iii) As to affidavits, the deciding date will be the date of swearing.

PAUL ADAMS,
Chief Master.

December, 1960.

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* The rules are set out in the Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2.

TICKNER AND ANOTHER *v.* HEARN AND ANOTHER.

[COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), October 6, 7, November 22, 1960.]

Rent Restriction—Statutory tenant—Forfeiture of status—Non-occupying tenant—Animus revertendi—Tenant a patient in mental hospital for six years—No intention to abandon occupation—Daughter in occupation, with tenant's furniture—Tenant's condition improved, and now a voluntary patient—Slight possibility of return to premises—Whether sufficient hope and possibility of return to retain status of statutory tenant.

In June, 1954, the statutory tenant of a dwelling-house left the house with the intention of paying a short visit to a married daughter. Another daughter, who lived with the tenant, remained in the house. While away from home, the tenant was taken ill, and on Aug. 4, 1954, she was admitted to a mental hospital, under a summary reception order, suffering from schizophrenia. Since that date she had remained in the hospital continuously. She was now seventy-three years old. Although she was not cured, her mental condition had improved, and in November, 1959, she was regraded to voluntary status and could, in consequence, leave the hospital, if she wished to do so, by giving seventy-two hours' notice to the authorities. She had not mentioned leaving the hospital, but she still regarded the house as her home and frequently expressed the hope of returning there. The daughter, who had remained in occupation of the house throughout the tenant's absence, maintained it as a home to which the tenant could return if that became possible. The landlords claimed possession of the house on the ground that, in the circumstances, the tenant's occupation had ceased. The county court judge held that no real abandonment of possession was shown on the evidence, and he refused to make an order for possession in favour of the landlords. On an appeal by the landlords,

Held: the decision of the county court judge would not be disturbed for there was evidence which would justify a finding of fact that there was an intention on the part of the tenant to return to live in the house and that there was a real possibility of her returning within a reasonable time, with the consequence that she had not abandoned her possession thereof.

Brown v. *Brash & Ambrose* ([1948] 1 All E.R. 922) considered.

Appeal dismissed.

[As to the position of a non-occupying tenant under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, see 23 HALSBURY'S LAWS (3rd Edn.) 807, para. 1586; and for cases on the subject, see 31 DIGEST (Repl.) 658-661, *7604-7623*.]

Cases referred to:

Brown v. *Brash & Ambrose*, [1948] 1 All E.R. 922; [1948] 2 K.B. 247; [1948] L.J.R. 1544; 31 Digest (Repl.) 660, *7619*.

Bushford v. *Falco*, [1954] 1 All E.R. 957; [1954] 1 W.L.R. 672; 3rd Digest Supp.

Cunliffe v. *Goodman*, [1950] 1 All E.R. 720; [1950] 2 K.B. 237; 31 Digest (Repl.) 378, *5070*.

Skinner v. *Geary*, [1931] All E.R. Rep. 302; [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 31 Digest (Repl.) 659, *7612*.

Appeal.

The plaintiffs, who were the landlords of a dwelling-house to which the Rent Restrictions Acts applied, appealed against a judgment given by His Honour JUDGE SIR DONALD HURST at Aylesbury County Court on Feb. 3, 1960, whereby he refused to make an order in their favour against the defendants for possession of the premises. The first defendant became the statutory tenant of the premises on the death of her husband in January, 1954. Since August, 1954, she had been A in a mental hospital. The second defendant, who was a daughter of the first defendant, had lived in the premises with the first defendant and continued to occupy the premises on behalf of the first defendant during the first defendant's illness. The plaintiffs alleged that the first defendant's possession of the premises had ceased and that the second defendant wrongly refused to leave the premises. The county court judge held that the burden of proof lay on the first defendant B to show that there had been no intention on her part to abandon possession of the premises; that the evidence was just sufficient to discharge the burden; and that, therefore, the plaintiffs' claim failed.

The defendants served a notice under R.S.C., Ord. 58, r. 6, that, at the hearing of the plaintiffs' appeal, they would contend that the decision of the county court judge should be affirmed on the grounds given by him, and, further on C the following grounds: (i) that the burden of proof lay on the plaintiffs to show that the first defendant had abandoned possession of the premises and that the plaintiffs failed to discharge the burden; and (ii) that the plaintiffs were estopped from asserting that the first defendant's possession of the premises had ceased or that she had lost the protection of the Rent Acts by reason of representations made to the second defendant by the plaintiffs' predecessors in title and by the D plaintiffs, by their conduct, that they recognised that the first defendant's possession of the premises had not ceased.

A. P. Leggatt for the plaintiffs.
P. R. Pain for the defendants.

Cur. adv. vult. E

Nov. 22. The following judgments were read.

ORMEROD, L.J.: This is an appeal from a decision of His Honour JUDGE SIR DONALD HURST given at Aylesbury on Feb. 3, 1960, when he refused to make an order in favour of the plaintiffs for the possession of a house known as " Quetta ", Buckland, near Aylesbury.

The house was bought by the plaintiffs, Mr. and Mrs. Tickner, on Jan. 22, 1959, F from its previous owner, Mr. Thorne, who became the owner on Nov. 3, 1957. The first defendant, Mrs. Hearn, with her husband and family had occupied the house for many years on a weekly tenancy. In January, 1954, Mr. Hearn died and the first defendant and her daughter, the second defendant, Daisy Blanche Hearn, continued to live in the house. It is not in dispute that after her husband's death the first defendant remained in occupation as a statutory tenant. G In June, 1954, the first defendant, who had nursed her husband through a long illness, went to visit her married daughter in Devizes for a rest and a change. When she was at Devizes she had a mental breakdown, and on Aug. 4, 1954, was admitted to the Devizes mental hospital, under a summary reception order, suffering from schizophrenia, and has since remained there. In November, 1959, she was regraded to voluntary status. It is not in dispute that, up to the H time of her illness, the first defendant had every intention to return to " Quetta ". The question in the appeal is whether she is now entitled to the protection of the Rent Restrictions Acts. If she is still the occupying tenant, she is protected. The right of the second defendant to continue to live in the premises depends on whether the first defendant is still a statutory tenant.

The only medical evidence called at the hearing was that of Dr. Russell, the I medical superintendent of the hospital at Devizes. It is, I think, necessary to quote extensively from the judge's notes of his evidence. He said that the first defendant was a patient, admitted on Aug. 4, 1954:

> " . . . summary reception order—schizophrenia—seventy-three years. Date of birth Nov. 25, 1886. Regraded to voluntary status November, 1959. Not because cured—present condition, still schiz. while some degree improvement, there is no question of cure. Form 23, not recommended

> she leave—ninety per cent. females voluntary or informal under new Act (1). Most unlikely that she will ever leave hospital—bearing in mind status. Voluntary patient—this means she can leave in seventy-two hours; she has not mentioned to me intention to leave. She requires constant psychiatric care—day and night nurses. This will continue unless remission of symptoms—which I do not anticipate."

The evidence then goes on to discuss the visits paid by the daughters regularly to see the first defendant. Then in cross-examination he said:

> "Patients have home address on record—names, address in case of necessity. Many time talked to her—she regards 'Quetta' as her home. She has said like to go back if gets better. She has spoken about getting better, she has genuine hope of getting better—remarkable strides in treatment, one can't say that there will not be development in treatment to help, but there is her age to consider. Her age is factor in assessing chances of recovery."

Then in re-examination he said: "Fair physical condition—doesn't mean she is breaking up". Then, in answer to questions by the court:

> "Have had radical cure after thirty—ages forty, fifty. She has been slightly better in six years—not fundamental—better behaviour in relationship with other people and staff. Not able to make decisions as to management of affairs—if asked to consent to any proposition I would not allow her to do so—interviewed her prior to this case—said, do you understand I have to go to court—she understood and gave consent—she appreciated that this house was being considered. She expressed hope she would one day leave hospital, but appreciated she wasn't well enough at that time. She showed a little anxiety, difficult to say whether this was relative to proceedings—suffers from personal delusions of persecution."

The learned judge regarded the case as one very near the border-line. He said, according to the notes of his judgment:

> "The onus has been on the [first] defendant in this trying case to establish that there has been an intention to return or conversely no intention to leave."

After careful consideration of the medical evidence, he said:

> "The evidence is just sufficient in this case to discharge the onus and has satisfied me that there has been no real abandonment of possession."

It was submitted by counsel for the plaintiffs that, if the first defendant was to be allowed to remain as tenant, there must be shown to be present not only corpus possessionis but also animus revertendi. Having herself been away from the house for so long a time, the burden was on her to establish a positive intention to return. It was argued that the effect of the medical evidence was that she was incapable of forming an intention and, therefore, it was impossible for her to discharge the burden which her long absence from the house had caused to be laid on her. Counsel went further. He argued, on the authority of the definition of "intention" given by ASQUITH, L.J., in *Cunliffe* v. *Goodman* (2), that the intention must be one which could reasonably be carried out, and the medical evidence in this case was that it was extremely unlikely.

On behalf of the defendants it was argued that, once the absence was explained, as it had been in this case, the burden was again cast on the plaintiffs to establish that the first defendant had abandoned the tenancy, and in view of the fact that she had been unable to form any intention the burden in consequence could not be discharged. Put in a simple form, the argument is that up to the time of being taken ill the first defendant had every intention of returning.

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(1) Mental Health Act, 1959; 39 HALSBURY'S STATUTES (2nd Edn.) 961.

(2) [1950] 1 All E.R. at p. 724; [1950] 2 K.B. at pp. 253, 254.

By reason of her infirmity she has at no time since then been capable of changing that intention and, therefore, has not abandoned the tenancy. This is an attractive argument but cannot, I think, be the right approach to the problem. Otherwise the same reasoning would apply if the first defendant was in such a hopeless condition that there was no possible chance of her ever being able to leave the hospital. It cannot, I think, be the intention of the Rent Restrictions Acts that in such circumstances the statutory tenancy should be allowed to continue. The learned judge appears to have accepted this argument at one stage of his judgment when he said:

> " On the evidence her intention is to return and she has never been in a position mentally to alter that intention."

There cannot be an intention if the mind is no longer capable of forming one. I cannot see the difference between being unable mentally to alter an intention and being unable to form or to have an intention, and, if that were the real foundation of the learned judge's judgment, I should be in serious doubt whether it could stand.

In *Brown* v. *Brash & Ambrose* (3), where the question was whether the tenant had in the circumstances retained any corpus possessionis, ASQUITH, L.J., delivering the judgment of this court, said: " The question is one of fact and of degree ". It must first be determined, of course, what the question is. I think that there must be evidence of something more than a vague wish to return. It must be a real hope coupled with the practicable possibility of its fulfilment within a reasonable time. The judge said this, and it appears to be in accordance with the medical evidence:

> " Her hopes are all in line with the intention not to go away from this home [i.e., " Quetta "] and return when she is better. People are astonished at the strides that have been made in mental illness. The doctors cannot rule out the possibility that there may be something which will help [the first defendant] and there is this to be said: she is on the road in that direction, because it is no longer thought necessary by the hospital authorities that she should remain a compulsory patient but she has recovered sufficiently to be a voluntary patient and she could give seventy-two hours' notice to the hospital authorities and can leave the hospital if she wishes. True the authorities would probably try their best to persuade her otherwise, but if she made up her mind she could go. What is there to say that she will not take a desire and try to put it into action to go back into this house? And I must take this fact into account: she is improving her relations with other people and improving the state of schizophrenia which is the cause of her delusion of persecution by other people with whom she comes into contact. Who am I to say that the stage might not be reached within a reasonable time when the authorities would say that her relationship had so improved as to make it safe to let her out to the care of her daughter [the second defendant]? I cannot say that she is incurable. It is true that the doctor very fairly said that this was unlikely in view of her age but she is a voluntary patient. She has never been in a position to alter that intention to have any legal consequences. She likes to hear talk of home and what people are doing at home and what her daughter is doing at home and she would like to return there and she regards ' Quetta ' as her home, with hope of going back."

The learned judge then went on to say:

> " The evidence is just sufficient in this case to discharge the onus and has satisfied me that there has been no real abandonment of possession . . ."

Put the other way, I think that the learned judge is saying that the first defendant has shown that she still looks on " Quetta " as her home and has always done so and has a real hope of returning there, and that this is an intention to which he should have regard. In view of the fact that she is now a voluntary patient and of the advances that have been made and are still being made in the treatment of mental illness, it might well become practicable within a reasonable time for her to leave the hospital and return home in the care of her daughter, the second defendant.

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(3) [1948] 1 All E.R. at p. 925; [1948] 2 K.B. at p. 254.

Although I agree with the learned judge that this is a border-line case, I think that there was evidence on which he could find an intention to return to live in the house and that is the conclusion to which I think he came. I would, therefore, dismiss the appeal. A question was raised on behalf of the first defendant that in any event the plaintiffs were estopped from asserting that the tenancy had ceased by reason of the conduct of their predecessors in title. In view of the conclusion to which I have come, it is unnecessary to consider this question, which does not appear to be without difficulty.

WILLMER, L.J.: I, too, find myself unable to differ from the conclusion at which the learned county court judge arrived. It is now common ground that, on the death of her husband in January, 1954, the first defendant continued to occupy the premises—a house known as " Quetta "—as a statutory tenant. She lived there with her daughter, the second defendant, until June, 1954, when she went away for what was intended to be a temporary stay with another daughter. Unhappily, while she was thus away from home, she was taken ill and on Aug. 4, 1954, was admitted to a mental hospital, under a summary reception order, suffering from schizophrenia. Since then she has remained continuously in hospital until the present day, and has never returned home. Her mental condition has so far improved that in November, 1959, she was regraded to voluntary status. But there has been no complete cure, and the medical evidence has been that there is no real likelihood of her ever leaving hospital having regard to her age, which was seventy-three at the time of the trial. The second defendant has remained throughout in occupation of " Quetta ", which she has maintained as a home for the first defendant to return to, should that ever be possible.

The plaintiffs acquired the freehold of " Quetta " in January, 1959, and in December, 1959, commenced the present proceedings, whereby they claim possession of the premises. Their claim is founded on an allegation that, the first defendant having left the premises in 1954 and never returned, her possession thereof has accordingly ceased. It is not in dispute that the second defendant has no independent right of her own. The case for the plaintiffs is that the passage of so long a time during which the first defendant has been absent from the premises raises a presumption against her that she has abandoned her possession. This, it is said, she can only rebut by proving affirmatively (a) that she has retained an animus revertendi, and (b) that she has in the meantime maintained what is described as a corpus possessionis. No question arises as to the latter in this case, for it is conceded that the continued occupation of the premises by her daughter, the second defendant, with her furniture would amount to a sufficient corpus possessionis. As to the former, it is contended that, so far from any intention to return being proved, the first defendant, by reason of her mental condition, has been throughout, and still is, incapable of forming any intention at all. In this connexion it is argued that it is not enough to prove merely a vague, general desire to return. There must, it is said, be something which is reasonably likely to be capable of practical fulfilment, and reliance is placed on the well-known definition of " intention " given by ASQUITH, L.J., in *Cunliffe* v. *Goodman* (4).

On the other side, counsel for the defendants has argued that, where, as here, the tenant's prolonged absence from the disputed premises has been due to mental illness, the mere fact of such prolonged absence raises no presumption against the tenant; or, if there is any such presumption, it is immediately rebutted on A proof of the tenant's mental incapacity: for, in the absence of capacity to form any intention, there could not ever have been, in law, any abandonment of possession. Alternatively, it has been contended that on the facts, if and in so far as the first defendant has been shown to have formed any intention at all, her intention throughout has been to return to " Quetta ", which she has always regarded, and still regards, as her home. B

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(4) [1950] 1 All E.R. at p. 724; [1950] 2 K.B. at pp. 253, 254.

The learned judge, while holding that the onus was on the first defendant to prove that she had an intention to return, or, conversely, no intention of leaving, came to the conclusion on the facts that she had discharged the onus that was on her. According to the note of his judgment he said:

> ". . . on evidence such as this, there is no intention to abandon the premises at all. On the evidence her intention is to return and she has never been in a position mentally to alter that intention." C

In reaching his conclusion the learned judge relied on evidence given by the second defendant and by the medical superintendent of the hospital to the effect that the first defendant always regarded, and spoke of, " Quetta " as her home, and frequently expressed the hope of going back there. The learned D judge recognised that, on the medical evidence, it was unlikely that she would ever leave hospital, but, having regard to the advances that have been made in medical treatment, he declined to rule out the possibility that she might one day be able to give effect to her desires and return home. In such circumstances he expressed himself as satisfied that there had been no real abandonment of possession, and that, therefore, the plaintiffs' claim must fail. E

We have been referred to a number of authorities in which consideration has been given to the effect of prolonged absence from the disputed premises on the part of a tenant. This, however, appears to be the first occasion on which it has been necessary for this court to consider the effect of such an absence in the context of mental illness, though decisions either way have been arrived at by learned county court judges in cases to which our attention has been called. F The argument for the plaintiffs has been largely based on the judgment of this court delivered by ASQUITH, L.J., in *Brown* v. *Brash & Ambrose* (5). In that case the tenant's absence, for a period of something like fifteen months, was due to the fact that he was serving a prison sentence as the result of a crime committed by him. The actual decision of the court in favour of the landlord was based on the fact that shortly after the tenant's imprisonment his mistress, whom G he had left in occupation, left the premises and removed most of the furniture, so that it was no longer possible to say that the tenant retained any corpus possessionis. In the course of delivering the judgment of the court, however, ASQUITH, L.J., said this (6):

> " . . . absence may be sufficiently prolonged or unintermittent to compel the inference, prima facie, of a cesser of possession or occupation. The H question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect. The legal result seems to us to be as follows:— (1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) To repel it he must, at all events, establish a de facto intention on his part to return after his absence."

I I do not read this statement on the part of ASQUITH, L.J., as meaning that in all cases of prolonged absence, where a tenant appears as defendant to resist a landlord's claim to possession, the burden of proof is on the tenant throughout. What is meant, as I understand it, is no more than what has been described as a provisional onus, such as may arise in the course of any case where facts are proved which call for an explanation. The fact of long absence on the part of a tenant is a fact which calls for explanation, and which, in the absence of explanation, may, and will normally, prompt the inference of an intention to abandon possession. That this is the true view is, I think, confirmed by the way in which Sir Raymond Evershed, M.R., expressed his decision in favour of the landlord in *Bushford* v. *Falco* (7), when he said that " . . . the tenant had not explained what must, on the facts, be otherwise taken as an abandonment of occupation ". These words of Sir Raymond Evershed, M.R., like the opening words of Asquith, L.J., in the passage which I have cited, support the view, which for my part I am disposed to think is the right view, that the question which has to be determined in a case of this sort is whether there has or has not been a cesser or abandonment of possession or occupation. In determining this question the fact of prolonged absence is necessarily a potent circumstance, but it is not of itself sufficient. The intention of the tenant in thus absenting himself still has to be considered; and such intention may, of course, have to be inferred from all the circumstances of the case. This being so, it seems to me that, once the tenant's absence is explained by proof of facts which do not of themselves involve an actual intention on his part to abandon possession, the plaintiff landlord is left where he started, and he must prove affirmatively that the tenant has in fact abandoned possession. The fact of prolonged absence, once it is thus explained, loses its compelling significance.

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(5) [1948] 1 All E.R. 922; [1948] 2 K.B. 247.
(6) [1948] 1 All E.R. at p. 925; [1948] 2 K.B. at p. 254.

If this be the true view, it appears to me that the plaintiffs' claim here must inevitably fail. The only witnesses whose evidence was relevant to this part of the case were the medical superintendent of the hospital (Dr. Russell), the male plaintiff, and the second defendant. The second defendant's evidence made it clear that, when the first defendant originally left " Quetta " in June, 1954, she did so only for the purpose of paying a temporary visit to her other daughter. There was clearly no evidence of any intention to abandon possession at that stage. As to the effect of the evidence with regard to the period since the onset of the first defendant's mental illness, two views are possible. Either she has been so ill that she has not so far been capable of forming any fresh intention at all, in which case, I think, the evidence falls short of proving that up to date she has abandoned possession. Alternatively, if during her time in hospital she has been capable of forming any intention, the evidence both of Dr. Russell and of the second defendant showed that she has remained throughout of the same mind, and that she still regards " Quetta " as her home, to which she hopes one day to return. Equally, on this view, it is impossible to say that the plaintiffs have proved anything amounting to abandonment of possession on the part of the first defendant.

I have not forgotten that in the view of Dr. Russell it is most unlikely that she will ever be fit enough to leave hospital. But, as pointed out by the learned judge, it is quite impossible in this case, having regard to the improvement already achieved and to the advances which have been made in methods of treatment, to rule out the possibility altogether. Had the evidence shown that in no conceivable circumstances could the tenant ever hope to leave hospital again, a different and, as I think, a difficult question would have arisen. It might well be held that in such circumstances the landlord sufficiently discharged the onus of proof. That is a question which may possibly have to be considered on some future occasion, and I prefer to express no concluded view about it. It is not a question which arises in this case, where the evidence is far from proving anything of the sort. On the evidence given in this case, I find it impossible to disagree with the conclusion reached by the learned judge. In my judgment the plaintiffs have failed to prove the case which they set out to prove, namely, that the first defendant has abandoned her possession of the premises.

A further point was taken on behalf of the first defendant, namely, that the plaintiffs were estopped by reason of their own and their predecessors' conduct from alleging that the first defendant's possession of the premises had ceased. This was countered on behalf of the plaintiffs by a submission that a claim to the protection of the Rent Acts could not be founded on an estoppel. We were referred to a number of authorities from which it became clear that the point raised was one of some difficulty. For my part, having regard to the conclusion at which I have arrived on the main part of the case, I find it unnecessary to express any opinion on the question of estoppel.

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(7) [1954] 1 All E.R. at pp. 959, 960.

UPJOHN, L.J.: As the learned county court judge recognised more than once in his judgment, this is a difficult and border-line case. A statutory tenant in possession of rent-controlled premises only has a personal right of occupation; he has no estate or property as tenant at all, no right which he can transmit to others. This has been decided over and over again. If he ceases to occupy the premises, then he does not fall within the policy of the Rent Acts, which was to enable a person paying the proper rent fixed by Parliament to remain in occupation: see *Skinner* v. *Geary* (8), per Scrutton, L.J.

Whether a person is in occupation for the purposes of the Rent Acts is, however, essentially a question of fact and degree. If a man is personally absent from his house, he does not thereby necessarily cease to be entitled to the protection of the Acts. A man may be temporarily absent for business or holiday purposes and he does not thereby cease to be in occupation. When absence is more prolonged, a more difficult question arises. It was put in this way by Asquith, L.J., in *Brown* v. *Brash & Ambrose* (9):

> " Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, prima facie, of a cesser of possession or occupation. The question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect. The legal result seems to us to be as follows:—(1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) To repel it he must, at all events, establish a de facto intention on his part to return after his absence."

In addition, of course, a tenant who is de facto out of possession must prove an animus possidendi, that is to say, he must clothe his inward intention with some formal and outward visible sign of it. It is, however, conceded that in this case that condition is satisfied by virtue of the continued occupation of the premises by the second defendant and it is unnecessary, therefore, to consider that aspect of the matter further.

Counsel for the plaintiffs, relying on the passage in the judgment of Asquith, L.J., which I have just quoted, has submitted to us that the onus is on the tenant to establish a de facto intention to return. Counsel for the defendants has argued that the real question to be determined is whether the tenant has abandoned possession. Speaking for myself, I accept the argument that, where absence is more prolonged than is to be explained by holiday or ordinary business reasons and is unintermittent, the onus lies on the tenant of establishing an intention to return if he seeks the protection of the Acts. I do not think that the question whether the tenant has abandoned possession is the relevant test. It is true, I think, that in a number of the reported cases abandonment of possession has been treated as synonymous with failing to show an intention to return, and it is clear that in the case before us the learned county court judge used the term " abandonment " as a short synonym for expressing the idea that there was no intention to return. However, abandonment of possession and failing to prove an intention to return are not the same thing. It would, I think, be easy to postulate circumstances where it could not be said that a tenant had abandoned possession, yet his intention to return was so vague and undetermined that he could not be said to have established an intention to return for the purposes of the Rent Acts.

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(8) [1931] All E.R. Rep. at p. 306; [1931] 2 K.B. at p. 560.

(9) [1948] 1 All E.R. at p. 925; [1948] 2 K.B. at p. 254.

The arguments of both counsel then proceed on the footing that, by reason of the first defendant's insanity, she has become incapable of expressing any further intention. Counsel for the defendants argues that the first defendant must be deemed to continue to have her last proved intention, i.e., that to return to "Quetta". Counsel for the plaintiffs submits that she can have no intention at all and, therefore, cannot establish any intention to return. I cannot accept either of these submissions. To certify a person as mentally unsound does not necessarily make him incapable of forming an intention on such a matter as this. It is a question of fact in each case whether his mental disease is such as to render him incapable of forming any intention or whether the disease falls short of that. Many persons who have been certified as insane are mentally incapable only in relation to certain matters or for certain periods, and in relation to other matters or during lucid intervals they are perfectly capable of contracting, or making a will, or forming an intention to return home when fit. It is a question of fact in the light of the medical evidence in each case.

For my part, however, I am of opinion that to establish an intention to return, by itself, is not necessarily sufficient to obtain the protection of the Rent Acts. The ultimate fact to be established is the fact of occupation, for it is only those in occupation whom the Acts protect. If a tenant is out of occupation for some time, he must at least prove an intention to return, but, if the circumstances of the case are such that, by reason of mental or physical illness or for some other reason, the intention, even if clearly and bona fide held, seems most unlikely to be achieved within a reasonable time, it must surely be open to the judge in a proper case to find as a fact that the tenant is not in occupation. It seems to me that some of the reported cases have gone very far in the protection of the tenant.

The learned judge, in the course of his careful and full judgment, at one stage undoubtedly expressed the view that, having been certified, the first defendant was not in a position mentally to alter her previous intention to return. For the reasons which I have given, I am unable to agree with that and, had the matter rested there, I should find myself unable to support the learned judge's judgment. But the matter did not rest there. He then went on to review the evidence very carefully in the greatest detail. He considered not only the first defendant's present position but her future. Having dealt with her improvement so that she had become a voluntary patient, he said this:

> "Who am I to say that the stage might not be reached within a reasonable time when the authorities would say that her relationship had so improved as to make it safe to let her out to the care of her daughter? I cannot say that she is incurable."

He concluded by saying:

> "The evidence is just sufficient in this case to discharge the onus and has satisfied me that there has been no real abandonment of possession and therefore the claim must fail."

I have already pointed out that, looking at the learned judge's judgment as a whole, it is plain that he is using the phrase "no real abandonment" as being synonymous with stating the view that there was an intention to return. As I read his judgment, the conclusion which he reached was that, looking at all the facts during her mental illness, he regarded it as a border-line case, but he came to the conclusion on those facts that she had established an intention to return and, at least, a real possibility of her return within a reasonable time. I think that there was evidence on which the learned county court judge could come to the conclusion that, as a fact, the first defendant had not ceased to occupy the premises for the purposes of the Rent Acts and, for this reason, I would not disturb his judgment and would dismiss the appeal.

Appeal dismissed.

Solicitors: *Crawley, Arnold, Ellis & Ellis*, agents for *Horwood & James*, Aylesbury (for the plaintiffs); *W. H. Thompson* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

HILTON *v.* THOMAS BURTON (RHODES), LTD. AND ANOTHER.

[MANCHESTER ASSIZES (Diplock, J.), March 16, 17, 1960.]

Master and Servant—Liability of master—Negligence of servant—Servant authorised to drive master's van and permitted to use van in order to obtain refreshment—Accident while returning in van to site of work after journey to café—Fellow-servant, riding in van, killed.

The deceased and H. were employed as demolition workers by a demolition contractor (referred to hereinafter as " the employer "). The hours of work were from 7.30 a.m. to 5.30 p.m., starting and ending at the employer's premises, and it was the usual practice for the demolition workers to be driven in the employer's van to and from the site on which they were working. Any workman who had a driving licence was authorised by the employer to drive the van, and the workmen were permitted to use the van for any reasonable purpose of their own, such as going to get refreshment while out on a job. On the day of the accident the deceased, H. and five other men were working on a site which was about thirty miles from the employer's premises. At about 12.20 p.m., the deceased, H. and another man went to a public house near the site for drinks, stayed there for about an hour, and, on returning to the site, ate their lunches, which they had brought with them. At about 3.30 p.m., these three men and another man decided to go to a café, which was about seven miles away, for tea. They started off in the employer's van, with H. driving, but when they were approaching the café they realised that there would not be time to go in, as they would have to return to the site to pick up the other three men before returning to the employer's premises. As they were returning to the site, the van overturned on a curve owing to the negligent driving of H., and the deceased was killed. His widow claimed damages against the employer as being vicariously responsible for H.'s negligence.

Held: the test whether the employer was liable for H.'s negligence was whether H. was doing at the time something that he was employed to do; accordingly, the employer was not liable, for on the facts H. was not at the time doing anything that he was employed to do.

Higbid v. *R. C. Hammett, Ltd.* ((1932), 49 T.L.R. 104) applied.

Dictum of MCNAIR, J., in *Harvey* v. *R. G. O'Dell, Ltd.* ([1958] 1 All E.R. at p. 665) considered.

[As to the liability of a master in tort for acts of a servant, see 25 HALSBURY'S LAWS (3rd Edn.) 539, 541, paras. 1027, 1029; and for cases on the subject, see 34 DIGEST 127-129, *981-991*.]

Cases referred to:

Canadian Pacific Ry. Co. v. *Lockhart*, [1942] 2 All E.R. 464; [1942] A.C. 591; 111 L.J.P.C. 113; 167 L.T. 231; 2nd Digest Supp.

Century Insurance Co., Ltd. v. *Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491; [1942] A.C. 509; 111 L.J.P.C. 138; 167 L.T. 404; 2nd Digest Supp.

Crook v. *Derbyshire Stone, Ltd.*, [1956] 2 All E.R. 447; [1956] 1 W.L.R. 432; 3rd Digest Supp.

A *Harvey* v. *R. G. O'Dell, Ltd.*, [1958] 1 All E.R. 657; [1958] 2 Q.B. 78; [1958] 2 W.L.R. 473; 3rd Digest Supp.

Higbid v. *R. C. Hammett, Ltd.*, (1932), 49 T.L.R. 104; Digest Supp.

Lloyd v. *Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 34 Digest 129, *991*.

B **Action.**

In this action the plaintiff, Janet Hilton, widow of John William Hilton, deceased, and administratrix of his estate, claimed damages against Thomas Burton (Rhodes), Ltd., the first defendants, and Albert Hoyle, the second defendant, under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, for negligently causing the death of the C deceased.

The deceased was employed as a foreman by the first defendants, who were demolition contractors. The second defendant was a fellow workman of the deceased. At the date of the accident, which occurred on Feb. 20, 1957, the deceased, the second defendant and five other men were engaged in demolishing mill machinery at Church, about thirty miles from either Audenshaw or Middle- D ton, where the first defendants' premises were situated. The usual hours of employment of the deceased and his fellow workmen were from 7.30 a.m. until 5.30 p.m., starting and ending at the first defendants' premises. The usual practice, which was followed on this occasion, was for the gang of demolition workers to be driven to work in the first defendants' van, a Bedford van, fitted for carrying passengers. Mr. Stratton was the usual driver, but any workman E with a driving licence, including the second defendant, was authorised by the first defendants to drive the van. At the end of the day the gang was brought back in the same van. As the men were normally engaged in work away from the first defendants' premises, it was necessary for them to get their lunch and, perhaps, other refreshments, while they were out at work. Mr. Burton, a director of the first defendants, did not mind whether they took their food and drink F with them and consumed it on the site or whether they went away from the site to get it at a café or public house. He was quite willing that they should have the van for that purpose, or for any reasonable purpose of their own, provided, presumably, that it did not interfere with their work.

On the morning of the accident the van was driven to the site by Mr. Stratton. On their way to the site, the men stopped, as was their custom, for a cup of G tea at a café, called Cora's Café, which was about seven or eight miles short of the site. All the men on the gang worked until 12.20 p.m. Three of them, including the second defendant and the deceased, then went to a nearby public house for drinks and remained there for about an hour. On returning to the site, they ate their dinners, which they had brought with them. The second defendant may have worked again for a short time. The three of them then decided that H they had done enough work for the day and sat around on the site until about 3.30 p.m. Another man, Mr. Statham, who had not been to the public house, also stopped work at about this time. He and the three who had been to the public house then decided to go to Cora's Café to have some tea, leaving the other three men, including Mr. Stratton, working on some other part of the site. On no previous occasion had the men, while working at this site, gone off to a café for I tea in the afternoon. As the four men were approaching the café in the first defendants' van, which was being driven by the second defendant, they realised that it was already 3.50 p.m., and they turned round, without entering the café, and started back to the site, so as to be there in time to collect the other three men who were still working, and then return to the first defendants' premises. On the way back to the site, the van overturned on a curve, and the deceased was killed.

The plaintiff alleged that the accident was due to the negligent driving of the second defendant. Against the first defendants, the plaintiff alleged (a) that the van was sent out in an unroadworthy condition, and (b) that the first defendants were vicariously liable for the negligent driving of the second defendant. A

DIPLOCK, J., held that the accident was the consequence of the negligent driving of the van by the second defendant, and that direct liability on the part of the first defendants (under (a) above) was not established. The report is confined to the question whether the first defendants were vicariously liable for the negligent driving of the second defendant. B

J. D. Cantley, Q.C., and *W. G. Morris* for the plaintiff.

Fenton Atkinson, Q.C., and *W. D. T. Hodgson* for the first defendants.

B. H. Gerrard for the second defendant.

Cur. adv. vult.

Mar. 17. **DIPLOCK, J.**, after stating the facts and his finding that the accident which caused the death of the deceased was the consequence of the negligent driving of the first defendants' van by the second defendant, held that there was no direct liability for the accident on the part of the first defendants, and continued: C

The question remains, and it is probably the most important practical question in this case: Are the first defendants liable, vicariously, for the second defendant's negligence? I think that the true test can best be expressed in these words: Was the second defendant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent as in *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board* (1), or even fraudulent, as in *Lloyd* v. *Grace, Smith & Co.* (2), or contrary to express orders, as in *Canadian Pacific Ry. Co.* v. *Lockhart* (3), the master is liable. If, however, the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence, or permission. To say, as is sometimes said, that vicarious liability attaches to the master where the act is an act, or falls within a class of act, which the servant is authorised to do, may be misleading. In one sense, a master may be said to authorise a servant to do an act when he grants the servant permission to do something for the servant's own benefit, which, without such permission, would be a breach of his contract of employment or even a tort, as when he permits him to take time off for refreshment in working hours, as in *Crook* v. *Derbyshire Stone, Ltd.* (4), or permits him to use the master's property, as in *Higbid* v. *R. C. Hammett, Ltd.* (5). In such cases, the master is not liable, for although he may be said, in a loose sense, to authorise the act, it is nevertheless not an act which the servant is employed to do. On which side of the line does the present case fall? D E F G

Mr. Burton, a director of the first defendants, who was called, not for the first defendants but for the second defendant, has gone to the utmost limit which his innate sense of truthfulness will permit him, to establish that the first defendants (or, rather, their insurers) are liable. He said (and I accept it) that he permitted the employees to use the van for any reasonable purpose such as going to get refreshment while out on a job away from the first defendants' depot. He said that, provided that they got through a reasonable amount of work, he did not mind whether they actually worked for the full hours for which they were paid, and that on the day of the accident, although the second defendant and the others who went off to the café had done little more than half a day's work before they decided to go off, he had no objection, and they were doing it perfectly properly, and with his permission. I doubt whether he really would have taken that view but for the tragic consequences and his desire to ensure that the widow of the deceased would obtain compensation for her husband's death; but, even assuming in the plaintiff's favour that Mr. Burton is H I right in saying that, is it sufficient to enable her to recover against the first defendants?

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(1) [1942] 1 All E.R. 491; [1942] A.C. 509.
(2) [1912] A.C. 716.
(3) [1942] 2 All E.R. 464; [1942] A.C. 591.
(4) [1956] 2 All E.R. 447.
(5) (1932), 49 T.L.R. 104.

Counsel for the plaintiff put the case in this way. He placed great reliance on the position of Mr. Statham, and said that the journey was fairly incidental to the day's work of Mr. Statham at the site in Church. Mr. Statham was employed, he said, to go thirty miles away and to do heavy work at a place where no facilities for refreshment were provided on the premises. The vehicle was at the general disposal of the men for getting, among other things, refreshment, and, counsel submitted, the deceased was driving the vehicle to the café for the purpose of getting Mr. Statham, who had not gone off to the public house earlier in the day, some reasonable refreshment for the purpose of enabling him to work. Counsel relied on the judgment of MCNAIR, J., in *Harvey* v. *R. G. O'Dell, Ltd.* (6), where the learned judge (it is true, obiter) expressed the view (7), that, where an employee was injured by the negligent driving of a fellow employee when being taken to obtain refreshment during working hours, that was done in the course of the employment which the employee was employed to do, and, accordingly, the master was vicariously liable. MCNAIR, J., expressed that view obiter, making it quite plain that he was not attempting to lay down a general rule, and I do not doubt that there may be circumstances in which a master is vicariously liable for injury to an employee, or to anyone else, where his vehicle is being driven for the purpose of obtaining refreshment by his servants while out on work. Indeed, he may expressly or impliedly instruct one of them to drive the others for that purpose.

However that may be, I have to look at the realities of the situation. What were the circumstances, and what was the purpose for which this journey to Cora's Café and back was taken? Looking at the realities of the situation, it seems to me to be clear beyond a peradventure that what happened was this. The four men, having taken the view that they had done enough work to pass muster, were filling in the rest of their time until their hours of work had come to an end. After sitting and chatting on the job for some time, they decided to go to the café to fill in the time until they could go back to the first defendants' depot and draw their pay. This seems to me to be a plain case of what, in the old cases, was sometimes called going out on a frolic of their own. It had most tragic consequences, but it does not seem to me that it is possible to hold (though I would like to do so if I could), looking at the realities of the situation, that on the course of that journey the second defendant was doing anything that he was employed to do. It may be that he was using his master's vehicle with his master's permission, but as *Higbid* v. *R. C. Hammett, Ltd.* (8) shows, that is not enough. The true test is: Was he doing something that he was employed to do? I think, on the facts of this case, that he plainly was not. It follows, therefore, that I am unable to find any liability on the part of the first defendants. The second defendant is clearly liable, and damages have been agreed at £5,500, plus funeral expenses of £51 18s. 6d. The plaintiff is, accordingly, entitled to judgment for that amount against the second defendant.

[HIS LORDSHIP apportioned the damages, awarding £451 18s. 6d. for loss of expectation of life, under the Law Reform (Miscellaneous Provisions) Act, 1934, and £5,100 under the Fatal Accidents Acts, 1846 to 1908.]

Judgment for the plaintiff against the second defendant, and judgment for the first defendants against the plaintiff.

Solicitors: *Temperley & Taylor*, Middleton (for the plaintiff); *James Chapman & Co.*, Manchester (for the first defendants); *Wm. Hulme & Son*, Manchester (for the second defendant).

[*Reported by* M. DENISE CHORLTON, *Barrister-at-Law.*]

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(6) [1958] 1 All E.R. 657; [1958] 2 Q.B. 78.

(7) [1958] 1 All E.R. at p. 665; [1958] 2 Q.B. at p. 102.

(8) (1932), 49 T.L.R. 104.

Re LANGLEY'S SETTLEMENT TRUSTS. LLOYDS BANK, LTD. *v.* LANGLEY.

[CHANCERY DIVISION (Buckley, J.), November 28, 29, 30, 1960.]

Conflict of Laws—Foreign judgment—Recognition—Guardianship order of foreign court in relation to settlor not under incapacity by English law—English settlement giving settlor power of withdrawal of funds—Notice of withdrawal executed by settlor—Whether settlor had thereby effectively exercised power of withdrawal.

A settlor made an English settlement dated Aug. 8, 1928. Since 1937 he had resided in California in the United States of America. He suffered from multiple sclerosis by reason of which he had little power of movement in his limbs although his mental capacity was unaffected. By letters of guardianship issued in the Superior Court of the State of California in 1956 his wife was appointed guardian of his estate and person under s. 1460 of the California Probate Code on the ground that he was an incompetent person by reason of old age and disease and was unable, unassisted, to manage and take care of himself or his property. Clause 8 of the settlement provided that the settlor might withdraw from the settlement and require the trustee to transfer to him as his absolute property any part of the trust fund. By an order of the Superior Court of California his guardian was authorised, inter alia, to exercise all his powers under the settlement. By a notice of withdrawal dated Oct. 12, 1959, the settlor declared that in exercise of the power of withdrawal conferred on him by the settlement he thereby withdrew part of the capital of the trust fund and authorised his wife to act as agent on his behalf. The notice was executed by the settlor and by his wife as his guardian and was delivered to the trustee of the settlement.

Held: the proper law of the settlement being English law and the settlor being under no incapacity according to English law, the court would not have regard to the order of the Californian court, since the order was one that arose from the principles or custom or positive law of a foreign country and was of a kind which (if regard were had to the order) would deprive the settlor of rights under the settlement; accordingly effect would be given to the notice of withdrawal.

Worms v. *De Valdor* ((1880), 49 L.J.Ch. 261) and *Re Selot's Trust* ([1902] 1 Ch. 488) followed.

[As to foreign judgments being unenforceable as contrary to the policy of English law, see 7 HALSBURY'S LAWS (3rd Edn.) 143, 144, paras. 253-255; and for cases on the subject, see 11 DIGEST (Repl.) 537, 538, *1471-1482*.]

Cases referred to:

Selot's Trust, Re, [1902] 1 Ch. 488; 71 L.J.Ch. 192; 11 Digest (Repl.) 538, *1482*.

Waite's Settlement Trusts, Re, Westminster Bank, Ltd. v. *Brouard,* [1957] 1 All E.R. 629; [1958] Ch. 100; [1957] 2 W.L.R. 1024; 3rd Digest Supp.

Worms v. *De Valdor,* (1880), 49 L.J.Ch. 261; 41 L.T. 791; 11 Digest (Repl.) 538, *1481*.

Adjourned Summons.

This was an application by originating summons dated Feb. 24, 1960, by the plaintiff, Lloyds Bank, Ltd., the trustee of a settlement dated Aug. 8, 1928, to determine, inter alia, whether by the notices of withdrawal respectively dated or acknowledged on Feb. 14, 1957, and Oct. 12, 1959, or by either of them, the first defendant, George Edward Downes Langley, or the second defendant, Mary Margaret Langley on his behalf, had effectively exercised the power of withdrawal conferred by cl. 8 of the settlement.

The first defendant, who was the settlor, had lived since 1937 in the State of California, U.S.A. He suffered from multiple sclerosis by reason of which he had little power of movement in any limb but his mental capacity was unaffected.

By letters of guardianship issued in the Superior Court of the State of California dated Feb. 14, 1956, the second defendant (his wife) was appointed guardian of the person and estate of the first defendant under s. 1460 of the California Probate Code which provides:

> " Any superior court to which application is made . . . may appoint a guardian for the person and estate . . . of an insane or an incompetent person. As used in this division of this code, the phrase ' incompetent person ', ' incompetent ', or ' mentally incompetent ', shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."

By a notice dated Feb. 14, 1957, addressed to the plaintiff's solicitors, the second defendant purported to exercise the power of withdrawal on behalf of the settlor to the extent that it was then available. By an order made in the Superior Court of California on Apr. 9, 1957, the second defendant was authorised, inter alia, to exercise all the powers over the trusts of the settlement that the first defendant could have exercised had he been competent. By a notice of withdrawal dated Oct. 12, 1959, the first defendant declared that in exercise of the power of withdrawal conferred on him by the settlement he thereby withdrew part of the capital of the trust fund and authorised the second defendant to act as agent on his behalf in the withdrawal. The notice was executed by the first defendant, and by the second defendant as his guardian, and was delivered to the plaintiff on Oct. 17, 1959. A power of attorney dated Oct. 12, 1959, executed by the first defendant, was delivered to the plaintiff on Oct. 23, 1959, annexed to a copy of the above-mentioned notice, appointing the second defendant his attorney and giving her power inter alia to act on his behalf in the withdrawal of funds from the settlement.

The third, fourth, fifth, sixth, seventh and eighth defendants were respectively, Ruby Maude Pauline Langley, Claude Martin Langley, Richard Martin Langley, Christopher Downes Langley, Edward Nicholas Langley, and Jacqueline Mary Purcell, all of whom were entitled or contingently entitled to beneficial interests under the trusts of the settlement.

J. A. Armstrong for the plaintiff.

J. W. Brunyate for the first and second defendants.

B. T. Buckle for the third, fourth, fifth, sixth, seventh and eighth defendants.

BUCKLEY, J., having given judgment on a previous point, continued: I now have to decide whether by a notice of withdrawal dated Oct. 12, 1959, Mr. Langley, the first defendant, or Mrs. Langley, the second defendant on his behalf, has effectively exercised a power of withdrawal contained in cl. 8 of the settlement dated Aug. 8, 1928. I ignore an earlier notice of withdrawal dated Feb. 14, 1957, because no reliance is now placed on that.

Clause 8 of the settlement is in the following words:

> " The settlor may at any time during his life withdraw from the settlement hereby made and require the trustees to transfer to him as his absolute property any part of the trust fund provided (i) that until the sixty shares have been sold and transferred under the said agreement for sale the whole of such sixty shares shall remain in the trust fund and that after such shares have been sold and transferred the capital of the trust fund remaining after such withdrawal shall be then of the present value of £33,000 excluding the said policies and (ii) that the settlor shall have duly performed up to date the covenant contained in cl. 1."

The shares originally settled, that is to say, the sixty shares mentioned in that clause, have long since been sold, and at an earlier date Mr. Langley exercised his power under this clause to withdraw so much of the trust fund as was then in excess of £33,000, excluding the policies. Since then the remaining trusts and investments have appreciated, and the value of the trust fund is once again in excess of £33,000.

On Oct. 12, 1959, the notice of withdrawal was executed by Mr. Langley and also by Mrs. Langley as his guardian appointed under the law of California with a view to withdrawing from the trust fund so much of the property comprised in the trust as represented the excess over and above £33,000. I need not repeat the circumstances relating to Mr. Langley's state of health and the appointment of Mrs. Langley in California as his guardian.

The settlement with which I am concerned is undoubtedly an English settlement and its proper law is English law and, in those circumstances, it appears to me on the decision of DANCKWERTS, J., in *Re Waite's Settlement Trusts, Westminster Bank, Ltd.* v. *Brouard* (1) that in considering whether or not there has been an effective exercise of a power under that settlement I have to apply English law. In applying English law I have to consider how far, having regard to the rules of the conflict of laws as recognised by English courts, I have to give effect to the orders which have been made by the Californian courts. The evidence with regard to that, of Mr. A. H. Robbins, the Californian lawyer, who has sworn an affidavit filed on behalf of the plaintiff in this matter, is to the effect that the appointment of Mrs. Langley as Mr. Langley's guardian under s. 1460 of the California Probate Code is to vest the legal, but not the equitable, title to property of his, in her, as his guardian, to suspend his powers of inter vivos disposition and to confer the right of managing his affairs on her as his guardian. It would seem that under Californian law Mr. Langley has no power to deal with any of his property, and I think, at any rate I am prepared to assume, for present purposes, that under Californian law he would not be able to exercise such a power of withdrawal as I am here concerned with. On the other hand, I have come to the conclusion that Mr. Langley is a person who suffers from no mental defect. In the contemplation of English law, if the orders of the Californian court be ignored, he is a person perfectly capable of exercising this power, and if he is to be treated as a person perfectly entitled to exercise his power, there is no ground on which it can be said that the notice of withdrawal is defective in any way.

The crucial question, therefore, appears to me to be whether, having regard to the Californian orders and their effect in American law, I am bound to treat Mr. Langley as being what otherwise in contemplation of English law he would not be, that is to say, someone incapable of dealing with his own property and incapable of exercising this power.

I have been referred by counsel, Mr. B. T. Buckle, to r. 28 and r. 29 in ch. 10 of DICEY'S CONFLICT OF LAWS (7th Edn.), at pp. 223 and 227. Rule 28 is to the effect:

> "Subject to r. 29, the existence of a status under the law of a person's domicil is recognised by the court, but such recognition does not necessarily involve giving effect to the results of such status."

Rule 29 is to the effect:

> "The court will not give effect to the results of a status existing under a foreign law which is penal."

With regard to r. 28 there is one matter which in the view of the editors of DICEY is or may be a matter of importance, and that is the question of what is the domicil of the person concerned. The domicil of Mr. Langley is a question which has not been debated before me and about which I propose to come to no conclusion. One of the witnesses suggests that he is probably domiciled in California, but the evidence is quite insufficient to arrive at any conclusion on that aspect of the matter.

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(1) [1957] 1 All E.R. 629; [1958] Ch. 100.

In connexion with those two rules, it is relevant to look at the decision of FARWELL, J., in *Re Selot's Trust* (2). That was a case which related to a gentleman who, unfortunately, seems to have been of prodigal habits and in respect of whom a conseil judiciaire had been appointed under French law. Under French law where a French subject of full age is found to be of extravagant habits he may be restrained from dealing with or disposing of or alienating or receiving a receipt for his movable property without the consent of a person who is termed a conseil judiciaire. The question arose in that case whether the court in England would pay regard to an order appointing a conseil judiciaire so as to deprive a beneficiary under an English trust of his right personally to receive property to which he was entitled under the trust. The property was property to which the man in question had become absolutely entitled under an English will, and FARWELL, J., said this (3):

> " I have considered the reasons given by FRY, J., for his judgment in the case of *Worms* v. *De Valdor* (4), and I am unable to distinguish this case in principle, and I certainly feel it my duty to follow that case. The first ground taken in that judgment was, that where the disability or the disqualification in question arises from the principles or custom or positive law of a foreign country, especially of a penal nature, it is not regarded by this court; and FRY, J., declined to regard this particular appointment of conseil judiciaire in that very case on that ground. Further, he went on to hold (and with all respect I am not quite sure how far he ought to have decided the question of French law without evidence upon it), upon a perusal of the works of two eminent writers on French law, that there was no change of status in that case, and that consequently the plaintiff was not affected by the order of the French court."

FARWELL, J., questioned whether FRY, J., was justified in forming an opinion about that because he had before him no evidence of French law. However, he found that he would be prepared to follow the decision of FRY, J., in *Worms* v. *De Valdor* (4) on that aspect of the matter also, but the part of the judgment which I think is relevant to the present case is that ground which is placed first, namely that

> " where the disability or the disqualification in question arises from the principles or custom or positive law of a foreign country, especially of a penal nature, it is not regarded by this court . . ."

The word " penal " there does not, I think, clearly mean punitive; it means law of a kind which deprives the person affected of his rights or property in a way which adversely affects his interests.

Counsel for the third and subsequent defendants says that in the present case s. 1460 of the California Probate Code is not penal but protective; but it seems to me that the appointment of a conseil judiciaire under French law also would be, by parity of reasoning, not penal but protective. It is imposing between the prodigal and his property the protective hand of the conseil judiciaire for the benefit of the prodigal; and in the case of the appointment of a guardian under s. 1460 of the California Probate Code the appointment of the guardian is designed to protect the person from being imposed on by persons who might be in a position to impose on him in consequence of his disability, whatever its nature may be. The two kinds of order would seem to me to be in pari materia, and if it is right for the court to pay no attention to the appointment of a conseil judiciaire it seems to me that it must follow that the court in considering the application of English law to the exercise of a power under an English trust should not have regard to an order such as the order of the Californian court in the present case. If no regard is to be paid to the orders of the Californian court, there is no question but that Mr. Langley was competent to exercise the power. He has exercised the power and, for those reasons, I will declare that by the notice of Oct. 12, 1959, Mr. Langley has effectively exercised the power of withdrawal conferred by cl. 8 of the settlement.

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(2) [1902] 1 Ch. 488. (3) [1902] 1 Ch. at p. 492. (4) (1880), 49 L.J.Ch. 261.

Declaration accordingly.

Solicitors: *Reynolds, Gorst & Porter* (for the plaintiff); *Coward, Chance & Co.* (for the first and second defendants); *Pothecary & Barratt* (for the third, fourth, fifth, sixth, seventh and eighth defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

THE HEBRIDEAN COAST. OWNERS OF STEAMSHIP LORD CITRINE *v.* OWNERS OF MOTORSHIP OR VESSEL HEBRIDEAN COAST.

[HOUSE OF LORDS (Lord Reid, Lord Morton of Henryton, Lord Tucker and Lord Morris of Borth-y-Gest), November 16, 17, December 21, 1960.]

Shipping—Collision—Damages—Detention—Measure of damages—No specific vessel chartered as replacement tonnage—Interest on capital value.

On Dec. 23, 1951, the Lord Citrine, now owned by the appellants, was in collision with the respondents' vessel, the Hebridean Coast. The respondents admitted liability. The Lord Citrine was detained for 11½ days undergoing permanent repairs. The Lord Citrine was one of a number of vessels used by the Central Electricity Authority (the predecessors of the appellants) to bring coal to London from various ports on the north east coast. The authority and the National Coal Board agreed tonnage programmes of coal for each summer and winter period and about a quarter of the tonnage due to be brought to London was brought by sea. The authority's own ships did not, and could not, carry more than about half of that coal, the rest being carried in chartered vessels. Certain vessels were chartered on ten-year charter, and others were employed on short charter or spot charter as required. All the authority's own ships were regularly employed and none was idle (nor would the Lord Citrine have been idle) during her detention period but no specific vessel, either of the authority's fleet or of the chartered ships, could be pointed out as having replaced her by carrying coal which she would have carried during the detention period. The carrying capacity lost by the Lord Citrine's detention was less than one per cent. of the total carried during the remainder of the six months' period of supply of coal, and all available coal was brought to London during that period. Damages for loss by detention of the Lord Citrine were referred for assessment, the appellants claiming special damage measured on the basis of the freight payable for chartering alternative tonnage.

Held: (i) the appellants' claim for special damage failed, since they had not proved that they had chartered substitute shipping space to carry the coal which the Lord Citrine would have carried but for her detention, and no inference could be drawn that such coal had been so carried;

(ii) the appellants were, however, entitled to general damages such as would compensate them for having been wrongfully deprived of her services for a period; and, no harm to the owners being proved beyond the loss of her services, the damages should be based on interest on the capital value of the ship, in accordance with the practice established by *The Greta Holme* ([1897] A.C. 596).

Decision of the COURT OF APPEAL ([1960] 2 All E.R. 85) affirmed.

[As to measure of damages in shipping collisions, see 30 HALSBURY'S LAWS (2nd Edn.) 860-862, paras. 1138, 1139; and for cases on the subject, see 41 DIGEST 800-803, *6613-6636*; 806-808, *6666-6695*; 812, 813, *6737-6745*.]

Cases referred to:

Admiralty Comrs. v. *S.S. Chekiang*, [1926] All E.R. Rep. 114; [1926] A.C. 637; 95 L.J.P. 119; 135 L.T. 450; 17 Asp. M.L.C. 74; *revsg.* sub nom. *The Chekiang*, [1925] P. 80; 41 Digest 805, *6663*.

Admiralty Comrs. v. *Susquehanna* (*Owners*), *The Susquehanna*, [1926] All E.R. Rep. 125; [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 17 Asp. M.L.C. 81; *affmg.* [1925] P. 196; 41 Digest 802, *6624*.

No. 7 Steam Sand Pump Dredger (*Owners*) v. *Greta Holme* (*Owners*), *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 8 Asp. M.L.C. 317; 41 Digest 808, *6689*.

Strathfillan S.S. (*Owners*) v. *Ikala S.S.* (*Owners*), *The Ikala*, [1929] A.C. 196; 98 L.J.P. 49; 140 L.T. 177; 17 Asp. M.L.C. 555; Digest Supp.

Appeal.

Appeal by the Central Electricity Generating Board, the successors of the Central Electricity Authority, owners of the steamship Lord Citrine, from an order of the Court of Appeal (HODSON, WILLMER and DEVLIN, L.JJ.), dated Mar. 10, 1960, and reported [1960] 2 All E.R. 85, affirming an order of LORD MERRIMAN, P., dated June 19, 1959, and reported [1959] 3 All E.R. 126, on a motion by the respondents, the owners of the motorship or vessel Hebridean Coast, which had collided with and damaged the Lord Citrine, objecting to the Admiralty Registrar's assessment of the damages suffered by the appellant by reason of the detention of the Lord Citrine for eleven and a half days while undergoing repairs necessitated by the collision. The facts are set out in the opinion of LORD REID.

Ashton Roskill, Q.C., *Waldo Porges, Q.C.*, and *R. F. Stone* for the appellants.

Kenneth Carpmael, Q.C., *Peter Bucknill* and *J. D. H. Rochford* for the respondents.

Their Lordships took time for consideration.

Dec. 21. The following opinions were read.

LORD REID: My Lords, nearly nine years ago, on Dec. 23, 1951, there was a minor collision off Cromer between the Lord Citrine and the Hebridean Coast. The owners of the Hebridean Coast admitted liability on Mar. 31, 1952, and since then the only question at issue between the parties has been the amount of damages due to the appellants. The appellants' statement of damages, amounting in all to £5,241, was not filed until June 14, 1956, and the case only now comes before your Lordships for final decision. The Lord Citrine was owned by the Central Electricity Authority and was one of a number of vessels used by them to bring coal to London from various ports on the north east coast. When the collision occurred, she was on a voyage in ballast from London to Immingham. After the collision, she was able to proceed to Immingham and, after some temporary repairs, to take on her cargo of coal and carry it to London. Thereafter she was out of service for a time undergoing permanent repairs. The largest item in the appellants' claim was

> " 14. Loss by detention: 10 a.m. 31.12.51 to 7 a.m. 14.1.52 thirteen days twenty-one hours, loss of use of Lord Citrine for carriage of coal and charter of equivalent shipping space £2,451 13s."

All the other items were agreed or decided by the Admiralty Registrar, and this item has now been modified, the claim now being for £1,525 for detention for 11½ days.

The point at issue between the parties is largely a question of fact. The Admiralty Registrar made careful and elaborate findings of fact, but on some crucial points these lack precision. I do not blame him, because it would appear that the issues were not presented to him with precision. I shall first set out as briefly as I can the facts which are not in dispute. The Central Electricity Authority and the National Coal Board agreed tonnage programmes for each summer and winter period. About a quarter of the tonnage due to be brought to London was brought by sea. During the winter period November-April, 1951-52, the coal board only supplied about eighty-seven per cent. of the agreed tonnage. About 1,250,000 tons should have been brought by sea during this period, and it would seem that about eighty-seven per cent. of that amount was in fact brought by sea. It is not disputed that all the coal available for shipment was in fact shipped during the period. The authority's own ships did not, and could not, carry more than about half of that coal, the rest was carried in chartered vessels. Certain vessels were chartered on ten-year charter. Others were employed on short charter or spot charter as required. The Lord Citrine's voyages lasted on the average 8½ days and her average cargo was 4,171 tons. If she had not been under repair, she would not have been idle but would have been carrying coal, but we do not know to what port she would have been sent or what particular consignment of coal she would have carried during the repair period. There is no evidence or finding that the loss of the Lord Citrine's services during the repair period in any way dislocated the authority's programme or that any particular steps were taken at the time to make good that loss of her services. The registrar found that all the authority's own ships were " regularly employed " and that none was " idle during the detention period ". He further found that

> " no specific vessel can be pointed to as having taken the place of the Lord Citrine during the 11½ days' detention of that vessel."

By that he clearly means no specific vessel either of the authority's fleet or of the chartered ships. The appellants' argument before him was that

> " the general circumstances were such as to indicate that the loss of one of their ships resulted in their having to use chartered tonnage more than they would otherwise have done."

Their claim was based on the cost to them of the " charter of equivalent shipping space ", and the finding of the registrar is:

> " I do not think that if the [appellants] have to show they chartered other tonnage to replace the Lord Citrine they have succeeded in doing so."

But he added: " It seems to me quite likely that they did in fact do so ", though he does not explain why he thought this quite likely.

The argument which I have quoted from the registrar's reasons was repeated before your Lordships. If I substitute the word " prove " for " indicate ", the argument might be valid if supported by the facts. The appellants attached great importance to *Strathfillan S.S.* (*Owners*) v. *Ikala S.S.* (*Owners*), *The Ikala* (1). I shall quote two passages. VISCOUNT SUMNER said (2):

> " It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work, which she would otherwise have done during the time, went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay."

LORD WARRINGTON OF CLYFFE said (3):

> " Though there was no sufficient positive evidence of any chartering effected for the purpose of supplying the tonnage lost by the detention of the Strathfillan the circumstances proved might have been such that the tribunal would have been justified in drawing the inference that a proportion of the chartered tonnage did in fact supply the tonnage lost by the detention."

Proof may be by direct evidence or by inference, and the standard of proof in civil cases is that the fact to be proved must be made to appear more probable than not. The essential steps in the appellants' argument are these. All the coal available during the winter period was in fact brought to London. This must have included the coal which the Lord Citrine would have carried if there had been no detention for repairs. That coal must have been carried either in the authority's vessels or in chartered vessels. It could not have been carried in the authority's vessels because they were already being used to their full capacity. Therefore, it must have been carried in chartered vessels. It is more expensive to carry coal in chartered vessels, and the claim is for the difference in cost between carrying the coal in chartered vessels and carrying it in the authority's vessels.

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(1) [1929] A.C. 196; 17 Asp. M.L.C. 555.
(2) [1929] A.C. at p. 205; 17 Asp. M.L.C. at p. 559.
(3) [1929] A.C. at p. 211; 17 Asp. M.L.C. at p. 561.

If any one of the links in this chain is faulty the argument breaks down, and I need only consider the statement that all the authority's vessels were already being used to their full capacity. The amount which the Lord Citrine would have carried during the detention period is a very small proportion of the total carried during the remainder of the winter period by the authority's vessels—almost certainly less than one per cent. Do the findings then show that so small an extra burden could not be or probably was not carried by them? The registrar's findings are that all the authority's own ships and those on ten-year charter were "regularly employed over the years" and that "none of the authority's vessels except the Lord Citrine was idle during the detention period". I do not regard a finding that vessels were regularly employed over the years as excluding the possibility or even the likelihood that they could have carried one per cent. more than they did, and finding that none was idle during the detention period is of little weight. All we know is—if we do know it—that all the available coal was brought during the winter period. There is nothing to show that the coal which the Lord Citrine would have carried was brought at any particular time, and that is not surprising because no one knows what coal she would have carried or from what port. I would also refer to and adopt what WILLMER and DEVLIN, L.JJ., said on this matter in the Court of Appeal (4).

Counsel also referred your Lordships to the evidence. They were quite entitled to do so because the registrar's findings are not binding on this House even when they have been accepted in the courts below; but the evidence appears to me to be even less definite than the registrar's findings and to afford even less basis for the appellants' contentions.

The appellants then argued that, in any event, they are entitled to general damages, that the method of assessing such damages is a jury question, and that taking the whole matter into consideration as a jury would, a fair method is to take into account what, as a matter of regular practice, the authority was paying for chartered tonnage. I must confess that I do not understand that. I do not proceed on any supposed distinction in principle between a profit-earning ship and a non-profit-earning ship. The task of assessing damages is easier with a profit-earning ship and depends on the probability that she would have earned so much money if her owner could have used her. With a non-profit-earning ship, there is no direct financial loss, and one must ask what harm was done to the owner by his being deprived of the loss of his ship. Then comes what may be a very difficult task, to put a value in money on the harm which the owner has suffered. But you must first prove the harm. If no harm is proved beyond the mere fact that the owner is deprived of the services of his ship during the period of repairs, the opinion of LORD HERSCHELL in *No. 7 Steam Sand Pump Dredger (Owners)* v. *Greta Holme (Owners), The Greta Holme* (5) appears to have given rise to the practice of awarding damages based on interest on the value of the ship. In this case, if the coal in question was carried in the authority's own vessels, there is nothing to show that that involved them in any substantial additional expense. The case would be like *Admiralty Comrs.* v.

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(4) [1960] 2 All E.R. at pp. 90, 91, 93, 94.
(5) [1897] A.C. at pp. 604, 605; 8 Asp. M.L.C. at p. 320.

Susquehanna (*Owners*), *The Susquehanna* (6). It is only if the coal was carried in chartered ships that there would be any reason for taking into account the cost of so carrying it. But that is just what the appellants have failed to prove. I do not see how general damages can be awarded on the basis of compensating an owner for some kind of harm which he cannot prove that he ever sustained. The award of general damages approved by the Court of Appeal was based on interest on the value of the vessel. The appellants argue that that is a very unsatisfactory basis. So it may be, though it has been in use for a long time; but if the only alternative proposed by the appellants cannot be supported, then I see no other possible course but to use this method with all its disadvantages.

In my judgment, the appeal should be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, throughout the argument on this appeal, the words "the appellants" were used to cover both the present owners, the Central Electricity Generating Board and their immediate predecessors, the Central Electricity Authority. I shall follow this practice. The respondents admitted liability and all questions of damages have been agreed, except for one item, namely, a claim for damages in respect of the detention of the Lord Citrine, for a period which has been agreed at 11½ days, while the collision damage was being repaired. The learned President (LORD MERRIMAN) awarded, by way of general damages, interest at seven per cent. on the capital value of the Lord Citrine, and the Court of Appeal affirmed his decision. Counsel for the appellants submitted that the method of awarding interest on capital was a "last resort" in assessing damages and should not have been adopted in the present case. He put his argument as follows. (i) It is to be inferred that the appellants chartered tonnage to replace the Lord Citrine. If so, the damage sustained is special damage, and the amount is the net cost to the appellants of chartering equivalent space; alternatively, (ii) The appellants lost the use of the Lord Citrine for 11½ days, and are entitled to be compensated in general damages therefor. Such damages fall to be ascertained by reference to the sums which the appellants were paying for chartered tonnage, as a matter of regular practice, less expenses saved by not using the Lord Citrine. My Lords, in my opinion, the claim to special damage must fail, as the evidence does not establish that the appellants chartered any tonnage to replace the Lord Citrine, and a claim for special damage must be clearly proved.

In support of his second argument, counsel for the appellants referred to the following findings by the registrar:—

> "(i) The authority's own ships could not have carried the whole of the seaborne coal actually received; there were ten large chartered vessels on ten-year charter from June, 1949; all these vessels were regularly employed over the years subject of course to periods of survey, etc.; certain other vessels were employed on short charter and others on spot charter as required, e.g. owing to weather conditions:
>
> "(ii) None of the authority's vessels except the Lord Citrine was idle during the detention period and if any had been idle it would have been known to the authority:
>
> "(iii) If the Lord Citrine had not been under repair she would not have been idle but would have been carrying coal or on the way in ballast for more coal or loading or unloading; the average duration of a round voyage was agreed at 8⅓ days including loading and unloading:
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> "(iv) At no time during the twenty-six winter weeks of 1951-52 was the authority not chartering vessels additional to the long-term chartered vessels."

Counsel then referred to the following passage in the registrar's "reasons for decision":—

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(6) [1926] All E.R. Rep. 125; [1926] A.C. 655; 17 Asp. M.L.C. 81.

> "There is, in my view, no difficulty in finding the proper amount of damages in the present case; I accept the figure arrived at by the [appellants] in their amended claim. The main point which seems doubtful is whether the [appellants] are entitled to base that figure, which I feel to be the right one, on charter-rates less savings as they have done or whether the figure must be reached in another way."

Counsel submits that, at this stage, the registrar went wrong in principle. Thinking that he was precluded from awarding general damages on the former basis, because the appellants were not a profit-earning body, he had resort to the method of awarding damages by way of interest on the capital value of the Lord Citrine. My Lords, I think that the registrar was wrong in drawing any distinction, for this purpose, between a profit-earning body and a non-profit-earning body. I see no reason, in principle, why such a distinction should be drawn, and no one of the authorities cited in argument lends any support to the view taken by the registrar. So far, I would accept counsel's argument. In *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna* (7) VISCOUNT DUNEDIN observes: "... the functions of the registrar and merchants are those of a jury", and I think it was open to the registrar to adopt the method of assessing damages which he rejected, if he thought that this method was justified by the evidence.

In my view, however, the appellants have not proved that they were put to any extra expense in carrying coal by the detention of the Lord Citrine. In agreement with the learned President and the Court of Appeal, I think that the present case is simply one wherein the appellants have been wrongfully deprived for a time of the services which could have been rendered by that vessel. They are, therefore, entitled to general damages on the principle laid down in *No. 7 Steam Sand Pump Dredger* (*Owners*) v. *Greta Holme* (*Owners*), *The Greta Holme* (8).

I would dismiss the appeal.

LORD TUCKER: My Lords, this case does not, in my view, raise any question of principle or general importance in shipping circles save in so far as it seeks to disturb a practice which has prevailed ever since the decision in *No. 7 Steam Sand Pump Dredger* (*Owners*) v. *Greta Holme* (*Owners*), *The Greta Holme* (8) in 1897. It is clear that the appellants failed to prove any specific damage which could be assessed in pounds, shillings and pence. This seems to be generally referred to as special damage in contradistinction to general damages which cannot be accurately quantified but fall to be computed on what is often referred to as "a jury basis" or a "judicial guess". The distinction may be convenient, but I doubt whether it is strictly accurate when applied to loss alleged to have been suffered as a result of damage to a chattel by negligence. Specific damage of the kind referred to must be strictly proved and must, in the case of collision at sea, be causally connected with the collision. See per VISCOUNT SUMNER in *Strathfillan S.S.* (*Owners*) v. *Ikala S.S.* (*Owners*), *The Ikala* (9).

Having failed to prove such damage, the appellants sought to invite your Lordships to infer that extra coal must at some time have been carried in chartered vessels instead of the authority's own ships as a result of the detention of the Lord Citrine for repairs necessitated by the collision with the Hebridean Coast. If such was the case, I do not understand why it could not have been proved at the inquiry before the Admiralty Registrar or at any rate that some firmer basis for such an inference could not have been laid than the mere statement by the registrar that "none of the authority's vessels except the Lord Citrine

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(7) [1926] All E.R. Rep. at p. 128; [1926] A.C. at p. 662; 17 Asp. M.L.C. at p. 83.
(8) [1897] A.C. 596; 8 Asp. M.L.C. 317.
(9) [1929] A.C. at p. 205; 17 Asp. M.L.C. at p. 559.

A was idle during the detention period." There is no finding that they were all loaded to capacity, nor is there any finding that any chartered vessel which otherwise would have been idle was available. Furthermore, the evidence of the witness Stafford (10) showed that he really was not possessed of sufficient material to enable him to answer questions as to the whereabouts of any particular vessel or its employment at any particular time, so that too much reliance cannot be placed on the denial that any of the authority's vessels were "idle" during B the period in question. Having, therefore, failed to prove or lay the foundation for an inference that additional coal was carried at charter rates as a result of the collision and having left the evidence in such a state that it would appear not improbable that the authority in fact suffered no pecuniary loss at all, it was argued that, nonetheless, the registrar should not have adopted the practice which derives from *The Greta Holme* case (11) of assessing damages in such C cases on the basis of interest on the value of the damaged vessel. I can find no reason in the present case for holding that the registrar was not entitled to take the course which he did, subject to the deduction for depreciation allowed in the Court of Appeal. In *Admiralty Comrs.* v. *S.S. Chekiang* (12), LORD SUMNER was somewhat critical of the principle of assessing damages on this basis but, after examining the facts of that case, he stated that he could not say as a D matter of law that the registrar was wrong in adopting this method. It appears to me that this observation is equally applicable to the present case and that there are no special facts or circumstances which render it inappropriate.

I would, accordingly, dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, though the damage E caused to the Lord Citrine had the result that her owners were deprived of her use for a period of 11½ days, they have not been able to point to any specific charter by which the use of some substituted vessel was obtained. They contend, however, that the facts which have been found justify an inference that they did charter tonnage to replace the Lord Citrine. The learned registrar, while holding that they had failed to show that they had chartered replacement F tonnage, considered that it was quite likely that they had in fact done so. On the evidence, I do not consider that any inference that replacement tonnage was chartered could legitimately be drawn; nor do I think that the likelihood that there had been such chartering was shown. The appellants had a number of ships available to them for the carriage during the winter period of the coal that they intended to carry to London by sea; some of these ships were owned G by them and some were chartered. In submitting that an inference should be drawn that the loss of the use of the Lord Citrine resulted in some chartering of replacement tonnage, the appellants do not fix the period or the dates of the suggested chartering, though their claim is based on the average of the charter rates ruling in the period between the end of November, 1951, and the first part of February, 1952. It is always possible that, in the later part of the H winter period, there was some chartering that continued for a slightly longer time than would have been the case had the Lord Citrine not been damaged, but this is neither established by direct proof nor, in my view, by inference. When it is remembered that the tonnage of coal that would be carried by the Lord Citrine on one voyage was a minimal fraction of the total tonnage which would be carried by sea during the winter period and for which purpose a fleet I of ships was available, it seems probable that the lost carrying capacity was, as WILLMER, L.J., said (13), "easily absorbed by the work of the other vessels which the [appellants] had at their disposal." It is sufficient, however, to say that proof is lacking from which it can be deduced that some additional or prolonged chartering was caused. It is possible that, as a result of the temporary unavailability of the Lord Citrine, the accumulated stocks of coal of the appellants at their generating stations were at some time or times slightly less than they would otherwise have been; this, however, is speculative and, in any event, the appellants have not suggested that their output of electric power was at all affected.

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(10) A shipping executive with Messrs. Stephenson Clarke, Ltd.
(11) [1897] A.C. 596; 8 Asp. M.L.C. 317.
(12) [1926] All E.R. Rep. 114; [1926] A.C. 637; 17 Asp. M.L.C. 74.
(13) [1960] 2 All E.R. at p. 90.

On the findings of the learned registrar, the respondents have not sought to argue that the damages to be awarded in respect of the loss of the use of the Lord Citrine for 11½ days should be only nominal. It is, therefore, proper that such sum should be awarded as will fairly compensate the appellants. This sum is to be assessed having regard to the particular facts of this case. No help in the process of assessment is to be derived from seeking to describe the Lord Citrine by some form of words or by seeking to place her in some category or classification. Everything depends on the circumstances which are special to this case. The appellants would not have hired out the Lord Citrine on a commercial basis and so have earned money from some charterer. Nor was their use of the Lord Citrine in any way comparable to the use which the owners of The Ikala (14) were able to make of her as a profit-earning ship earning specially high profits in exceptional times. Nevertheless, the wrongdoing of the respondents did have the result that, for a period of 11½ days, the Lord Citrine was under repair whereas, had she not so been, she would have been carrying coal and playing her part in the appellants' comprehensive winter coal-carrying operations. The then capital value of the Lord Citrine was for her owners "infructuous" during the 11½ days. In these circumstances, I respectfully agree with the assessment of damages made by the learned President (Lord Merriman), which, on the evidence in this case (subject to the addition of the agreed sum for depreciation), seems to me to have been fair and reasonable.

Appeal dismissed.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Botterell, Roche & Temperley*, Newcastle-upon-Tyne (for the appellants); *Middleton, Lewis & Co.*, agents for *Middleton & Co.*, Sunderland (for the respondents).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

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(14) See [1929] A.C. 196; 17 Asp. M.L.C. 555.

BEESLY *v.* HALLWOOD ESTATES, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), November 16, 17, 1960.]

Deed—Execution—Sealing—Delivery as escrow—Sealing by body corporate—Lease—Parts of lease not exchanged—Condition implied—Whether corporation bound by lease.

An engrossed counterpart of a proposed new lease, to be granted in pursuance of the tenant's exercise of an option, was sent to the tenant's solicitors. The landlords, who were a company, executed the new lease intending to deliver it, and delivering it thereby, as their deed conditionally only (so the court found) on the tenant's executing the counterpart. The counterpart was executed by the tenant. Before documents were exchanged, the landlords, not having called on the tenant to deliver the counterpart, refused to continue with the matter.

Held: the lease, having been executed by the company as an escrow, could not be recalled by the company pending performance of the conditions on which it was delivered, and the tenant was entitled to the new lease.

Dictum of FARWELL, L.J., in *Foundling Hospital (Governors & Guardians)* v. *Crane* ([1911] 2 K.B. at p. 379) applied.

Decision of BUCKLEY, J. ([1960] 2 All E.R. 314) affirmed.

[As to the effect of delivery of a deed as an escrow, see 11 HALSBURY'S LAWS (3rd Edn.) 350, para. 561; and for cases on the subject, see 17 DIGEST (Repl.) 221-225, *200-255*.]

Cases referred to.

Foundling Hospital (Governors & Guardians) v. *Crane*, [1911] 2 K.B. 367; 80 L.J.K.B. 853; 105 L.T. 187; 17 Digest (Repl.) 217, *170*.

Hollington Brothers, Ltd. v. *Rhodes*, [1951] 2 All E.R. 578; [1951] 2 T.L.R. 691; 2nd Digest Supp.

Phillips v. *Edwards*, (1864), 33 Beav. 440; 3 New Rep. 658; 55 E.R. 438; 17 Digest (Repl.) 224, *245*.

Xenos v. *Wickham*, (1866), L.R. 2 H.L. 296; 36 L.J.C.P. 313; 16 L.T. 800; 17 Digest (Repl.) 216, *153*.

Appeal.

This was an appeal by the defendants, Hallwood Estates, Ltd., from an order of BUCKLEY, J., dated Apr. 13, 1960, and reported [1960] 2 All E.R. 314, whereby it was ordered that on the plaintiff handing over to the defendants the counterpart of the further lease mentioned in the re-amended statement of claim the defendants should hand over to the plaintiff the further lease executed by them on or before Sept. 26, 1958. The plaintiff served a counter-notice claiming that the judgment could be upheld on grounds other than that on which BUCKLEY, J., decided in her favour, but no argument on them was heard since they fell to be considered only if the appeal otherwise succeeded.

Nigel Warren, Q.C., and *A. E. Holdsworth* for the defendants.

Sir Lynn Ungoed-Thomas, Q.C., and *F. B. Alcock* for the plaintiff.

HARMAN, L.J., delivered the first judgment, at the request of LORD EVERSHED, M.R.: This appeal concerns the lease of property consisting of a shop and two flats in Ewell Road, Surbiton. The story begins in 1938 when this property was the subject of a lease by the predecessors in title of the defendants to a predecessor in title of the plaintiff. That lease was for a term of twenty-one years from Lady Day, 1938, and it contained an unconditional option for the lessee to exercise by notice the right which was thereby given to him or her to have a further lease of twenty-one years to start from Lady Day, 1959, i.e., when the old lease ended. In 1948 the lease was assigned to the plaintiff who paid £5,000, partly for the assignment and partly for the goodwill of a hairdressers' business carried on in the shop. The reversion was assigned to the defendants in 1955. On July 1, 1958, the plaintiff sent a notice to the defendants or their solicitors exercising the option, and there is no dispute that in point of form that notice was a good exercise of the option. There was a certain amount of negotiation between the solicitors by correspondence, but on Sept. 11, 1958, an engrossed counterpart of the proposed new lease was sent to the plaintiff's solicitors. Between that date and Sept. 26, the new lease was executed by the defendants, and of that more hereafter. About the same time, on Sept. 24 or Sept. 25 the counterpart was executed by the plaintiff. On Oct. 8 the defendants wrote refusing to go on with the matter. There had by then been no exchange of the two documents. The writ was issued on Feb. 6, 1959, and the statement of claim was delivered on Feb. 26. By that claim the plaintiff, who is now the respondent to this appeal, asked for a declaration that she was entitled to a further lease in pursuance of the option and an order on the defendants to execute. The defence was that the option was void as it had never been registered as an estate contract under the Land Registration Act, 1925. Confronted with that, the plaintiff amended her statement of claim and pleaded that if the option was itself bad, the correspondence between the solicitors prior to Sept. 26, 1958, amounted to a fresh contract to grant a new lease and that specific performance of that should be granted. In June, 1959, the defence was amended, and it was there pleaded that there was a condition precedent to any agreement that might exist, viz., that certain repairs should be done and that the parties had never reached any consensus on the subject and, therefore, no agreement was made. Alternatively there was a plea of mistake, and the defendants counterclaimed for possession, the former lease having run out on Lady Day, 1959.

The plaintiff was still in occupation. There followed the usual discovery, and it is the lamentable fact that the defendants did not disclose the document of lease executed by them, nor did they disclose the minute book of the company which, as hereinafter appears, contained a most relevant entry, and the action came to trial without the plaintiff being aware of those two matters. The minute and the lease came to light during the course of the hearing, and it is not surprising that the judge then granted an adjournment to the plaintiff and that she re-amended her statement of claim on Mar. 31 to plead that the lease had been executed and that on tender by her of the counterpart, which she had always been ready to do, she was entitled to have the lease handed over to her: the contract on this footing was complete and not a matter for specific performance at all. There was a re-amendment of the defence in which it was admitted that the seal of the defendants was affixed to the document of lease, but it was apparently denied that there had been any delivery. Alternatively, it was said that if there had been delivery, it was subject to a condition, viz., that there should be an agreement about the so-called decorations and that there should be exchange, which had never occurred. The hearing was resumed on Apr. 11 on that footing.

A number of points were taken and on two of them the defendants were successful. The learned judge held that the option was not binding for want of registration as an estate contract: further that the letters passing between the solicitors and the document of lease and the counterpart themselves did not constitute any new contract of which the plaintiff could obtain specific performance. One of the pleas in the defence was rejected, viz., that about mistake: the learned judge held that the mistake, if there was one, was a mistake of law and, therefore, no defence. In the end the plaintiff succeeded on the ground added by the re-amendment that the deed had been executed as an escrow and, that being so, it was not a mere offer that could be withdrawn before acceptance, but was a deed subject to a condition; and that there had been no breach of any condition to which it was subject and, therefore, it was a binding document. It is on that point alone that the defendants have appealed to this court.

There is a cross-notice whereby the questions of registration and contract are put in issue, but those questions have not been agitated before this court because they do not arise on the appeal and would only arise in the event of the appeal being successful.

The question, therefore, was, first of all: What was the nature of this document? The learned judge held that it was a deed delivered as an escrow, in other words, that there had been a good execution and delivery, and that matter was not put in issue before us at all.

The learned judge dealt with the matter quite shortly. He held that in view of the Law of Property Act, 1925, s. 74, he was bound, prima facie, to hold that there had been due execution, this being a document under seal issuing from a body corporate and appearing on the face of it to be complete. He is reported to have said (1):

> "Counsel for the defendants concedes that the seal of the defendants was regularly attached to the lease. I know nothing further about the actual circumstances of its being attached. It will be recollected that the correspondence to which I have made reference discussed an undertaking to be given by the plaintiff relating to certain decorations."

He goes on to say (2):

> "I do, however, know that the seal is countersigned by . . . the chairman of the board . . . it is, in my view, clear from [the evidence] that everybody present at the board meeting of Sept. 26 regarded the lease sealed by the defendant company as binding, albeit they did so with regret. Whereas this attitude of mind would, in my opinion, not be inconsistent with the binding quality of the lease being conditional on the lessee binding herself by execution of a counterpart to obligations on her part expressed in the lease, it is, in my judgment, inconsistent with any idea that it was also conditional on some matter wholly extraneous to the lease, as was the proposed undertaking as to redecoration. I, therefore, reach the conclusion of fact that the defendants, by sealing the lease, intended to deliver, and did deliver, it as their deed intended to bind them, conditionally only on the plaintiff executing a counterpart, and subject to no other condition."

It was admitted before us, and not surprisingly, that this was right, for when one looks at the minute of Sept. 26 one finds a record of a meeting on Sept. 26 at which all the three directors of the appellant company were present. It reads:

> "132, Ewell Road, Surbiton. A new lease has been executed for the letting of this property to Mrs. P. E. Weaver [the plaintiff] for a term of twenty-one years from Mar. 25, 1959, at a rent of £200 per annum for the first seven years, £225 for the next seven years and £250 for the remaining seven years, the tenant paying all outgoings."

This, be it observed, is a report by the chairman, who was also the managing director of this company, to the board meeting and it was accepted as a fait accompli.

It was only at that meeting and after that report had been made, a general regret being expressed at the company being obliged to create this new lease, which was extremely unprofitable to them having regard to the rent, that one of the board suggested that there might be a loophole if the earlier document of lease containing the option were not registered. The company's solicitors were consulted and they expressed the view, apparently, that it did not matter whether it was registered or no, but one of the directors who was a solicitor (and who gave evidence) made further investigations in the matter and, as a result, it was decided to write the letter which I have mentioned on Oct. 8, 1958, declining to go on with the matter.

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(1) [1960] 2 All E.R. at p. 324.

(2) [1960] 2 All E.R. at p. 325.

The substantial plea is that as by Oct. 8 there had been no performance of the condition as to exchange in that the counterpart had not been returned, the defendant company was entitled to withdraw from what was, in effect, an offer made subject to a condition not then accepted and, therefore, retractable at will by the offeror. If that were the true nature of a document delivered in escrow, the result might follow. The question, then, is: What is an escrow? Can a body or an individual, having executed a document under seal as an escrow subject to a condition, resile before the condition is accepted? That, really, is the point now taken and it is a very narrow one. If there had been no delivery, as was pleaded, the matter would be wholly different, but that, by the time the action came to this court, had been decided as a fact by the learned judge and accepted by the defendants.

An escrow, then, is a type of deed which, perhaps, is best described in NORTON ON DEEDS; I read from the author's (the first) edition at p. 15:

> "If an instrument be delivered to take effect on the happening of a specified event or upon condition that it is not to be operative until some condition is performed, then pending the happening of the event or the performance of the condition the instrument is called an escrow. 'The maker [of a deed] may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or until some condition has been performed, but when the time has arrived or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow'."

The last part of that passage is a quotation from LORD CRANWORTH'S speech in the leading case of *Xenos* v. *Wickham* (3). NORTON (at p. 17) contains a further relevant statement:

> "Whether the document was delivered as an escrow or as a deed is a question of what the parties intended, and that intention may appear either from their statements or the circumstances."

That is to say, the question is one of fact, and it has been so decided in this case.

We also had our attention drawn to SHEPPARD'S TOUCHSTONE (7th Edn.) where it is stated (at p. 58):

> "Delivery of a deed [*read* writing] as an escrow, is said to be where one doth make and seal a deed [*read* writing] and deliver it unto a stranger until certain conditions have been performed and then to be delivered to him to whom the deed [viz. writing or grant] is made, to take effect as his deed. And so a man may deliver a deed and such a delivery is good."

Then two so called "cautions" are mentioned and those cautions relate to matters which are no longer the law. It is further stated (ibid., at p. 59):

> "But when the conditions are performed, and the deed delivered over, then the deed shall take as much effect as if it were [had been] delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect then, if the party that doth make it be, not at the time of the making thereof, disabled from making it."

Lastly on this subject I quote a dictum of FARWELL, L.J., in *Foundling Hospital (Governors & Guardians)* v. *Crane* (4). I need not deal with the facts of that case; it was there held, as the headnote shows, that the proper inference from the facts was that the document was never legally delivered either absolutely as a deed or as an escrow and was therefore inoperative. From the judgment of Farwell, L.J., I read these words (5):

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(3) (1866), L.R. 2 H.L. at p. 323.

(4) [1911] 2 K.B. 367.

> " Was the deed then delivered as an escrow, or was there no delivery at all? I doubt if a man, by executing a deed, and handing it over to his own solicitors to be held on his behalf until he gives them further instructions, makes a delivery of it as an escrow at all; I doubt also if a deed can be delivered as an escrow at all subject to an overriding power in the grantor to recall the deed altogether."

In other words, if you do deliver a document as an escrow it is your act and deed and is not recallable by you. If, of course, the condition be never performed it never becomes binding, and I suppose there must come a time, if there be unreasonable delay in the performance of the condition, when, in these days at any rate where equitable principles govern the actions of the court, the person or firm that has executed the escrow would be released from its obligation. But in this case there was no refusal on the part of the plaintiff to exchange the counterpart. It is quite clear that was the condition, although some attempt was made to argue that no condition was attached. In my opinion, however, where it is the common intention of the parties, as, indeed, is almost universal in these days, to proceed by means of lease and counterpart it is readily to be inferred that delivery of the counterpart is a condition of the escrow.

Nobody here on the company's part called on the plaintiff to deliver her counterpart. There was no unreasonable withholding of it or delay. It was merely that the company, having second thoughts or, perhaps, shrewder advice, determined to attempt to get out of what was for them in the event binding. In my judgment, that is exactly what they cannot do.

Reliance was placed on *Phillips* v. *Edwards* (6). Those who rely on reports in 33 Beavan are sometimes said to be in the last ditch, but I do not complain at all here that there is anything wrong about the decision. It was a decision in a case about contract and it was said that the execution of the two documents without exchange did not amount to a contract. There is, in my judgment, nothing controversial about that; indeed, I ventured to express some such view in a case to which Buckley, J., referred in his judgment. The statement of Sir John Romilly, M.R., in *Phillips* v. *Edwards* (6) and my own statement in *Hollington Brothers, Ltd.* v. *Rhodes* (7) were relied on by counsel for the defendants as showing that it was necessary that there should be an exchange before the parties were bound. If the matter had lain in contract that would be right, if there had been no delivery of the deed of lease that would be right; but on the facts here it is quite clear that there was a delivery, but a delivery in escrow. An escrow is no less a man's act and deed because there is a condition outstanding than is a perfectly completed deed handed over, and, therefore, the defendants were at least bound to wait a reasonable time before attempting to resile from their position. In my judgment the learned judge, although he did not deal specifically with that aspect of the case, did, in fact, decide it on that ground, and quite rightly, and as far as the appeal goes it seems to me that it fails and ought to be dismissed.

DONOVAN, L.J.: It is, of course, the case that a deed may be delivered subject to a condition that it shall not take effect until some other event happens or some condition is fulfilled; in other words it may be delivered as an escrow. But if I purport to deliver a deed, and at the same time indicate that I am to be free to undo it at any time before it passes to the grantee, I am not delivering a deed subject to a condition, I am not delivering a deed at all; because delivery in this context indicates an intention to be bound presently by the deed, albeit in some cases subject to a condition. I doubt whether Sir John Romilly, M.R., intended to say anything different in *Phillips* v. *Edwards* (8) to which HARMAN, L.J., has referred.

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(5) [1911] 2 K.B. at p. 379.

(6) (1864), 33 Beav. 440.

(7) [1951] 2 T.L.R. at p. 694; [1951] 2 All E.R. 578.

In the present case the only condition which, in my view, could be spelt out of the facts attending the delivery of the lease by the defendants is, as the learned judge held, that the plaintiff should execute and deliver her counterpart, which she did. If there were the further condition that, having done this, she should send that counterpart to the defendants, she has at all times been ready and willing to do so. I agree, accordingly, that the appeal should be dismissed.

LORD EVERSHED, M.R.: I am also of the same opinion and only add a very few words to what has been said by my brethren out of respect to the arguments of counsel before us in a case which is somewhat unusual in its nature, raising, as it does, a short but strict point of law.

It was conceded by counsel for the defendants that the sealing of the lease in question shortly before Sept. 26, 1958, by the defendant corporation operated its execution and delivery, but it was said that the lease was delivered as an escrow; i.e., that its effect was suspended or qualified pending the performance of the indicated condition.

The condition suggested was that there must first be an exchange, in accordance with ordinary conveyancing practice, of the lease on the one hand and its counterpart on the other. As counsel for the plaintiff pointed out, there is substantial ground, at any rate on the evidence, for the view that the sealing of this deed was not at the time intended to be, still less expressed to be, conditional. BUCKLEY, J., however, held on the facts that the lease was delivered as an escrow subject to the condition that the counterpart should be executed and delivered by the plaintiff lessee. I am certainly prepared to accept that conclusion, and since, as is always so in the case of a lease, there are substantial obligations put on the lessee, such a condition would be the natural, and I venture to think the only natural, condition to the delivery of the lease as an escrow.

As HARMAN, L.J., has pointed out, there is an important distinction in this respect between an instrument in writing which may be executed conditionally and a deed. For in the case of the former, until the condition is performed, there is nothing at all. The position is not the same in the case of an instrument under seal executed and delivered, for in the latter case, as pointed out in the passage which HARMAN, L.J., has cited in *Xenos* v. *Wickham* (9), when the time has arrived or the condition has been performed the delivery becomes absolute and the maker of the deed is absolutely bound by it whether he has parted with its possession or not.

The real basis of the argument of counsel for the defendants is that pending the performance of the conditions, i.e., execution and delivery of the counterpart by the plaintiff, the defendants were entitled, for any reason which they thought good, to resile altogether from the effects of their deed; and that, in my judgment, is inconsistent with the fundamental character of delivery of the lease as an escrow. No doubt if performance of the condition is long enough delayed, the party who has delivered the deed might be relieved in equity from any further consequences; but like my brethren I am of opinion that, where a lease such as the lease in this case has been executed and delivered as an escrow, he who has executed and delivered it cannot thereafter, pending performance, resile from it altogether and do so on an entirely novel ground. I mean by that last expression that when the execution and delivery was reported to the board of the defendant company there had been a suggestion that the option was unenforceable. At the time the advice given to the board was that such suggestion was unfounded and so the matter was left. At a later date other advice was given which led the defendant company to suppose that—as, indeed, BUCKLEY, J., held—the option was unenforceable by reason of want of registration, and what the defendants here have sought to sustain is that having discovered afterwards that fact, they can on that ground altogether resile from the deed at any time before the actual performance of the condition. For the reasons which have already been given by HARMAN, L.J., with which I entirely agree, I cannot accept that submission, and I, like my brethren, therefore, think that the appeal fails and must be dismissed.

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(8) (1864), 33 Beav. 440.

(9) (1866), L.R. 2 H.L. at p. 323.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *George C. Carter & Co.* (for the defendants); *S. Sydney Silverman* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

COUNCIL OF THE SHIRE OF ASHFORD *v.* DEPENDABLE MOTORS PTY. LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Morris of Borth-y-Gest), October 24, 25, 1960.]

Privy Council—Australia—New South Wales—Sale of goods—Implied condition of fitness—Particular purpose—Motor tractor sold for road construction purposes—Whether buyer made known to seller particular purpose for which tractor required so as to show that buyer relied on seller's skill or judgment—Whether buyer relied on seller's skill or judgment—New South Wales Sale of Goods Act, 1923-53, *s.* 19 (1).

Sale of Goods—Implied condition of fitness—Particular purpose—Motor tractor sold for road construction purposes—Whether buyer made known to seller particular purpose for which tractor required so as to show that buyer relied on seller's skill or judgment—Whether buyer relied on seller's skill or judgment—New South Wales Sale of Goods Act, 1923-53, *s.* 19 (1).

The appellants, a corporation, wishing to acquire a tractor for use in their road construction work, asked B., whom they had recently chosen to act as shire engineer but who had not yet taken up his duties or become the appellants' servant, to inspect a Breda tractor which the respondents had for sale. B., when inspecting the tractor, told C., the respondents' joint managing director, that he, B., was there on behalf of the appellants, and that they were interested in a tractor; B. asked whether the machine would do " the work we expect it to do ". On being told by B. that the tractor would be engaged entirely on road construction work which entailed some clearing, a lot of dozer work and quite a lot of scoop work, in which the tractor would be required to haul a scoop that the appellants had already bought, C. replied that that was the type of work for which the tractor was built and was the type of work that would suit it. In evidence, C. denied that B. asked him whether the tractor was suitable, but admitted that he believed it was suitable for the appellants' work and would have said so if he had been asked. B. made no written report to H., the shire clerk, but told him that he had inspected the tractor and that it seemed to him to have plenty of horse-power and was big enough for the work required. H. communicated this to the various councillors and to the president. The president was asked whether, in relation to the purchase of the tractor, he relied on B.'s report and he answered " Yes. I had nothing else to rely on ". The appellants bought the tractor. The tractor was not, in fact, reasonably fit for the purposes of road construction. The appellants claimed damages for breach of s. 19 (1) of the New South Wales Sale of Goods Act, 1923-53*.

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* The text of s. 19 (1) is set out at p. 98, letter A, post.

Held: the appellants were entitled to damages for breach of s. 19 (1) of the Act because—

(i) the proper inference to be drawn from the evidence was that B. was asked to anticipate his duties as shire engineer and to do gratuitously what it would have been his duty to do if he had already become the appellants' servant; he was acting within the scope of his authority in disclosing to the respondents on the appellants' behalf the particular purpose for which the tractor was required, and that authority covered disclosing the purpose so as to show that he was relying on the respondents' skill or judgment in making his report to the appellants.

(ii) the appellants in fact relied on the respondents' skill or judgment, and it was not necessary that B., who conducted the negotiations, should have made H. and the president fully aware of the assurances that B. had received from C. as regards the suitability of the tractor for road construction work.

Appeal allowed.

[**Editorial Note.** Section 19 (1) of the New South Wales Sale of Goods Act, 1923-53, is in identical terms to the Sale of Goods Act, 1893, s. 14 (1).

As to the fitness of goods for the particular purpose for which the goods are required, see 29 HALSBURY'S LAWS (2nd Edn.) 63, para. 73; and for cases on the subject, see 39 DIGEST 440-446, *693-744*.

For the Sale of Goods Act, 1893, s. 19, see 22 HALSBURY'S STATUTES (2nd Edn.) 998.]

Cases referred to:

Cammell Laird & Co., Ltd. v. *Manganese Bronze & Brass Co., Ltd.*, [1934] All E.R. Rep. 1; [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; Digest Supp.

Manchester Liners, Ltd. v. *Rea, Ltd.*, [1922] All E.R. Rep. 605; [1922] 2 A.C. 74; 91 L.J.K.B. 504; 127 L.T. 405; 39 Digest 445, *744*.

Medway Oil & Storage Co., Ltd. v. *Silica Gel Corpn.*, (1928), 33 Com. Cas. 195; Digest Supp.

Appeal.

Appeal by special leave by the Council of the Shire of Ashford, New South Wales, from an order of the High Court of Australia (DIXON, C.J., MCTIERNAN, KITTO, TAYLOR and MENZIES, JJ.), dated May 8, 1959, reversing an order of the Full Court of the Supreme Court of New South Wales (OWEN, HERRON and HARDIE, JJ.), dated Sept. 10, 1958, setting aside an order of FERGUSON, J., in the Supreme Court of New South Wales dated Dec. 4, 1956, whereby judgment and verdict was given in favour of the respondents, Dependable Motors Pty. Ltd., for £4,915. The facts are set out in the judgment of the Board.

C. L. D. Meares, Q.C. (of the Australian Bar), and *M. R. E. Kerr* for the appellants.

R. G. Reynolds, Q.C., and *R. J. Bainton* (both of the Australian Bar) for the respondents.

LORD REID: The action was commenced by the appellants on Mar. 30, 1954. The appellants, on Mar. 16, 1951, ordered from the respondents a Breda motor tractor with accessories, the price being £6,751 14s. The tractor was duly delivered in May, 1951. The appellants required it for road construction work in their shire, and it was used on this work for some time. It developed a number of defects, and the appellants claim damages for breach of the implied condition set out in s. 19 (1) of the New South Wales Sale of Goods Act, 1923-53. The defence is that the requirements of this section have not been satisfied. Damages were assessed by the Full Court of the Supreme Court of New South Wales at £4,915, and it is admitted that, if this appeal succeeds, that sum should now be awarded to the appellants.

Section 19 (1) is in the following terms: A

> "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: B
>
> "Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose."

At the trial before FERGUSON, J., the respondents admitted that the tractor was goods of a description which it was in the course of the respondents' business C to supply. The respondents did not contend that the sale of the tractor was the sale "of a specified article under its patent or other trade name", so that the proviso to s. 19 (1) has no bearing on the present appeal. The greater part of the evidence at the trial dealt with the performance of the tractor and the defects which it developed while in use by the appellants. It is now admitted that the tractor was not, in fact, reasonably fit for the purposes of road con- D struction, and the argument before their Lordships was concerned with the question whether the other requirements of the section were satisfied; whether the buyer made known to the seller the particular purpose for which the tractor was required, whether the buyer made that known to the seller "so as to show that the buyer relies on the seller's skill or judgment" and whether the buyer in fact relied on the seller's skill or judgment. E

The facts which give rise to these issues are somewhat unusual, and it is necessary to state them in some detail. Early in 1951 the appellants wished to acquire a tractor for use in their road construction work. The shire clerk, Mr. Heywood, heard of a Breda tractor which the respondents had for sale in Sydney. Early in March the appellants appointed a new shire engineer, Mr. Bowman, after seeing him and satisfying themselves as to his qualifications. F Mr. Bowman was still employed on other work and did not take up his duties or become the servant of the appellants until after the events with which this case is concerned. It was to be part of his duty to supervise road construction work, and he had some experience of this and of the working of tractors in this connexion. On or about Mar. 12 Mr. Bowman was in Sydney. Mr. Heywood was aware of this and, after consulting Mr. Black, the President of the Shire G Council, and certain councillors, he telephoned to Mr. Bowman. This telephone conversation is very important because much turns on the inferences which should be drawn from it. Mr. Bowman said in evidence that Mr. Heywood told him that the appellants were interested in purchasing a tractor, and asked him whether he would be so kind as to go and have a look at the tractor which could be seen at the respondents' showroom. He replied, "Yes. I will H probably go and see them tomorrow". He added that nothing else was said besides a few pleasantries. Mr. Heywood's evidence is brief.

> "Q.—Did you then ring up the engineer? A.—Yes. I rang Mr. Bowman. He was in Sydney at the time. Q.—What did you ask him to do? A.—I asked him would he go to Dependable Motors and have a look at the tractor and see if he thought that it was suitable for the work we required. Q.— I Was that something which you did on the instructions of the council? A.—Yes."

There was no cross-examination. Mr. Bowman said that he was told to ask for Mr. Corney, but it does not appear whether or not he was told that by Mr. Heywood. It is not disputed that Mr. Bowman was aware of the type of work for which the tractor was required. The next day Mr. Bowman went to the respondents' premises and met Mr. Corney, who was their joint managing director. Again, it is important to have in mind exactly what took place, and their Lordships will set out the important part of the evidence. It appears that Mr. Bowman spent half an hour or an hour with Mr. Corney. Their Lordships quote from Mr. Bowman's evidence in chief; he did not depart from or modify it in cross-examination:

> " Q.—Would you tell us in direct speech what was said and done by both of you then? A.—In the first place I said to Mr. Corney—I gave him my name and so on and I said, ' I am here on behalf of the Ashford Shire Council. I understand they are interested in a tractor which you have for sale and I would like to see it.' He said, ' There is the tractor over there '—it was towards the front of the building. We walked over to the tractor and I said to Mr. Corney, ' Can you tell me anything about it? ' and he proceeded to point out a few good points about the tractor—such as its robust construction. I think he bent down to look at it underneath and I bent down too. He pointed out the framework underneath and then he mentioned something about the construction of the tractor—which was unorthodox so far as tractors were concerned. He pointed out that the tracks were made on what you would call unitary construction. The pads and the rails of the tracks were cast in one piece, rather than assembled in two pieces, as is usual with tractors.
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> " Mr. Reynolds [for the respondents]: Q.—Is that what he said or what you observed? A.—Really, what I observed. I mentioned the fact to him—that they were constructed somewhat along unorthodox lines and he said, ' Yes. That is a special construction of this company. It is their own particular method. The tracks are made of a particular type of steel—specially treated to give very long life and work, and it has very high wear-resistance qualities '. I think he then started the motor up. The motor seemed quite good actually. It ran for a few minutes. This was a fairly big tractor and it made a big noise in the showroom. He turned it off after a few minutes. We discussed it further and I said to him, ' Tell me something about it. What are its capabilities? What is its horse-power? ' and he said, ' 85 h.p.' I said, ' What about the weight? ' and he said, ' It is about seven tons in weight '. I then asked, ' Do not you think that is a bit low for the horse-power? ' and he said, ' Oh, no. There are seven or eight others in this particular make of tractor in operation at the moment '. He mentioned one up the North Coast—I think it was at Casino. I am not sure on that point. There was another one up round Tamworth somewhere, I think, and he said they were giving good service. We had quite a lengthy discussion on the actual tracks of the machine. They were of a kind that I was a bit worried about—(Objected to).
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> " His Honour: Q.—Would you give the conversation as well as you can? A.—Well, it is difficult, of course. I cannot remember much that was said. He pointed out to me that the firm that had made the tractor—he said, ' It is a very reputable firm. It is a very big firm engaged in the manufacture of locomotives as well as tractors. It is quite an outstanding firm in Italy ', and he added that there was no doubt about the quality of the machine or the quality of the tracks. Then I said to him, ' Will this machine do the work *we* expect it to do? ' and he replied, ' What do you expect it to do? ' I said, ' It will be engaged entirely on road construction work ', and he said, ' What does that entail? ' I said, ' Clearing, some clearing and a lot of dozer work, and quite a lot of scoop work. The council had already purchased a 6-8 yard scraper scoop '. It was a Le Tourneau make, purchased from Tutt Bryants. I then said, ' This tractor will be required to haul that scoop. Will it be capable of doing that? ' and he replied, ' Yes. That is the type of work the tractor is built for. It is just the type of work to suit it '."

Their Lordships will not quote from the evidence of Mr. Corney because the argument before them proceeded on the footing that Mr. Bowman's evidence could be accepted. They will only note that Mr. Corney said that Mr. Bowman introduced himself as the shire engineer, and said that he had been instructed to give a report on the tractor to his council with a view to purchase; and that, while Mr. Corney denied that Mr. Bowman asked him whether the tractor was suitable, he admitted that he believed that it was suitable for council work and would have said so if he had been asked.

The other matter of fact to which great importance was attached in argument is the report made by Mr. Bowman after his conversation with Mr. Corney. There was no written report. Mr. Heywood said:

> " Q.—Did Mr. Bowman subsequently ring you up? A.—He rang me back within a day or two; I could not just be sure when. Q.—Did he tell you—What did he report on it? A.—He told me that he had inspected the tractor. It seemed to him to have plenty of horse-power and was big enough for the work we required. Q.—Did you communicate that to the various councillors including the president? A.—Yes. Q.—Did you then receive instructions from the president as to its purchase? A.—Yes."

The president, Mr. Black, was asked whether, in giving these instructions, he relied on Mr. Bowman's report and he answered " Yes. I had nothing else to rely on."

On these facts, the respondents' main contentions were briefly, (first) that Mr. Bowman had no authority from the appellants to make known to the seller on their behalf the particular purpose for which the tractor was required and had no authority to place reliance on the seller's skill or judgment, because the sole duty entrusted to him was to make up his own mind about the suitability of the tractor; and (secondly) that, whatever reliance Mr. Bowman may have put on the seller's skill or judgment in deciding what report to make, the buyer (the appellants) cannot have so relied if only because no councillor and no servant of the appellants was aware of what had passed between Mr. Bowman and Mr. Corney when the appellants bought the tractor.

The first question to be decided is the nature and extent of the authority given to Mr. Bowman by the appellants. That depends on the proper interpretation to be put on Mr. Heywood's brief telephone conversation with Mr. Bowman on Mar. 12. It must, in their Lordships' judgment, be held that Mr. Bowman was given sufficient authority to enable him to perform the task which was then entrusted to him, and so the real question is—what was the task which Mr. Bowman then undertook to perform? That question must be answered by considering the words which Mr. Heywood used in light of the circumstances known to both parties. The respondents' submission is that what Mr. Bowman was asked to do was merely to go and inspect the tractor and use his own judgment in deciding whether he thought it suitable for road work, and that he should be regarded as an independent expert commissioned by the appellants to give them his expert advice about the tractor. The other interpretation is that he was to act on behalf of the appellants in the same way as he would have done if he had already entered on his duties as shire engineer. There is, their Lordships apprehend, no doubt that, if he had already taken up his duties as shire engineer, it would have been part of his duty to advise the appellants if asked to do so, and that, if he had been asked while shire engineer to do what in fact he was asked to do on Mar. 12, he would have had authority to ask for and receive assurances on behalf of the appellants; if, as shire engineer, he had received the assurances which in fact he received from Mr. Corney, the appellants could have relied on these assurances as having been given to them. The appellants being a corporate body must act through some person and, in a case like the present, the obvious person would be the shire engineer.

The opinions of the learned judges of the High Court and of the Supreme

A Court of New South Wales were sharply divided on this matter, and their Lordships have given it their anxious consideration. In their Lordships' view, the words of a brief conversation of this kind should not be considered in isolation, and Mr. Heywood's words should not be regarded as intended by themselves to define the legal basis on which Mr. Bowman was to act. The question is rather what meaning Mr. Heywood's words were calculated to convey to Mr. B Bowman, and that involves consideration of the facts which were known to them when the conversation took place. Mr. Bowman has a good working knowledge of the use of tractors in road construction, but he was not a technical expert in tractor construction. He was not asked to submit a written report, and he was not paid for what he was asked to do. He was asked and agreed to carry out his task as an obligement to his future employers. He would become C responsible to them in due course for working the tractor, and his task was one which would naturally have fallen to him as part of his duties if he had already assumed the duties of the post to which he had been appointed. In these circumstances, their Lordships, while recognising that no inference can be drawn with absolute certainty, have come to be clearly of opinion that the proper inference in this case is that Mr. Bowman was being asked to anticipate his D duties as shire engineer, and to do gratuitously what it would have been his duty to do if he had already become the appellants' servant. Certainly that was Mr. Bowman's understanding; he said in evidence that he told Mr. Corney that he had come on behalf of the appellants, and Mr. Corney said that he introduced himself as the shire engineer. In their Lordships' judgment, Mr. Bowman was correct.

E The extent of an agent's authority, if in doubt, must be determined by inference from the whole circumstances. If the task entrusted to Mr. Bowman was to act for the appellants as if he were already their servant then, in their Lordships' judgment, it must be inferred that he was given such authority as he would have had if he had already become their servant. It may be that, if a technical expert is called in to give independent advice to a buyer on the merits F of certain goods, the terms of his engagement will not authorise him to disclose to the seller the particular purpose for which the goods are required, or to accept assurances from the seller as the basis of the independent advice which he is being paid to give. But Mr. Bowman was not called in because he was an independent technical expert; neither Mr. Heywood nor Mr. Black had any ground for supposing that he was an expert in these matters; and he was not being G paid. If he was to act as if he were already performing the duties of shire engineer the natural thing for him to do would appear to be just what in fact he did; to disclose to the seller the purpose for which the tractor was required and to seek assurances about it. The seller, as agent for this make of tractor, might be expected to know better than Mr. Bowman what work it was capable of doing. In their Lordships' judgment, Mr. Bowman was acting within the scope H of his authority in disclosing to the seller on behalf of the appellants the particular purpose for which the tractor was required. And, if he had authority so to act on behalf of the appellants, that must cover disclosing that purpose so as to show that he was relying on the seller's skill or judgment in making his report to the appellants.

Their Lordships turn to Mr. Corney's position. Did Mr. Bowman show him I that the buyer was relying on his skill or judgment? Mr. Corney thought that Mr. Bowman was the shire engineer and knew that after their conversation he was going to report to the appellants with a view to their buying the tractor. He must have realised—any reasonable man would have realised—that, in making his report, Mr. Bowman intended to rely on the assurances which he had given, and he had no reason to suppose that the appellants were not so relying when they placed their order. The respondents argue that that is not sufficient because, in ordering the tractor, the appellants did not in fact rely on what had taken place between Mr. Bowman and Mr. Corney; Mr. Bowman never told them about this, and a person cannot rely on something of which he is ignorant. The respondents found on well-known statements of the law— A

> "Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation" (*Cammell Laird & Co., Ltd.* v. *Manganese Bronze & Brass Co., Ltd.* (1), per LORD WRIGHT). B
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> "The reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity" (*Medway Oil & Storage Co., Ltd.* v. *Silica Gel Corpn.* (2), per LORD SUMNER).

They argue that what Mr. Corney said cannot have been an inducement leading the appellants to purchase the tractor; the appellants relied solely on what Mr. Bowman told them and he said nothing about his conversation with Mr. Corney. C

Such general statements of the law do not deal with the position of a buyer who acts through agents or servants as a corporation must do. There is no doubt that the making known to the seller of the buyer's particular purpose may take place during negotiations which precede the making of the contract of sale and that there need be no reference to this in the contract itself. What is necessary is that the buyer shall contract in reliance on what took place during the negotiations, and that his reliance at the time when the contract is made "... is a matter of reasonable inference to the seller and to the court ..." (per LORD SUMNER in *Manchester Liners, Ltd.* v. *Rea, Ltd.* (3)). If the agent who conducts the negotiations is the same person as the agent who makes the contract on behalf of the buyer there is no difficulty. But the case where they are different persons has to be considered. In the present case, Mr. Bowman conducted the negotiations on behalf of the appellants, and Mr. Heywood made the contract on their behalf. The question is whether it is necessary that the former should have made the latter fully aware of what took place during the negotiations before the latter agent made the contract. The appellants, being a corporation, cannot themselves rely on or be induced to act by anything; they can only rely on or be induced or act through their agents or servants. Mr. Bowman was their agent when obtaining Mr. Corney's assurances. Equally Mr. Black, the president of the council, and Mr. Heywood were only their agent and servant when deciding to order and ordering the tractor. Mr. Black and Mr. Heywood were induced to do this by Mr. Bowman's report, and that report was induced by the seller's assurances received by Mr. Bowman on behalf of the appellants. Mr. Black was not the appellant corporation, and their Lordships cannot hold that their answer to the question whether the appellants are to be held to have relied on the seller's skill or judgment should be affected by the fact that Mr. Black was not told what had taken place between Mr. Bowman and the seller. D E F G H

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and that the order of Sept. 10, 1958, of the Full Court of the Supreme Court of New South Wales should be restored. The respondents must pay the appellants' costs in the High Court of Australia and before their Lordships.

Appeal allowed.

Solicitors: *Fisher, Dowson & Wasbrough* (for the appellants); *Galbraith & Best* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(1) [1934] All E.R. Rep. at p. 11; [1934] A.C. at p. 423.
(2) (1928), 33 Com. Cas. at p. 196.
(3) [1922] All E.R. Rep. at p. 613; [1922] 2 A.C. at p. 90.

Re TRUNDLE (*deceased*). EMANUEL *v.* TRUNDLE AND OTHERS.

[CHANCERY DIVISION (Cross, J.), November 30, 1960.]

Will—Money—" Any moneys that I have in the bank "—National Savings Certificates, share certificates, post-war credit certificates and diamond ring deposited at bank—Travellers' cheques held by deceased—Extent of gift.

By his will dated Sept. 26, 1956, the testator bequeathed to his two godchildren by name " any moneys that I have in the bank " to be divided between them. There was no gift of residue. At the date of his death on Dec. 3, 1958, the testator had a credit balance on a drawing account at his bank, where he had deposited other property, including National Savings Certificates, share certificates, post-war credit certificates, and a diamond ring. Uncashed travellers' cheques bought from his bank were found in the testator's residence.

Held: the gift to the godchildren was prima facie limited to the testator's credit balance at his bank and there was nothing in the context to give a wider meaning to the words used by the testator; but there was no distinction to be drawn for this purpose between the credit balance on the drawing account and the credit represented by the travellers' cheques, and both passed under the bequest.

Re Prater ((1888), 37 Ch.D. 481) applied.

[As to the meaning of " money ", see 34 HALSBURY'S LAWS (2nd Edn.) 253, para. 307, and SUPPLEMENT; and for cases on the subject, see 44 DIGEST 720-731, *5692-5850* and 2nd DIGEST Supp.

As to the nature of travellers' cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 223, para. 416.]

Cases referred to:

Perrin v. *Morgan*, [1943] 1 All E.R. 187; [1943] A.C. 399; 112 L.J.Ch. 81; 168 L.T. 177; 2nd Digest Supp.

Prater, Re, Desinge v. *Beare*, (1887), 36 Ch.D. 473; *revsd.*, C.A., (1888), 37 Ch.D. 481; 57 L.J.Ch. 342; 58 L.T. 784; 44 Digest 679, *5202*.

Adjourned Summons.

The plaintiff, Vera Marie Emanuel, as sole executrix of the will of the testator, Guy Marcus Trundle, deceased, applied to the court by originating summons under R.S.C., Ord. 55, r. 3 (g), to determine which of the following assets and which other (if any) assets were comprised in the gift in the will of " any moneys that I have in the bank ": National Savings Certificates; investments; diamond ring; post-war credit certificates; all of which assets were deposited with the testator's bank; and travellers' cheques drawn on the same bank and held by the testator.

S. W. Templeman for the plaintiff, sole executrix under the will.

J. A. Brightman for the first defendant, brother and next of kin of the testator.

M. W. Jacomb for the third and fourth defendants, godchildren of the testator and beneficially interested under the bequest.

CROSS, J.: The testator, Mr. Guy Marcus Trundle, made his will on Sept. 26, 1956, and died on Dec. 3, 1958. After appointing the plaintiff, Vera Marie Emanuel, to be his executrix he continued as follows:

> " I give and bequeath unto Sonya Paynter and Penelope Bray [his godchildren] any moneys that I have in the bank to be divided between them. My cottage in Cornwall and contents, the contents of my flat at 816, Chelsea Cloisters and my car I leave to Mrs. Emanuel to dispose of as she considers fit."

The will contained no residuary gift. The personal estate was worth about

£4,671. There is no doubt that the car and the other personal chattels go to Mrs. Emanuel. They are worth about £675. Some property cannot on any footing come under the gift to the godchildren. The principal item which is undoubtedly undisposed of is a sum of £1,507 representing the repayment of the testator's contributions under the pension scheme of the General Electric Co., Ltd., by whom he was employed. He died in employment, and, therefore, that sum became due to him. Then there were some other relatively small sums of money that were due to him from various sources which were also undisposed of.

The difficulty arises with regard to a number of assets which were, to use a neutral phrase, connected with his bank, Lloyds Bank, Ltd., 62, Brook Street, London. First there were one thousand National Savings Certificates deposited in the bank. There were certificates of shares in various companies worth a few hundred pounds which were also deposited in the bank. His Leeds Permanent Building Society passbook showing his title to some shares in that society, and some post-war credit certificates, which are simply a record of the liability of the state to pay a sum of money to the holder in the future, were deposited at the bank. He had a credit balance on his drawing account of £336 3s. 1d. There was a diamond ring also deposited in the bank, and, finally, there were some travellers' cheques which he had bought from the bank which were not in the bank but were in his flat at Chelsea Cloisters. It is agreed by counsel for the next of kin that the cash balance on the drawing account passes to the godchildren under the gift. It is also conceded by counsel for the godchildren that the diamond ring does not pass under the gift because it cannot in any sense be said to be an investment of money. The contest between them is with regard to the other items which I have mentioned.

Apart from authority, I should say that a phrase such as "my money at the bank" or "my money in the bank" prima facie refers simply to the credit balance which the testator may have in his account at the bank. If authority is needed it is to be found in *Re Prater*, *Desinge* v. *Beare* (1), where the Court of Appeal drew a distinction between the gift of "half my property at R.'s bank" which they held (2), differing from CHITTY, J., to include shares, the certificates of which were deposited in the bank, and a gift "of my money at the bank", which they plainly thought would only cover bank balances. I do not think that there is anything in *Perrin* v. *Morgan* (3) which tells against this view. *Perrin* v. *Morgan* (3) laid down that the word "money" by itself has no prima facie meaning, whereas before that decision it had been laid down in a number of cases that "money" meant prima facie only cash and debts due, and that in order to extend it beyond that one had to find a particular context. But what VISCOUNT SIMON, L.C., said indicates that he accepted the view that "money in the bank" has a prima facie meaning. He said (4):

> "Again, . . . it is a matter of common speech to refer to one's 'money at the bank', although in a stricter sense the bank is not holding one's own money and what one possesses is a chose in action which represents the right to require the bank to pay out sums held at the call of its customer."

That suggests that VISCOUNT SIMON, L.C., would not have thought that the phrase "money at the bank" prima facie covered anything beyond bank balances. The context of a particular will may show, however, that the words "money at the bank" are equivalent to such a phrase as "property at the bank" which the Court of Appeal was dealing with in *Re Prater* (1).

Counsel for the godchildren, who has put the case very persuasively, submitted to me that here there is sufficient context to show that these words

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(1) (1888), 37 Ch.D. 481.
(2) (1888), 37 Ch.D. at p. 484 per LORD HALSBURY, L.C.; at p. 486 per COTTON, L.J.
(3) [1943] 1 All E.R. 187; [1943] A.C. 399.
(4) [1943] 1 All E.R. at p. 190; [1943] A.C. at p. 407.

"any moneys that I have in the bank" ought to be construed in this will as including all choses in action the documents of title to which are at the bank. The grounds on which he suggests that are, first that a gift of a bank balance is a somewhat capricious disposition because of its fluctuating character and that the court should incline against a construction which would confine the words to a fluctuating gift of that sort especially in a case where there is no residuary gift and any property not covered by the disposition would be undisposed of. He argues that the property which is undoubtedly undisposed of by this will all consists of items which the deceased may well not have had in mind as belonging to him when he made his will. As I said, the largest item is the £1,507 which became due at his death in respect of his contributions under the pension scheme. It is likely enough that the testator would not expect to die while still in employment and would not have been thinking of that sum or the other relatively small sums which are undoubtedly undisposed of as being likely to form part of his estate. Counsel points out that if one excludes those items, then on his construction everything that the testator had would be disposed of. He suggests that the scheme of the will was to give the real property and personal effects to Mrs. Emanuel and to give the rest of the personal property to the godchildren. He goes on to point out that the words used are not "my money at the bank" or "my money in the bank" but are "any moneys that I have in the bank". He says that is a vaguer phrase and in the particular circumstances can reasonably be held to include all investments the documents of title to which were at the bank and even the future debt from the government, the record of which was in the bank in the form of post-war credit certificates. It may very well be that this testator intended this phrase "any moneys that I have in the bank" to include all those items. On the other hand, it is not my function to guess at what he meant. I must construe the words he has used, and, as I have said, I think that "any moneys that I have in the bank" mean naturally simply the credit balance and I cannot find here any context which would justify me in giving them a wider meaning.

I must now deal with the travellers' cheques which stand on a different footing. Counsel for the next of kin argued that a distinction is to be drawn between a credit balance on a drawing account and travellers' cheques, and that, although travellers' cheques undoubtedly represent a debt due from the bank, they are really more like banknotes. He says, therefore, that as the travellers' cheques were not deposited at the bank but were found in the testator's flat they were not included in the gift. I cannot accept that argument. I think that if a man asks himself what money he has at the bank he may reasonably include in his answer not only his credit balance but also any uncashed travellers' cheques which he has bought from the bank with part of that credit balance.

I therefore propose to declare that the cash in the drawing account and the travellers' cheques pass under the gift to the godchildren but that the other items in dispute are undisposed of.

Declaration accordingly.

Solicitors: *Moon, Gilks & Moon* (for all parties other than the first defendant); *Sydney Morse & Co.* (for the first defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

THE PACIFIC CONCORD. OWNERS OF STEAMSHIP OR VESSEL GEORGIDORE *v.* OWNERS OF PACIFIC CONCORD EX CALUMET.

[Probate, Divorce and Admiralty Division (Lord Merriman, P.), October 17, 18, 19, 20, November 4, 1960.]

Shipping—Collision—Damages—Liability admitted by defendants—Ship surveyed and repairs recommended before next special survey—Repairs effected by plaintiffs whilst charterparty in existence and before date of special survey—Claim for loss by detention and loss of profits for breach of charterparty—Whether claims alternative or cumulative.

On Sept. 21, 1955, a collision occurred between the Pacific Concord and the Georgidore, for which the owners of the Pacific Concord admitted liability. Between September, 1955, and November, 1956, the Georgidore was surveyed on three occasions on each of which it was recommended that permanent repairs be effected before her next special survey which was due in 1958. The permanent repairs were such as would take about twenty-eight days to execute. In the latter part of 1956 about ten weeks' notice was needed to obtain a dry dock in north east England for a vessel to enter for permanent repairs. There was no evidence that the plaintiffs made any arrangements for a dry dock there for this purpose. At the end of November, 1956, they entered into a new charterparty for the Georgidore. The charterparty provided for a cancellation date, Feb. 5, 1957, and enabled the charterers to cancel if the vessel had not arrived then for loading at a port in Canada. On Dec. 12, 1956, the vessel, having completed a return voyage, discharged part of her cargo at Newcastle, and on Dec. 20 she completed discharge at London. On Dec. 21 she entered a dry dock at Millwall, which was the only dry dock then available in London for her permanent repairs. The execution of repairs at London was both more expensive and slower than in north east England. On Jan. 26, 1957, she left dry dock after being repaired and arrived at the port of loading in Canada on Feb. 15, 1957. The charterers abandoned their right of cancellation by reason of her having arrived after Feb. 5, 1957, in consideration of a reduction of 4s. 6d. per ton in the freight, resulting in a total loss of profit of £2,319 18s. 4d. The plaintiffs claimed this sum (item 19) as an independent head of damage in addition to loss for detention (item 18).

Held: item 19 was not recoverable in addition to item 18 because—

(i) item 19 was not a head of damage independent of a general claim for loss for detention (see p. 112, letter B, post).

Dicta of Lord Herschell in *The Argentino* ((1889), 14 App. Cas. at pp. 523, 524) and *The Lady Emerald* ((1932), 44 Lloyd's Rep. 176) applied.

(ii) the decision of the plaintiffs to send the Georgidore into dry dock on Dec. 21 in London was, in the circumstances, unreasonable and had exposed the defendants to additional cost by reason of the plaintiffs' not doing what they ought to have done as reasonable men, viz., they ought to have made timely arrangements for dry docking the vessel in the north east of England (see p. 113, letter I, to p. 114, letter C, post).

Dictum of James, L.J., in *Dunkirk Colliery Co.* v. *Lever* ((1878), 9 Ch.D. at p. 25) quoted by Viscount Haldane, L.C., in *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.* ([1912] A.C. at p. 689) applied.

Appeal allowed.

[As to measures of damages in shipping collisions generally, see 30 Halsbury's Laws (2nd Edn.) 855, para. 1125; and for cases on the subject, see 41 Digest 800-802, *6613*, *6614*, *6617*, *6623*, *6624*.

As to recovery of costs of repairs, see 30 Halsbury's Laws (2nd Edn.) 859, para. 1134; and for cases on the subject, see 41 Digest 806, 807, *6666*, *6677*.

As to expenses for detention of vessel and loss of profits, see 30 Halsbury's Laws (2nd Edn.) 860, 861, paras. 1136, 1137, 1138 and Supplement; and for cases on the subject, see 41 Digest 802, 803, *6626-6636* and Supplements.]

Cases referred to:

Argentino, The, (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 6 Asp. M.L.C. 348; *affd.* sub nom. *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino*, (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp. M.L.C. 433; 41 Digest 802, *6627*.

British Westinghouse Electric & Manufacturing Co., Ltd. v. *Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 17 Digest (Repl.) 108, *226*.

Dunkirk Colliery Co. v. *Lever*, (1878), 9 Ch.D. 20; *subsequent proceedings*, (1879), 41 L.T. 633; *on appeal* sub nom., *Ellis Lever & Co.* v. *Dunkirk Colliery Co.*, (1880), 43 L.T. 706; 17 Digest (Repl.) 108, *225*.

Lady Emerald, The, (1932), 44 Lloyd's Rep. 176; Digest Supp.

Motion.

This was a motion by the defendants, the owners of the Pacific Concord, by way of appeal from a decision of the Admiralty registrar in favour of the plaintiffs, the owners of the Georgidore, on a reference to assess damages in respect of a collision between the Pacific Concord and the Georgidore, for which the defendants admitted liability.

On Sept. 21, 1955, the Georgidore, whilst at anchor near Tilbury in Northfleet Hope in the River Thames, was struck by the Pacific Concord. For this collision notice of admission of liability was filed by the defendants on Dec. 9, 1955. Shortly after the collision the Georgidore grounded on the Black Shelf, came free but shortly afterwards ran aground for the second time. Salvage services were rendered and the Georgidore came to anchor again in Northfleet Hope about three hours after the collision. After a preliminary survey by a Lloyd's surveyor the Georgidore was allowed to proceed to Falmouth where she was in dry dock from Sept. 23 to Sept. 26, 1955. The damage immediately apparent was to the Georgidore's stem and adjacent plating; some repairs were effected and, on Sept. 26, 1955, Lloyd's surveyor passed the vessel as being eligible to be continued as classed with fresh record of dry docking in September, 1955, subject to permanent repairs to the buckled stem plate and to various numbered plates being carried out at the next special survey, and subject to the starboard bower anchor being dealt with at the earliest opportunity (the damage to this anchor was unconnected with the collision). At Falmouth there was no examination for internal damage to the vessel. An estimate was then made, on insufficient data, that the repairs would take seventeen days and cost £6,500 plus dock dues. The next special survey was not due until 1958, but it was expedited and actually took place at Hartlepool in October, 1957, when it lasted a whole month.

The Georgidore then proceeded to Cardiff where she was examined afloat between Feb. 7 and Feb. 20, 1956, for what was described as " equipment and annual freeboard survey ". Again there was a recommendation that permanent repairs to stem plating and bottom shell plating on the starboard side should be done by the next special survey; but the vessel was not dry docked at Cardiff; however, she was, between Nov. 6 and Nov. 8 (the only days available), surveyed in dry dock at Hull. Under the heading " special reasons list " it was stated that the indented stem, stem plating and bottom shell plating on the starboard side had been examined and remained efficient, but they were not then dealt with. On this survey, Lloyd's surveyor reported that the vessel was eligible to have a fresh record of dry docking in November, 1956, subject to permanent repairs being effected to stem and stem plating and bottom shell plating (starboard side forward) by the next special survey and to the vessel being specially examined for possible damage at the next dry docking.

The Georgidore next proceeded to Canada and, on Nov. 28, 1956, she left Three Rivers for the United Kingdom with a cargo of grain. While she was on this voyage a fresh charterparty was made on Nov. 29, 1956; the vessel was fixed to load at Hampton Roads or Baltimore and proceed to Hamburg or one safe port Weser, with the provision that the orders for port of discharge were to be given to the master off Land's End on his application to a given address not less than seventy-two hours before the estimated time of arrival at the discharge port. The charterparty specified that the Georgidore was not to tender before 9 a.m. on Jan. 20, 1957, and the charterers had the option to cancel the charter if the vessel was not ready at the loading port before 9 a.m. on Feb. 5, 1957. The dates of the charterparty of the time for tendering, and the cancellation date, respectively, were vital to the case put forward by the defendants. There was no evidence that any preliminary inquiries were made about the availability of a dry dock on its conclusion before the fresh charterparty was made on Nov. 29, 1956. On Dec. 12, 1956, the Georgidore arrived at Newcastle, where it was hoped she would complete her discharge; but the charterers exercised their option for the discharge to be completed in London. Accordingly, after discharging part of her cargo, the vessel left Newcastle on Dec. 13, 1956, and arrived in London on Dec. 15, 1956. The plaintiffs, in the meantime, in the hope that the discharge of cargo would be completed at Newcastle, made inquiries for stemming a dry dock at Newcastle, but no dry dock was available there, two and a half months' notice at that time being required for stemming a dry dock on the north east coast. On Dec. 20, 1956, the vessel completed her discharge in London. By that time it was ascertained from the Port of London authority that a dry dock at Millwall belonging to the London Graving Dock Co., would be available and, accordingly, the Georgidore entered dry dock for permanent repairs on Dec. 21, 1956, that being the only dry dock available in London at that time. The repairs were completed on Jan. 26, 1957, when the vessel left dry dock and sailed for Hampton Roads under the charter of Nov. 29, 1956. The voyage took twenty days, and she arrived at Hampton Roads on Feb. 15, 1957, ten days after the cancellation date of the charterparty. The charterers abandoned their right to cancel the charter in consideration of a reduction of 4s. 6d. per ton on the agreed freight, a figure which produced a sum of £2,319 8s. 4d. (item 19: loss of profit).

The plaintiffs filed a claim for £56,830 4s. 5d., based on the foregoing facts, on Feb. 4, 1959—liability for the collision having been admitted by the defendants on Dec. 9, 1955. The defendants consented to a reference which came before the Admiralty registrar on Jan. 7, 28, 29, Feb. 2, and on Apr. 11, 12, and 13, 1960, when the plaintiffs' claim, as amended on Dec. 17, 1959, came to £53,545 10s. 7d. Certain items were agreed between the parties and on May 11, 1960, the registrar decided that the plaintiffs were entitled to recover the sum of £55,336 4s. 4d. and on the same date gave reasons for his decision.

On June 7, 1960, the defendants appealed against this decision on grounds which may be summarised as follows:—the registrar—(a) was wrong in law in holding that the plaintiffs, whose ship was in a seaworthy condition, were entitled to have repairs done where the costs were high at a time and place convenient to themselves and recover full costs from the defendants: the plaintiffs should have chosen a time and place which would involve the minimum delay and expense; (b) ought not to have held that the plaintiffs were entitled to recover full costs of having repairs done in London when they ought to have known that in London the time and expense involved would be far greater than at ports on the north east coast of England or at continental ports; (c) was wrong in law in holding that the plaintiffs were justified in arranging for repairs to be carried out at a time which necessarily involved delays caused by the Christmas holidays and bad weather; (d) was wrong in law in holding the defendants liable for the whole or alternatively part of item 18 (detention claim—£19,080 assessed at thirty-six days at £530 per day) because the plaintiffs were under a duty as prudent owners to mitigate their loss and have the repairs done when the Georgidore would be going into dock for other reasons; (dd) was wrong in allowing damages for detention (item 18) in addition to loss of profit (item 19: £2,319 8s. 4d.) on the charterparty dated Nov. 29, 1956: the claims were alternative, not cumulative; (e) was wrong in stating the cancellation date under the charterparty to be Feb. 8, 1957, when it should have been Feb. 5, 1957, and was wrong in law in stating that the loss resulting from the failure of the vessel to present itself on or before the cancellation date was due to the defendants' negligence; (f) misdirected himself under item 20 (daily running costs: £5,596 8s. 5d.) in allowing a rate of £167 per diem for thirty-six days when the plaintiffs should have arranged for the repairs to be done in dry dock or, alternatively, at a substantially shorter period than thirty-six days.

The items of claim considered and varied on appeal were—7 (b) (permanent repairs—grounding damage which the registrar assessed at £15,669 1s.); 9 (London Graving Dock expenses: £1,134 6s.), 18 (loss by detention) and 19 (loss of profits). The other items appealed against under headings (a) to (c), namely 8 (dry dock dues), 10 (towage), 11 (water consumed by vessel under repair), 13 (adjusting compasses), 14 (nightwatchman), 15 (boatage), 17 (pilotage), 20 and 21 (superintendence and survey fees) were allowed by LORD MERRIMAN, P., at the registrar's figures. The case is reported mainly on the point whether item 19 was recoverable.

The authority and cases cited below were cited in argument in addition to those in the judgment*. *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.*†, cited in the judgment, was referred to by the court in the course of the argument.

Ashton Roskill, Q.C., and *B. C. Sheen* for the appellant defendants.

Waldo Porges, Q.C., and *B. D. J. Walsh* for the respondent plaintiffs.

Cur. adv. vult.

Nov. 4. **LORD MERRIMAN, P.**, in stating the facts emphasised that the dates of the charterparty of the time of tendering (viz., not to tender before 9 a.m. on Jan. 20, 1957), and the cancellation date (viz., the option to cancel the charter if the Georgidore were not ready at the loading port in Canada before 9 a.m. on Feb. 5, 1957), were vital to the case put forward by the defendants. HIS LORDSHIP found that, whatever one or other representative of the plaintiffs might have had in mind about having the repairs done at the conclusion of the voyage from Canada (1), there was no evidence that any preliminary inquiries were made about the availability of a dry dock on its conclusion before a fresh charterparty was made on Nov. 29, 1956. HIS LORDSHIP, after stating the facts continued, reading the following judgment: The basis of the defendants' objection to being charged with the expense of the repairs executed [in London between Dec. 21, 1956, and Jan. 26, 1957], either wholly or at any rate of the full extent, can be summarised as follows. There was no urgency whatever, since the repairs could have been done at any time by the next special survey which, as already stated, was not due until 1958. The largest head of claim is in respect of detention. As regards this, at any rate, the defendants' objection, in whole or in part, rests on the probability that if the repairs had been postponed until the next special survey no further time would have been expended than would be required for the special survey itself, any demurrage in respect of which would, of course, be for the owners' account.

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* 11 HALSBURY'S LAWS (3rd Edn.) 289, 291, 292; *Roper* v. *Johnson*, (1873), L.R. 8 C.P. 167; *Payzu, Ltd.* v. *Saunders*, [1919] 2 K.B. 581; *James Finlay & Co., Ltd.* v. *N.V. Kwik Hoo Tong Handel Maatschappij*, [1928] 2 K.B. 604; *The Carslogie*, [1952] 1 All E.R. 20.

† [1912] A.C. 673.

(1) The vessel had left Canada on Nov. 28, 1956, for the United Kingdom with a cargo of grain.

In addition, with regard to the amount of the claim as a whole, the following considerations are also urged: In spite of the lack of urgency the plaintiffs stemmed a dry dock in London, where it is common ground that the work is both greatly more expensive than at a north east coast port and also is admittedly slower; that they did so in the winter when, apart from shorter hours of daylight and the expectation of wintry weather, it would be known that the expense of removing sludge from the oil tanks would necessarily be greater in cold than in warmer weather; at a time when the work would necessarily be interrupted by the Christmas holidays—which in fact lost a full week; and without obtaining any tenders.

To deal with the last point at once. On the assumption, which I accept, that the dry dock was the only one available in London, nothing would have been gained by asking for tenders. In substance this point seems to me to stand or fall with the reasonableness or otherwise of stemming that dry dock at that time.

In this connexion I ought to refer to certain correspondence which passed between the solicitors. As long beforehand as Aug. 22, 1956, the defendants' solicitors wrote to the plaintiffs' solicitors noting the decision of the plaintiffs to leave their claim in abeyance until the permanent repairs had been carried out, and asking to be advised when the plaintiffs expected to effect these repairs. The reply of the plaintiffs' solicitors on Sept. 12, 1956, said that they had heard from their clients that the Georgidore was expected to return to this country about the end of October next, when it would be decided whether or not to execute permanent repairs. As there was no evidence on the point, I do not know whether any timely precautions had been taken to stem a dry dock for the return of the vessel to this country about the end of October other than the dock at Hull, which was only available, as I have already said, for a few days. However that may be, no such timely precautions were taken at any other time material to this case.

To continue the correspondence, on Dec. 3, 1956, the defendants' solicitors, referring to the letter of Sept. 12, asked to be informed about the present position, to which the reply on Dec. 4, was that it had been decided not to repair the vessel on her last visit to this country at the beginning of November last, but to complete one more round voyage, after which she would be dry docked for repair; the solicitors added that they would not fail to keep the defendants advised. As I understand it, the " one more round voyage " was the voyage from Canada, due to end, as appears from the remaining letters, in December, 1956. Meanwhile, the charterparty of Nov. 29, 1956, had been made.

In their reply on Dec. 6, 1956, the defendants' solicitors asked whether an indication could be given of when this completion of one more round voyage would be. In answer, the plaintiffs' solicitors forwarded a letter of Dec. 11, 1956, from the plaintiffs, the first paragraph of which reads as follows:

> " We thank you for your letter of yesterday's date regarding the deferred damage repairs on our . . . vessel, and in reply would inform you that she is due to arrive in the Tyne tomorrow to discharge part cargo, after which she will proceed to London to complete discharging and the present indications are that she will be free of cargo in London on the 22nd instant, when the deferred damage repairs will be carried out. [After a reference to arrangements for the attendance of the respective surveyors, the plaintiffs added:] We must say that we do not anticipate any repairs will be commenced before the Christmas holidays although the vessel may enter dry dock."

It is, I think, worth observing that the experienced solicitors for the defendants to whom that letter was forwarded on Dec. 12, 1956, took no exception to this programme.

This lays the defendants open to the comment that even if their solicitors had no right to object to the plaintiffs' dry docking their vessel as and when they chose, they could, if the objections to the time and place chosen are as weighty as the defendants insist, at least have uttered a caution that the plaintiffs must not expect to cover the whole cost of so unreasonable a choice. On the other hand, there is no reason to suppose that the defendants' solicitors knew anything about the charterparty of Nov. 29, 1956.

The repairs were in fact completed on Jan. 26, 1957, when the vessel left the dry dock and sailed for Hampton Roads under the charter of Nov. 29, 1956. The voyage took twenty days, and she arrived at Hampton Roads on Feb. 15, 1957, ten days after the cancellation date. It is necessary to point out here that the registrar in dealing with the point arising out of the cancellation date was wrong in stating that this was Feb. 8 instead of Feb. 5, 1957. This mistake is important. The late arrival, of course, gave the charterers the option of cancelling the charter. They abandoned their right to do this, in consideration of a reduction of 4s. 6d. per ton on the agreed freight, a figure which produces a sum of £2,319 8s. 4d., being item 19 under the heading " Loss of Profit ". I will come later to an objection in point of law to the recovery of anything in respect of this item.

On the dates alone it is argued that once the plaintiffs had bound themselves to the cancellation date of Feb. 5 it was almost inevitable, if the repairs were effected in London, when they were, that this date would be missed. The plaintiffs' own surveyor estimated that the repairs should take twenty-eight days. I accept this estimate, which is also important in connexion with the claim for detention. Allowing twenty-eight days for repairs instead of the thirty-six days actually taken, the Georgidore would have sailed for Hampton Roads on Jan. 18, 1957, instead of on Jan. 26, 1957. This, allowing the same time as was actually taken for the voyage—twenty days—would have meant that she would not reach Hampton Roads until Feb. 7, two days late. In effect, therefore, it is argued that the failure of the vessel to arrive before the cancellation date was due to a lack of co-ordination between the chartering department and the management of the plaintiffs' firm, in connexion with the charterparty of Nov. 29, 1956, and that missing the cancellation date did not flow from the collision. The plaintiffs claim to recover this item 19 in addition to their claim for detention, on the ground that it is in respect of what is in law a fresh contract, governing a period different from and subsequent to the detention period, when the vessel was actually at sea, earning the reduced rate. The question of law is whether this claim is cumulative to the claim for detention, or whether it is already included in that claim.

I have been referred to the judgment of LANGTON, J., in *The Lady Emerald* (2). I realise that the facts in this case differ from those in *The Lady Emerald* (2), in that in *The Lady Emerald* (2) a pro forma voyage account in respect of the interrupted voyage had been included in the three voyages from which the average earnings of the ship were calculated. Thus it was literally true that the loss of freight was claimed twice over. Here, on the other hand, the average earnings were arrived at by taking two earlier voyages and one voyage later than the interrupted voyage, and it is now sought to claim the reduction in freight caused by missing the cancellation date in the interrupted voyage as an independent head of damage. In my opinion, however, this distinction in the facts does not make any difference in the law to be applied. The question to be decided is: " What have the owners lost by their inability to employ their ship as a profit-earning instrument by her being laid up for repairs in consequence of the collision? ".

One appropriate method of calculating the damage is to prove the loss occasioned by the non-performance of the current charterparty (see per BOWEN and LINDLEY, L.JJ. in *The Argentino* (3)). Another method, usual and admittedly convenient, is to multiply the average figure for what might have been expected to be her daily earnings by the number of days for which the collision caused the vessel to be unemployed, and to arrive at the figure for the daily earnings by taking three typical voyages, two before and one after the period in question. This method excludes the actual figures of loss caused by the non-performance of the interrupted charterparty, but substitutes a notional figure arrived at in the way described. But the notional figure purports, and is intended, to represent the loss of earnings by the period of detention, and to represent the whole loss resulting from the enforced deprivation of the vessel as a profit-earning instrument.

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(2) (1932), 44 Lloyd's Rep. 176.
(3) (1888), 13 P.D. at p. 202; 6 Asp. M.L.C. at p. 352.

In my opinion, therefore, it is inadmissible to supplement that claim by proving an actual loss sustained through the non-performance of the current charter. The following observations were made by LORD HERSCHELL in the appeal in *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (4):

> " Where no claim is made in respect of loss arising from the owner having been deprived of the earnings of a voyage which was in contemplation, and the engagement for which had been secured, it would be right, and is no doubt the usual course, to award damages under the name of demurrage in respect of the loss of earnings which it must reasonably have been anticipated would ensue during the time of detention. But where such a claim is made as in the present case, the owner cannot, I think, be allowed in addition, as a separate item, demurrage in respect of the time the vessel was under repair. If he obtains as damages the loss which he has sustained owing to the loss of the employment he had secured he is put in the same position as if there had been no detention."

I think that these observations are in point and are decisive.

In *The Lady Emerald* (5) the two methods were in fact combined, because a pro forma voyage account of the charter voyage never performed was brought in for the purpose of averaging with the two previous voyages. Nevertheless, the resulting figure for daily earnings was a notional figure, and in my opinion the mere fact that in the present case the daily earnings are a notional figure calculated without reference to any specific loss on the current charterparty does not give the plaintiffs the right to add the so-called loss of profit to the claim for detention. I agree with the judgment of LANGTON, J. (4), that the claims are alternative.

It was conceded that the law laid down in the speech of VISCOUNT HALDANE, L.C., in *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.* (6) applies equally to the assessment of damages for tort as it does to damages for breach of contract. VISCOUNT HALDANE, L.C., quoted with approval (7) the following passage from the judgment of JAMES, L.J., in *Dunkirk Colliery Co.* v. *Lever* (8):

> " The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."

The convenience of the plaintiffs is, no doubt, an important consideration but I feel that undue emphasis has been laid on this by the registrar, to the exclusion of the correlative duty of the plaintiffs not to expose the defendants to additional cost by reason of not doing what they ought to have done as reasonable men.

The registrar says that the plaintiffs were not bound to repair in the cheapest possible way. I am assured that it was never argued that this was their duty, and if it had been so argued before me I should have agreed that that was putting the plaintiffs' duty too high. In terms applicable to the present problem their duty may be expressed as being to make such arrangements for the repair of the damage as a prudent uninsured owner would make for himself.

One of the reasons which the registrar gave for allowing the grounding damage,

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(4) (1889), 14 App. Cas. at pp. 523, 524; 6 Asp. M.L.C. at p. 435.

(5) (1932), 44 Lloyd's Rep. 176.

(6) [1912] A.C. at pp. 688-692.

(7) [1912] A.C. at p. 689.

(8) (1878), 9 Ch.D. at p. 25.

A item 7 (b), at the sum of £15,669 in full was that this sum had been agreed to. I think that, when he says that it was agreed as a matter of quantum subject to liability, he was referring to the contest before him on the question whether the defendants were responsible for the grounding damage at all. However this may be, it is quite clear now, as counsel for the plaintiffs freely admitted, that what was agreed was that the figure of £15,669 was reasonable for London. B This, of course, leaves open the question whether it was reasonable for the plaintiffs to have the repairs carried out in London at all in the circumstances of the case.

The registrar describes the length of time occupied in the repairs as being " longer than was expected ", and dismisses this as a misfortune for the defendants which they must bear. In my opinion, the phrase " longer than was C expected " ignores the point that London is known to be slower than other places, and that by the decision to send the Georgidore into dry dock in the period immediately before the Christmas holidays the lengthening of the time for repairs would not be unexpected but inevitable. This question, therefore, is inextricably bound up with the major question whether this decision was reasonable or not.

D On the other hand, the registrar does not appear to have considered any alternative to the extreme rival contentions that the decision to dry dock in London was fully justified on the one hand and that the repairs should have been postponed to the next special survey on the other hand. The registrar does indeed say that each time the ship was due in the United Kingdom the question of carrying out the repairs was considered by her managers, but he omits to notice E that this consideration was never, so far as the evidence goes, accompanied by timely attempts to stem a dry dock for the purpose. This comment applies particularly to the critical time in the last two months of 1956.

In my opinion the registrar should have considered whether, the plaintiffs having ascertained (if as business men they did not already know) that in order to stem a dry dock on the north east coast at the material time considerable F notice in advance was needed, it would have been reasonable for them before making the charter of Nov. 29, 1956, to arrange for that voyage to coincide with the making of arrangements in advance to stem a dry dock.

Alternatively, assuming that by the end of November the plaintiffs were already committed by the charterparty of Nov. 29, 1956, the registrar does not appear to have considered that the Georgidore, even allowing for a few days G for the repair of the pipes burst by frost in Canada, could have been presented at Hampton Roads or Baltimore under that charterparty well before Feb. 5, 1957, and would then have discharged at Hamburg or in the Weser by about the end of February. On this basis the question seems to me to be whether the proper course—say, early in December—was then to stem a dry dock to coincide with the Georgidore's actual commitments under the charterparty.

H I was entirely unconvinced by the argument that some such arrangement would have been impracticable. In my opinion it would have been greatly preferable to the sudden decision to dry dock the vessel in London, with the likelihood, if not the certainty, that she could not arrive at Hampton Roads (or Baltimore) before the cancellation date.

It is evident, and I find as a fact, that no such advance precautions were taken. I On the contrary, after attempts to stem a dry dock at Newcastle in December had failed and charterers had exercised their option for discharge to be completed in London, it is plain that a quick decision was made to take advantage of the one dry dock in London being vacant without there being any urgency, and, as I find, without any real attention to the fact that the Nov. 29 charterparty had tied the hands of the plaintiffs to dates for tendering and cancellation which in the circumstances were extremely unlikely, if not impossible, to be fulfilled.

I think that this was an unreasonable decision in spite of the fact that the letter of Dec. 11, 1956, already quoted (9), was received without protest by solicitors especially experienced in these matters. In my opinion, the plaintiffs would not have been doing (in the words of JAMES, L.J. (10)) anything otherwise than in the ordinary course of business, if, at the end of October or early in November, 1956, when they decided not to have the repairs done at that time, they had taken timely steps to stem a dry dock in advance and had negotiated the subsequent charter to fit the dates for which the dry dock was available. Nor, in my opinion, would they have been doing anything otherwise than in the ordinary course if, being already committed to the charterparty of Nov. 29, 1956, they had taken steps, say early in December, to stem a dry dock to fit the expected termination of the chartered voyage.

I find that the plaintiffs did expose the defendants to additional cost by reason of their not doing what they ought to have done as reasonable men.

On the other hand, I agree with the registrar in rejecting the defendants' argument that the only course open to the plaintiffs was to await the next special survey before doing the repairs. I am satisfied that some such middle course as I have indicated would have been reasonable and proper. If the plaintiffs were not bound, as I hold that they were not, to defer the repairs until the special survey due in 1958, some such arrangement as is suggested would have had to be made before then, and, as I understand the matter, would have been a reasonable method from the plaintiffs' own point of view of effecting the repairs with the least possible interruption of the employment of their vessel. The time taken for removal of the vessel from the port of discharge in Germany to, say, a north east coast port, would not, in my opinion, have been a serious matter even if the repairs were not done in Germany.

I was invited by both counsel, if I was not prepared to support the registrar's decision in full, to make my own assessment of the figure payable and so avoid the expense and difficulty of a further reference; and it was agreed that I should name a lump sum without going into detail about every separate item in the claim. Nevertheless, without unnecessary detail, I think that in fairness I ought to say in general terms what are my conclusions with regard to the main items.

With regard to the detention (item 18), rejecting as I do the defendants' contention that nothing is recoverable under this heading because the proper course was to defer the repairs until the period of the special survey, and rejecting as I do the plaintiffs' contention that dry docking in London was reasonable in the circumstances, I have allowed twenty-eight days for detention. I have already accepted the estimate given in cross-examination by Mr. Burns Glen as consulting engineer for the plaintiffs. It is fairly closely supported by deducting from the thirty-six days actually taken in London the full week wasted by the Christmas holiday, and, although the work done of course was different, by the month occupied by the special survey in October, 1957, as well as by the acknowledged fact that work in London is slower than the same work on the north east coast. The agreed figure of £530 per day produces £14,840 for detention (item 18). I have applied approximately the same fraction, seven-ninths, to other items affected by the same point.

I reject as irrecoverable for the reasons already given the further claim for loss of profit at 4s. 6d. per ton in respect of the charter of Nov. 29, 1956.

As to the cost of the repairs (item 7), there has been no challenge about the figure £2,497 6s. in respect of the damage to the stem (item 7 (a)), although, as the registrar truly points out, the criticism about dry docking in London might equally have been applied to this figure. I am, therefore, allowing this sum in full. As to the bottom damage (item 7 (b)), I accept the evidence that work on the north east coast is about fifty per cent. cheaper than in London, but I think it would be fair to award three-fifths of the amount allowed by the registrar.

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(9) Ante p. 110, letter H.

(10) (1878), 9 Ch.D. at p. 25.

On the hypothesis that the work would have been done early in 1957 something must be allowed for the general rise in costs, said to amount to eight per cent. per annum, and I have taken this into account.

Accordingly, I allow £9,402 in respect of item 7 (b), and I have applied the same fraction to item 9. I have allowed the remaining items at the figures allowed by the registrar.

Giving the best consideration to the matter that I can, I think that the plaintiffs should recover £39,960. Accordingly, I allow the appeal, and give judgment for this sum.

[There followed an argument on costs, and HIS LORDSHIP awarded the defendants two-thirds of the costs of the appeal.]

Waldo Porges, Q.C.: Owing to the peculiar state of the decisions, if any, on the point, I ask your Lordship for leave to appeal, if necessary.

LORD MERRIMAN, P.: Why are you asking for leave to appeal? I have given a final judgment.

Waldo Porges, Q.C.: Because, if I may respectfully say so, the point whether this is an interlocutory matter has never in fact been properly decided. As your Lordship may know, it was attempted to get the views of the Court of Appeal in a recent case called *The Hebridean Coast* (11). Unfortunately, the Court of Appeal did not express any view on the topic, although it was discussed.

LORD MERRIMAN, P.: I remember it being discussed in *The Hebridean Coast* (12). My recollection is that so far as this court was concerned we were all thoroughly agreed that it was a final judgment.

Waldo Porges, Q.C.: If I may remind your Lordship, in that case your Lordship did give leave to appeal, should it be necessary, and I think both sides endeavoured to get the views of the Court of Appeal whether it was in fact interlocutory or not.

LORD MERRIMAN, P.: It (13) is going to the House of Lords, is it not?

Waldo Porges, Q.C.: Yes, my Lord.

LORD MERRIMAN, P.: The Court of Appeal did not doubt that they were dealing with a final judgment, did they?

Waldo Porges, Q.C.: No, my Lord.

LORD MERRIMAN, P.: Nor did they send it to the House of Lords on the basis that it was anything but a final judgment.

Waldo Porges, Q.C.: This point which I am now in fact dealing with before your Lordship was discussed by both sides, so far as I can recollect, before the Court of Appeal. Unfortunately, as we all thought, the Court of Appeal did not feel disposed to give any guidance on it and, therefore, we are still in the position where there is in the White Book an expression of opinion by the author that it is an interlocutory matter (14).

LORD MERRIMAN, P.: I thought it was impossible to say that a final judgment for a specific sum was an interlocutory matter. However, to save any further debate about it, I will give you leave, if necessary; but I say categorically that I do not think that it is necessary.

Appeal allowed in part.

Solicitors: *Norton, Rose, Botterell & Roche* (for the appellant defendants); *Richards, Butler & Co.* (for the respondent plaintiffs).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(11) [1960] 2 All E.R. 85.

(12) [1959] 3 All E.R. 126.

(13) I.e., *The Hebridean Coast*. The decision of the House of Lords is reported at p. 82, ante.

(14) R.S.C., Ord. 58, r. 4, and notes thereunder: ANNUAL PRACTICE (1960), pp. 1663-1665.

Re WHOLESALE CONFECTIONERS' ALLIANCE OF GREAT BRITAIN AND NORTHERN IRELAND'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Russell, J., Sir Stanford Cooper, Mr. W. L. Heywood and Sir John Campbell), October 31, November 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, December 9, 1960.]

Restrictive Trade Practices—Reference—Wholesale Confectioners' Alliance of Great Britain and Northern Ireland—Recommendations as to price-fixing schemes—Recommendation as to maximum prices to be paid by wholesalers to manufacturers—Comparable trade re-selling price rates by wholesalers to retailers—Whether removal of restrictions would deny to public substantial benefit—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 21 (1) (*b*).

The Wholesale Confectioners' Alliance of Great Britain and Northern Ireland was an alliance of four members, the British Federation of Wholesale Confectioners, the Scottish Federation of Wholesale Confectioners' Associations, the South Wales and Monmouthshire Federation of Wholesale Confectioners and the Belfast and North of Ireland Wholesale Confectioners' Association. The three federations had as their members local associations of wholesalers, and the association had as its members wholesale confectioners in Northern Ireland. These wholesalers dealt by wholesale either in part or sometimes solely with confectionery, viz., chocolate and sugar confectionery (sweets). The objects of the Alliance were, inter alia, to formulate policy and advance agreed views on behalf of all wholesale confectionery interests, and to encourage the maintenance of standard prices and terms in the distribution sections of the confectionery industry and to issue price lists. Members of the Alliance handled about ninety per cent. of confectionery tonnage sold by wholesale. At the end of price control in 1953, agreed price schedules were issued by the Alliance and, in 1958, the Alliance produced the Yellow Price Schedule (prices of wholesaler to retailer) and the White Buying Price Schedule (manufacturer to wholesaler). The key schedule was the latter, which was divided into four categories of confectionery, (i) weigh-out lines, (ii) pre-packed lines, (iii) chocolate blocks, bars and other count lines, and (iv) sugar confectionery count lines. In each category was given in ascending order fixed or ticket price rates to the consumer and against each such consumer price rate was set, marked " A ", a manufacturer to wholesaler price rate which the Alliance recommended should be the maximum price rate which a wholesaler should pay to any manufacturer for a normal wholesaler's order of about three cwt. for confectionery in that category retailing at that consumer price rate. This recommendation as to maximum prices was not intended to apply to special circumstances of special lines, when (though rarely) wholesalers might pay more than the " A " price rate. In addition there were in the schedule for most of its range " B " and " C " manufacturer price rates in respect of each consumer price rate, " B " being lower than " A ", and " C " than " B ". The " B " and " C " price rates were designed to form a basis for working the Yellow Price Schedule, the principle of which was as follows. In respect of each item in each category (again listed by increasing consumer price rates), prices were set out as the recommended trade re-selling prices to retailers, again done in " A ", " B " and " C " price rates. The recommendations were that, when a wholesaler bought a particular consumer price rate line at " A ", he should re-sell at the comparable Yellow Schedule " A " price rate; when at " B ", similarly at " B "; when at " C ", similarly at " C "; when between " A " and " B ", then at " A "; when between " B " and " C ", then at " B "; when below " C ", then at " C "; and when (exceptionally) at above " A ", then at " A " plus the appropriate increase.

The Registrar of Restrictive Trading Agreements referred to the court, under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, the following restrictions: (i) Not to acquire from manufacturers chocolate or sugar confectionery, the buying price of which exceeded the " A " buying price shown in the price list as appropriate to the consumer price indicated by the manufacturer. (ii) If, exceptionally, chocolate or sugar confectionery was acquired from a manufacturer at prices exceeding the " A " buying price shown in the price list as appropriate to the consumer price indicated by the manufacturer, not to offer or supply the same to retailers save at the appropriate " A " selling price proportionately increased. (iii) Not to offer or supply chocolate or sugar confectionery bought by the offerer or supplier at the appropriate " A " buying price or at a price lower than the appropriate "A" buying price but exceeding the appropriate " B " buying price, except at the appropriate " A " re-selling price. (iv) Similarly, with the " B " and " C " prices. (v) Not to offer or supply chocolate or sugar confectionery bought by the offerer or supplier at the appropriate " C " buying price except at the appropriate " C " re-selling price. At the hearing the Alliance said that they had no wish to continue the first recommendation and it was, accordingly, declared contrary to the public interest. The Alliance sought to support the other restrictions under s. 21 (1) (b)† of the Act, contending: (a) that the removal of the restrictions would have the result that, in the more sparsely populated, but substantial, areas of the United Kingdom, where costs of distribution were relatively high, the margin available to retailers of confectionery would fall so low that no one would continue to retail confectionery in those areas; alternatively, that, in those areas, confectionery would be sold above the ticket prices; so that the general public as consumers and purchasers living in or visiting those areas would either be deprived of confectionery or would have to pay more for it; (b) that the existence of the price schedules, with their three-tier system of prices, enabled the manufacturer to make more than trivial increases in his price to the wholesaler to cover increased manufacturer's costs, without increasing the ticket price of the articles to the consumer, the sweet-eating public being the relevant public; (c) that the existence of the price lists made it unnecessary for retailers of confectionery (many of whom were in a small way of business and lacked business experience) to " shop " for their goods, and made it possible for them to ascertain quickly and easily, when any goods were offered to them, whether the price being charged was a reasonable one, the relevant public being a substantial section of the many retailers of confectionery as purchasers, and (d) that the removal of the restrictions would inevitably lead to disputes between retailers and wholesalers over the division between them of the distributors' margin. The court found that there was great competition among manufacturers and that the market now and in the foreseeable future must be regarded as a buyers' market.

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*Section 20, so far as relevant, provides: " (1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

" (2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar; . . .

" (3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

†Section 21 (1), so far as relevant, provides: " For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say—. . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . ."

Held: the restrictions were deemed by s. 21 (1) of the Act of 1956 to be, and were declared to be, contrary to the public interest, because—

(i) while the court was satisfied that, without the restrictions, competition between the wholesalers would tend to reduce the prices charged by wholesalers to retailers in many areas, it was not satisfied that no one would continue to retail confectionery in the sparsely populated, but more substantial, areas of the United Kingdom or that, in those areas, confectionery would be sold above the ticket prices, particularly in light of the fact that, as it was generally agreed that there were too many wholesalers, it was to be expected that the less efficient ones would go out of business in the absence of the price schedule, and that those who remained were expected to be, as a result, more capable of ensuring that their retail outlets would be maintained.

(ii) although, if a manufacturer's charges to the wholesaler had to be increased to an extent which, under the existing ticket price rates, could not produce a sufficient total distributors' margin, the consumer would have to pay more, the court could not accept that, without the price schedule, if the manufacturer's charges were increased to a lesser extent, the result would be the same.

(iii) the court was not persuaded that in a free market, the small retailers were incapable of profitably comparing the differing prices of the different wholesalers whose travellers sought to sell them the same lines, and such time and trouble as might now be saved to the small retailer by the operation of the price schedule did not appear to be a substantial benefit or advantage.

(iv) the fact that the removal of the restrictions might lead to differences of opinion in the course of bargaining or a general attitude of opposition between organised retailers and organised wholesalers would not deny to the public substantial benefits or advantages.

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.]

Case referred to:

Black Bolt and Nut Assocn. of Great Britain's Agreement, Re, [1960] 3 All E.R. 122; L.R. 2 R.P. 50; [1960] 1 W.L.R. 884.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the members of the Wholesale Confectioners' Alliance of Great Britain and Northern Ireland. The objects of the Alliance were (i) to formulate policy and advance agreed views on behalf of all wholesale confectionery interests; (ii) to secure representation on any body or bodies which might be formed affecting the confectionery industry with which government departments and any other organisations might confer, and to originate and promote negotiations with such bodies on any matter that might be deemed expedient or desirable; (iii) to share in deliberations regarding the development of the confectionery industry; (iv) to consult and co-operate with other sections of the confectionery industry in all matters designed for the improvement of the industry as a whole; (v) to encourage the maintenance of standard prices and terms in the distributive sections of the confectionery industry and to issue price lists; (vi) to acquire property both real and personal to any extent and in any lawful manner whether by way of purchase, taking on lease, loan, gift, bequest, A devise, prescription or otherwise and to apply the funds of the Alliance in furtherance of all or any of the objects of the Alliance, whether in the enforcement of any agreements entered into by the Alliance or otherwise.

The facts are set out in the judgment of the court, and the list of restrictions is set out at p. 122, letters A to D, post.

G. T. Aldous, Q.C., *B. J. H. Clauson* and *W. Aldous* for the Wholesale Con- B fectioners' Alliance of Great Britain and Northern Ireland.

Neville Faulks, Q.C., and *Arthur Bagnall* for the Registrar.

Cur. adv. vult.

Dec. 9. **RUSSELL, J.**, read the following judgment of the court: The Wholesale Confectioners' Alliance of Great Britain and Northern Ireland is a C trade association. It is an alliance of four members: these are the British Federation of Wholesale Confectioners, the Scottish Federation of Wholesale Confectioners' Associations, the South Wales and Monmouthshire Federation of Wholesale Confectioners, and the Belfast and North of Ireland Wholesale Confectioners' Association. The three federations have as their constituent members local associations of local wholesalers, and the association has as its D members wholesale confectioners in Northern Ireland. These wholesalers deal by wholesale either in part or sometimes solely with confectionery, viz., chocolate and sugar confectionery (sweets). Wholesale members of the Alliance (through the federations and association) total 1,980 odd, being divided approximately two hundred and twenty Scottish, eighty South Wales and Monmouthshire, one hundred and ten Belfast and North of Ireland, and 1,560 British. The E purposes of the Alliance include that of formulating policy and advancing agreed views on behalf of all wholesale confectionery interests, and also the encouraging of the maintenance of standard prices and terms in the distributive sections of the confectionery industry, and the issuing of price lists. There are some five hundred confectionery manufacturers, producing some twenty thousand lines. About eighty per cent. is produced by fifty of these manufacturers, and two hundred F manufacturers have a national distribution of their goods. On the chocolate side, ten manufacturers produce over eighty per cent.; on the sugar confectionery side, twenty-five manufacturers produce over fifty per cent. There is great competition among manufacturers. The market now and in the foreseeable future must be regarded as a buyers' market. Since the termination of confectionery rationing in 1953, the proportion of confectionery sold through wholesalers has sharply G declined, there being a substantial increase in direct sales by manufacturers to the larger retailers, or chain stores, or retailer buying groups. Normally, manufacturers are prepared to sell to anyone who will buy enough at a time; their price lists are commonly on a sliding scale related to quantity and applicable to wholesaler and retailer alike. The wholesalers' proportion has been estimated at thirty-five to forty per cent. in 1959 (225,000 tons) as compared with sixty to H seventy per cent. (390,000 tons) in 1953–54.

The Alliance membership consists of nearly two thousand wholesalers, out of some three thousand five hundred who handle confectionery to some extent. About one thousand of these do so to such a small extent that they are primarily wholesalers in some other line or lines, and are likely to be members of other comparable trade associations. Members of the Alliance probably handle about I ninety per cent. of confectionery tonnage sold by wholesale, and about five hundred big firms handle eighty per cent. of such tonnage. Confectionery wholesalers handling confectionery only are probably less than twenty per cent. of the total members. Some wholesalers also manufacture; some wholesalers also retail. Far the largest group of wholesalers deals in other commodities as well, such as tobacco, groceries, stationery, dry goods, chemists' sundries and so forth. In some of these mixed businesses confectionery predominates.

Retail confectionery outlets vary considerably in character. Main street confectionery shops tending to specialise in confectionery ordinarily buy from manufacturers direct. So also do chain stores, multiples, supermarkets, cinemas **A** and restaurants. Retail outlets such as public houses, cafés, petrol stations, school tuck shops, buy partly from manufacturers and partly from wholesalers; and so do secondary thoroughfare retail shops, which usually deal also in other goods. The most numerous group, and that which absorbs the greater part of the wholesalers' total tonnage, consists of back street shops and village shops which cannot order in quantities which make delivery by manufacturers worth while; **B** all these may for practical purposes be regarded as dealing also in goods other than confectionery. It is estimated that there may be as many as 250,000 retail confectionery outlets in the United Kingdom (excluding automatic vending machines), the greater number being in the category of small mixed shops served predominantly by the wholesaler. There is a retail trade association, the National Union of Retail Confectioners, with about eight thousand three hundred members. **C** Though perhaps half that number are small retailers, it is, nevertheless, not regarded by the Alliance's secretary as very representative of those retailers who form the majority of the wholesalers' customers. Retail prices to the consumer are normally either fixed or recommended by the manufacturer.

Confectionery from 1941 to 1953 was subject to rationing and consumer price control, the three sections of the trade being left to settle trade prices together. **D** At the end of price control, the three sections agreed price schedules which were issued in 1953 and 1954 by the Alliance. These incorporated a broad division of the distributors' margin between wholesaler and retailer of 25:75 for weigh-out goods, and 28:72 for other goods, which broad division had been basically accepted in the wartime agreements. In 1955, the leading, or "A", chocolate manufacturers were persuaded by the wholesalers to investigate distribution **E** costs with a view to increasing the total distributors' margin. In the result, these chocolate manufacturers increased the margin, and the Alliance, in 1956, produced a new schedule of prices whose details we need not canvass since this was later superseded by the 1958 Price Schedules the subject of the reference. In 1957, the Alliance again took the view that increases in costs justified an increase in the distributors' margin, and approached the leading chocolate **F** manufacturers with costs figures. In the result, those manufacturers agreed an increase in the distributors' margin of one per cent. and lowered their prices to the trade accordingly. The Alliance ultimately produced the Yellow Price Schedule (prices of wholesaler to retailer), and the White Buying Price Schedule (manufacturer to wholesaler). It will be convenient to describe the operation and nature of these schedules—which involve the restrictions now before the court— **G** and then revert to the manner in which they were produced. The key schedule is the White Buying Price Schedule. This is divided into four categories of confectionery, namely, (i) weigh-out lines; (ii) pre-packed lines; (iii) chocolate blocks, bars and other count lines; (iv) sugar confectionery count lines. In each category is given in ascending order fixed or ticket price rates to the consumer; against each such consumer price rate is set, marked "A", a manufacturer to **H** wholesaler price rate, which (as we indicate later) the Alliance recommends should be the maximum price rate which a wholesaler should pay to any manufacturer for a normal wholesaler's order of about three cwt. for confectionery in that category retailing at that consumer price rate. This recommendation as to maximum prices to be paid by wholesalers to manufacturers is not intended to apply to special circumstances of special lines, when (though rarely) wholesalers **I** may pay more than the "A" price rate. In addition, there are in the Buying Price Schedule (for most of its range) " B " and " C " manufacturer price rates in respect of each consumer price rate, " B " being lower than "A", and " C " than " B ". This price schedule, in setting out the " B " and " C " price rates, does not impose directly a restriction; those rates are designed to form a basis for working the Yellow Price Schedule, since not all manufacturers' goods retailing in any particular category at the same consumer price rate can command the top "A" trade price rate (as can, for example, the leading chocolate manufacturers with their intensive advertising leading to heavy demand and quick turnover), and those who cannot will charge at a lower trade price rate, which may be anywhere down to and below the "C" figures, "B" and "C" being only labelled steps in a downward trend. The principle of the Yellow Price Schedule is this. In respect of each item in each category (again listed by increasing consumer price rates), prices are set out as the recommended trade re-selling prices to retailers. Wherever in the White Buying Price List there are "A", "B" and "C" manufacturers' trade selling price rates, there are comparable "A", "B" and "C" trade re-selling price rates by wholesalers to retailers in the Yellow Price Schedule. The recommendations are that, when a wholesaler has bought a particular consumer price rate line at "A", he should re-sell at the comparable Yellow Schedule "A" price rate; when at "B", similarly at "B"; when at "C", similarly at "C"; when between "A" and "B", then at "A"; when between "B" and "C", then at "B"; when below "C", then at "C"; when (exceptionally) at above "A", then at "A" plus the appropriate increase. The Yellow Price Schedule "A", "B" and "C" figures are, in relation to the White Buying Price Schedule, "A", "B" and "C" figures; and in relation to the relevant consumer prices designed to reproduce the ratios of 28:72 and 25:75 already mentioned. The calculations are made to the nearest upward coin denomination, but are recalculated in the various weights or quantities which are set out in the Yellow Schedule for convenience as a ready reckoner. The Alliance White Buying Schedule works on a manufacturer's price rate to wholesalers for approximately a three cwt. purchase. Should a wholesaler buy less, he is not restricted in the price he pays, nor in the price he charges to retailers. Also if, by reason of buying more than three cwt., he receives a quantity reduction from the manufacturer, he is not (in our view) permitted to give to any retailer a quantity reduction, subject to federation modifications later mentioned. Next we understand that, if a wholesaler receives a special bargain by a manufacturer giving him a discount in kind (for example, one free package in ten), the schedules do not restrict him on re-sale at all. Lastly, the schedule is calculated on the assumption that the wholesaler receives from the manufacturer a discount of 1¼ per cent. or 3d. in the £ and gives to the retailer the same rate of discount.

The Yellow Schedule evolved thus. In some parts of the country it was already the practice of wholesalers to give the 1¼ per cent. discount to retailers. In other parts it was not. Originally, the Alliance suggested two Wholesalers' Re-selling Price Schedules, one for the no-discount areas and one for the discount areas. The former assumed no discount to retailers. The latter assumed the discount throughout the whole range, but equivalently stepped up the trade re-selling prices throughout the whole range. However, the inconveniences of the division into discount and non-discount areas led to the production of the compromise Yellow Schedule, which assumed the 1¼ per cent. discount throughout, but in part of the range did not step up the prices to offset it. The National Union of Retail Confectioners did not (and does not) approve of this schedule, and has its own White Schedule of recommended prices to be paid by retailers to wholesalers; this works on the same "A", "B", "C" principle; the prices are different, and are intended to be diminished by 1¼ per cent. discount where that can be obtained, though not elsewhere. In summary, the Retailers Union prefers its own schedule because it considers that it is more profitable for retailers; and, indeed, we think on the whole it is. Notwithstanding the views of the National Union of Retail Confectioners, the Alliance insisted on bringing their Yellow Schedule into operation; though some retailers, on the evidence, manage to persuade wholesalers to sell on the National Union of Retailers Schedule and allow the 1¼ per cent. discount. The above is the general background against which we have to consider the relevant restrictions.

There was a certain amount of dispute as to the relevant restrictions and the correct method of their statement. We consider that they are correctly stated

in document 8, being the list of restrictions filed on behalf of the Registrar. These A
are five in number, and are:

> " (i) Not to acquire from manufacturers chocolate or sugar confectionery, the buying price of which exceeds the 'A' buying price shown in the price list as appropriate to the consumer price indicated by the manufacturer.
>
> " (ii) If, exceptionally, chocolate or sugar confectionery is acquired from a manufacturer at prices exceeding the 'A' buying price shown in the price B list as appropriate to the consumer price indicated by the manufacturer, not to offer or supply same to retailers save at the appropriate 'A' selling price proportionately increased.
>
> " (iii) Not to offer or supply chocolate or sugar confectionery bought by the offerer or supplier at the appropriate 'A' buying price or at a price lower than the appropriate 'A' buying price but exceeding the appropriate C 'B' buying price, except at the appropriate 'A' re-selling price.
>
> " (iv) Not to offer or supply chocolate or sugar confectionery bought by the offerer or supplier at the appropriate 'B' buying price or at a price lower than the appropriate 'B' buying price but exceeding the appropriate 'C' buying price, except at the appropriate 'B' re-selling price.
>
> " (v) Not to offer or supply chocolate or sugar confectionery bought by D the offerer or supplier at the appropriate 'C' buying price except at the appropriate 'C' re-selling price."

For the Alliance, it was suggested that the first restriction no longer existed, having regard to the absence from the 1958 lists of a phrase present in those of 1956; and that, though the Alliance evidence was that the restriction was E intended to remain as a recommendation, nevertheless it was not found in the documents referred to the court. We do not agree with the suggestion. It was, however, made plain for the Alliance that they had no wish to continue the first recommendation, and that, if it was before the court, it could not be justified under the Restrictive Trade Practices Act, 1956. In the circumstances, the first restriction must be declared contrary to the public interest. It is right to F add that the Alliance contended that this was a harmless restriction, while accepting that this was no defence under the statute; we need express no opinion on that contention.

In respect of the remaining restrictions, the Alliance sought to justify them under s. 21 (1) (b), by satisfying the court that their removal would deny to the public, as purchasers or consumers of confectionery, specific and substantial G benefits or advantages enjoyed or likely to be enjoyed by them as such, by virtue of the restrictions or of any arrangements or operations resulting therefrom. No distinction was made between the four remaining restrictions, which stand or fall together.

A great deal of ground was covered in the course of the hearing, but it finally emerged that the Alliance rested its case under s. 21 (1) (b) under four heads. H

First head: that the removal of the restrictions would have the result that, in the more sparsely populated, but substantial, areas of the United Kingdom, where costs of distribution are relatively high, the margin available to retailers of confectionery would fall so low that no one would continue to retail confectionery in those areas; alternatively, that, in those areas, confectionery would be sold above the ticket prices; so that the general public as consumers I and purchasers living in or visiting those areas would either be deprived of confectionery or would have to pay more for it.

Second head: that the existence of the price schedules, with their three-tier system of prices, enable the manufacturer to make more than trivial increases in his price to the wholesaler to cover increased manufacturer's costs without increasing the ticket price of the articles to the consumer. Here again the sweet-eating public is the relevant public.

Third head: that the existence of the price lists makes it unnecessary for retailers of confectionery (many of whom are in a small way of business and lack business experience) to " shop " for their goods, and makes it possible for them to ascertain quickly and easily, when any goods are offered to them, whether the price being charged is a reasonable one. Here the relevant public is a substantial section of the many retailers of confectionery as purchasers.

Fourth head: that the removal of the restrictions would inevitably lead to disputes between retailers and wholesalers over the division between them of the distributors' margin—the difference between the manufacturers' price to the wholesaler and the ticket price to the public.

As to the first head: the basis of this contention is as follows: (a) It is agreed by the Registrar that the overall position revealed in the trade—operating for the most part under the relevant restrictions—is that hitherto, and now, the total distributors' margin is not unreasonable, that the total wholesalers' share thereof is not unreasonable, and that the total retailers' share thereof is not unreasonable. (b) The cost of distribution by wholesalers in populous areas must be lower than their costs of distribution in sparsely populated areas. (c) In populous areas it is to be expected that in a free market, with competition between wholesalers, there would be a cutting of the wholesalers' share of the distributors' margin in favour of the retailers in those areas, but this would mean that, in the sparsely populated areas, the wholesalers would have to demand a larger share of that margin in order to compensate for the diminution in the populous areas, the increase being so substantial that there would be left to the retailer in the sparsely populated areas no sufficient inducement for him to continue to sell confectionery at the ticket prices. (d) The result would, it is submitted, be probably no confectionery in those areas, or possibly sales in those areas at above normal ticket prices.

While we are satisfied that, without the restrictions, competition between wholesalers—the market in confectionery being a buyers' market—will tend to reduce the prices charged by wholesalers to retailers in many areas, we are not satisfied that either of the results submitted would follow in sparsely populated areas. Reliance was placed on the evidence of Mr. Esslemont, whose company is a member of the Aberdeen & District Wholesale Confectioners' Association, and deals by wholesale in confectionery, groceries, tea, hardware, toys and fancy goods. The company to a minor extent manufactures and retails confectionery. The company deals with two thousand nine hundred retailers of (inter alia) confectionery, in wide areas of Scotland including sparsely populated areas. In his statement, he said (in effect) that, if his total shares of the distributors' margin in confectionery were reduced, he would, if continuing in business in the remote areas, have to send confectionery there carriage forward, involving a very big increase in prices to the retailers, with the results submitted above. This was challenged in cross-examination, at a time when it was far from obvious that this point about sparsely populated areas was to find its place in the forefront of the Alliance's submissions, and Mr. Esslemont produced the much-qualified statement that, if the abandonment of the schedule affected (by price cutting) his share of distributors' margins in Aberdeen and thirty miles around—the more profitable areas—(I quote) " we might find that we were in difficulties in carrying on at the same prices to the more distant places." Without quoting further, it suffices to say that he was no more definite in re-examination. It appears to us that the fact that the overall margins are admittedly " not unreasonable " does not exclude the possibility of manoeuvre (embracing also manufacturers, who must maintain their outlets) such as will ensure the continued supply of confectionery to and by retailers in the more sparsely populated areas and at the overall ticket prices. The relevant retailers almost invariably stock confectionery as a part only of a general trade—such mixture of activities being reflected also in the wholesalers. It is difficult to envisage such a retailer closing down the confectionery side of his business while any profit remained in it.

It is to be observed that, in some remoter parts, Mr. Esslemont's company already charges more to retailers than in other parts—by not giving a discount of 1¼ per cent. or 3d. in the £—without affecting the retail availability or price of confectionery, which indicates elasticity in the retailers' share. He also gets special terms from certain manufacturers, which indicates elasticity in the manufacturers' margins of profit. Moreover, particularly in the light of the fact that it was generally agreed that there are too many wholesalers in this industry, it is to be expected that, in the absence of the schedule, the less efficient wholesalers will go out of business and those who remain are to be expected to be, as a result, more capable of ensuring that their retail outlets will be maintained. We are, accordingly, not satisfied that this first head has been established.

As to the second head: it is to be observed that, in order to fit the section, this contention must be re-written. It is necessary for the Alliance to satisfy the court that, without the restrictions contained in the schedule, the manufacturer would not be able to make any increase (other than trivial) in his price to wholesalers to cover an increase in his costs unless he simultaneously increased the consumer or ticket price. So stated, the proposition seems to us plainly wrong. The argument is put thus: a wholesaler deprived of the schedule would have to have some system of fixing his prices to retailers. The system he would choose would be the cost to him (manufacturer's charge) plus a percentage. If a manufacturer made an increase such as is envisaged, the whole of that increase plus a percentage thereon would, therefore, be passed on to the retailer, whose share of the distributors' margin would be so reduced that, in given cases, he would not take the goods unless the ticket price were increased to compensate him. On the other hand (it is said) if the price schedule operates, a manufacturer can increase his price (to cover his increased costs) from (say) " C " to "A", and this diminution of the distributors' margin will be borne proportionately by the wholesaler and the retailer, and the increase in consumer price will not in any given case be required.

This argument appears to us to pre-suppose that a manufacturer would be forced to increase his ticket price by virtue of a system which was described by counsel for the Alliance as lunatic—a system by which any increase in a manufacturer's price due to an increase in his costs is automatically added to the price to the retailer, plus, for good measure, a percentage. If a manufacturer's charges must be increased to an extent which, under existing ticket price rates, cannot produce a sufficient total distributors' margin, the consumer must of course pay more. But if they are increased to a lesser extent, we cannot accept—particularly in a buyers' market—that without the price schedule the result will, on the grounds urged, be the same. We are not satisfied under this head for the purposes of s. 21 (1) (b). We add that no doubt the three-tier system has advantages that might be lacking in a single price system. But that is not, of course, sufficient. It has certain obvious disadvantages (probably impossible of solution) in that, while flexible in some respects, it is rigid in others; for example, a move in the manufacturer's charge from fractionally below " B " to fractionally above " B " in the Buying Price Schedule would mean a move under the Yellow Schedule in the charge to the retailer from " B " to "A". But such considerations would be relevant only under the balancing provisions of s. 21 (1).

As to the third head: this ground was introduced at the hearing by amendment, no doubt as a result of the decision of this court in *Re Black Bolt and Nut Assocn. of Great Britain's Agreement* (1). That case was very special, and the circumstances totally different from those in the present case. Indeed, counsel for the Alliance did not suggest the contrary, his reference to it being no more than to indicate that the evidence of " shopping " is capable of being a relevant benefit or advantage, dependent, of course, on the circumstances. We have heard—and accept—a good deal of evidence to the effect that the majority of those who retail confectionery are not experienced in business matters. The argument on this point is, shortly, that with the existence of the schedule—which admittedly allows a not unreasonable share to the retailer—all that the small retailer needs to do is to check that he is being charged the schedule price; and for this he does not need the actual schedule, he need only ask the wholesaler's traveller to confirm that it is the approved trade price. Without such a yardstick, he would (it is said) have to compare wholesalers' price lists, whose contents, due to possible differences in method of lay-out, might be difficult truly to compare. Moreover, it is said, the comparisons would take time which the small retailer cannot afford. It may well be true that these small retailers, by and large, are in one sense not price conscious, in that they do not normally inquire as to prices, but accept the price quoted to them for goods they want. But as things stand at present, and have stood for many years, they have operated in a field in which substantially one price only has ruled for a given line, based on the schedule. We are not persuaded that, in a free market, these small retailers are incapable of profitably comparing the differing prices of the different (though numerically limited) wholesalers whose travellers seek to sell them the same lines. Indeed, it appears to be accepted under the first head that, in populous areas, competition between wholesalers will have the effect of reducing prices to retailers, which pre-supposes that retailers will compare prices either of their own volition or at the instance of wholesalers. Such time and trouble as may now be saved to the small retailer by the operation of the schedule does not appear to us to be a substantial benefit or advantage, and we are not under this head satisfied that the case for the Alliance under s. 21 (1) (b) is established.

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(1) [1960] 3 All E.R. 122; L.R. 2 R.P. 50.

As to the fourth head: this was, in our judgment, rightly referred to by counsel for the Alliance as, perhaps, a " minor point ". We do not exactly know what is meant by " disputes ", and the analogy which was introduced of two dogs at one dinner bowl only suggests a breach of the peace which we do not envisage in the distributors' section of the trade. If " disputes " means differences of opinion in the course of bargaining, we cannot regard their avoidance as a specific and substantial benefit or advantage to the relevant parties (the retailers), particularly when most of them are likely to benefit from such bargaining by a reduction in prices. If by " disputes " is meant a general attitude of opposition between organised retailers and organised wholesalers, we only comment that this exists now, the one preferring the National Union of Retail Confectioners' White Schedule, the other preferring the Yellow Schedule. An attempt was made to suggest by a process of mathematics that the difference between the two was negligible (if the retailers could only have the sense to see it), so that such " dispute " was unreal; but, in our view, that mathematical process was founded on a false assumption. Accordingly, under this fourth and last head the Alliance also fails to satisfy the court under s. 21 (1) (b).

Having regard to the limitation, in the end, of the Alliance's case to those four heads, and to the fact that under none of them is the court satisfied, it is unnecessary to consider a number of aspects of the case which were fully canvassed in argument and evidence, some of which would, or might, have required review under the balancing provisions of s. 21 (1).

We have not referred so far to the fact that certain of the federations, constituent members of the Alliance, have from time to time introduced modifications of the Alliance restrictions, as constitutionally they are entitled to do. Generally speaking, these modifications are designed to permit within the federation's area certain quantity discounts by wholesalers to retailers, or to retail buying groups, or to permit special terms to cash-and-carry retailers. Strictly, the restrictions came before us without those area modifications, and, in so far as those area modifications are in themselves restrictions under the statute, they are not strictly before the court. But, if we are to treat (in the relevant areas) the Alliance restrictions as so modified, there is, in our judgment, nothing in the modifications which can improve the case for the Alliance under

A the four heads mentioned. Taken by themselves, the area modifications cannot, of course, survive the abolition of the restrictions considered by us.

Accordingly, we declare that the restrictions contained in the Registrar's List document 8 are, under the statute, contrary to the public interest and that the referred agreement is void in respect of those restrictions.

Declaration accordingly.

B Solicitors: *Stafford Clark & Co.* (for the Wholesale Confectioners' Alliance of Great Britain and Northern Ireland); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

C

AVIATION AND SHIPPING CO., LTD. *v.* MURRAY (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Danckwerts, J.), November 4, 1960.]

Income Tax—Discontinuance of trade—Shipping company—Acquisition of subsidiary's two tramp ships—Ships managed before and after acquisition by same management company—Subsequent sale of the two ships by shipping company—Whether permanent discontinuance of trade—Finance Act, 1954 (2 & 3 *Eliz.* 2 *c.* 44), *s.* 17 (3). D

The ships of the taxpayer company and its subsidiary company, which owned two coal-fired tramp ships, were managed by a third company; all three companies had the same chairman. The ships were all on charter to E another company. On Dec. 30, 1954, the two ships of the subsidiary company and the trade connected with them were taken over by the taxpayer company, which then had five tramp ships. It was common ground that at this date there was a succession by the taxpayer company to the trade of the subsidiary company. In February and March, 1955, the two tramp ships were sold and three diesel ships were purchased, the charterers F releasing the original ships and taking time charters of the diesel ships. No goodwill attached to a tramp ship as opposed to a ship on a regular run.

Held: on the sale of the two ships by the taxpayer company in 1955, there had been a permanent discontinuance of the trade acquired from the subsidiary company, to which trade the taxpayer company had succeeded G on Dec. 30, 1954, this trade having to be treated as a separate trade by virtue of s. 17 (3) of the Finance Act, 1954.

Appeal allowed.

[As to succession to a trade for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 130, para. 231; and as to discontinuance where activities are continued by some other person, see ibid., pp. 136, 137, para. 238; and for H cases on the subject, see 28 DIGEST (Repl.) 65-68, *240-253* and p. 70, *265-267*.

For the Finance Act, 1953, s. 19, see 33 HALSBURY'S STATUTES (2nd Edn.) 119; and for the Finance Act, 1954, s. 17, see 34 HALSBURY'S STATUTES (2nd Edn.) 296.]

Case Stated.

I The taxpayer company appealed to the Special Commissioners of Income Tax against an assessment to income tax for 1956-57 made under Case I of Sch. D to the Income Tax Act, 1952, in the sum of £205,000 in respect of its profits as shipowners. On Dec. 30, 1954, the taxpayer company acquired from its wholly owned subsidiary, Ascot Shipping Co., Ltd., the only two ships of that company, making its total number of ships up to five, all of which at that time were chartered to British Iron and Steel Co. (Ore), Ltd. On Feb. 15, 1955, the taxpayer company sold one of the ships and on Mar. 14, 1955, it sold the other.

It was common ground between the parties that the condition of "consanguinity" required by s. 17 of the Finance Act, 1954, applied as between the taxpayer company and the subsidiary company. The questions to be determined arose under s. 17 of the Act of 1954, and were: (i) whether the trade of the subsidiary company was permanently discontinued on Dec. 30, 1954; (ii) if not, whether the taxpayer company succeeded on that date to the trade until then carried on by the subsidiary company; (iii) if the taxpayer company did succeed to that trade, whether the trade was permanently discontinued when the second of the two ships was sold on Mar. 14, 1955; and (iv) if the trade was permanently discontinued on Dec. 30, 1954, whether the activities of the trade or part of them were carried on and fell to be treated as a separate trade by virtue of s. 17 (3) and, if so, whether such separate trade was permanently discontinued on Mar. 14, 1955.

The taxpayer company contended: (a) that the trade of the subsidiary company was permanently discontinued on Dec. 30, 1954; (b) that the taxpayer company carried on the activities of the subsidiary company after Dec. 30, 1954, and such activities accordingly fell to be treated as a separate trade by virtue of s. 17 (3) of the Finance Act, 1954, and such separate trade was discontinued on Mar. 14, 1955; (c) that if, on Dec. 30, 1954, there was a change in the persons carrying on the subsidiary company's former trade within the meaning of s. 17 (1) of the Finance Act, 1954, such trade was permanently discontinued on Mar. 14, 1955, when the second of the two ships was sold. The Crown contended: (i) that the trade of the subsidiary company was not permanently discontinued on Dec. 30, 1954, or on any subsequent date, but was carried on thereafter by the taxpayer company as part of its own trade; (ii) alternatively, that, if s. 17 (3) of the Act of 1954 applied to the transactions on Dec. 30, 1954, neither the activities of the subsidiary company's trade nor any part of them carried on by the taxpayer company thereafter as part of its own trade were permanently discontinued in the year ended Apr. 5, 1955; (iii) in the further alternative, that, if the trade or activities or any part of them were permanently discontinued after they became part of the taxpayer company's trade, s. 130 (1) of the Income Tax Act, 1952, did not apply because what was then discontinued was only part of a trade.

The commissioners held that there was a transfer of the subsidiary company's whole trade to the taxpayer on Dec. 30, 1954, and the case fell within s. 17 (1) of the Finance Act, 1954, that the taxpayer company thereafter carried on one trade, a shipping trade, which was a merger of the trade which it had previously carried on with the trade previously carried on by the subsidiary company, so that there was one business only, i.e., that of the person carrying it on. No trade was permanently discontinued on the sale of the ships to outsiders, nor did the trade pass to those outsiders. The taxpayer company appealed to the High Court by way of Case Stated.

F. N. Bucher, Q.C., and *P. M. B. Rowland* for the taxpayer company.
Hilary Magnus, Q.C., and *A. S. Orr* for the Crown.

DANCKWERTS, J.: This is an appeal by a ship-owning company, the taxpayer company, against a decision of the Special Commissioners. The taxpayer company had a subsidiary company which owned two ships, the Avisvale and the Avismoat, and at the end of December, 1954, it was decided for convenience that the ownership of those ships and the trade connected therewith should be taken over by the taxpayer company. The two companies had the same chairman, a Mr. Purvis, and it was his company, the Purvis Shipping Co., Ltd., which was the manager of all the ships belonging to both the taxpayer company and the subsidiary company; and it was through that management company, as is very often the case in the shipping trade, that the two companies operated. The ships were taken over on Dec. 30, 1954, and it has been found by the commissioners that that created a succession to the subsidiary company's trade.

The two ships were coal burners and, therefore, less economical to run and less attractive for the personnel of the ships; and it had really been decided before by these companies, to which as I said the chairman was common, that steps were to be taken to replace these two ships by diesel ships. With that intention, in February, 1955, the Avisvale was disposed of by sale to a foreign company, and on Mar. 14, 1955, the remaining ship, the Avismoat, was disposed of to another foreign company. Subsequently three diesel ships were obtained, one of which was to replace one of the taxpayer company's ships. A B

The question which arises is whether, when those two ships which formerly belonged to the subsidiary company were sold, there was a permanent discontinuance of the trade which had formerly been the trade of the subsidiary company? The matter involves s. 19 of the Finance Act, 1953, and s. 17 of the Finance Act, 1954, and I can only say that the terms of those statutory provisions are to me a terrifying maze. I propose to get myself out of some of my difficulties, at any rate, by not involving myself in the wording of the sections at all. Counsel for the Crown invited me to hold that this was a very simple case, and I think that I can make it more simple so far as I am concerned by not reading the sections or considering their exact terms in any way. It seems to me perfectly clear from the arguments which have been addressed to me that, if I can reach a conclusion on what is the proper legal result of the sale of the two ships in 1955, the rest will merely be the intelligent application of those sections which the parties and their legal advisers are perfectly competent to do for themselves. So now I propose to confine myself to the facts and the findings of the commissioners. These sections undoubtedly involve a certain amount of reality, but they also involve a great deal of artificial consideration. C D E

The conception is that, when the question is whether there has been a succession or not, there may be a merger whereby the trade may disappear, or there may be a succession, as the commissioners have found, in which case, though the trade was carried on by the one company and for practical purposes—and therefore reality, I suppose—as one trade, artificially it is considered for the purposes of the statutory provisions to be a continuing trade, though carried on by the same person as the other trade. F

For the purposes of this appeal, it is common ground that the finding of the commissioners should be accepted that on Dec. 30, 1954, there was a succession. In order that there should be a succession, it seems to be a necessary hypothesis that the trade so acquired continues thereafter as a separate trade. Consequently, we have to treat the position as being that, after the taxpayer company acquired the two ships from the subsidiary company, the taxpayer company had one trade consisting of the exploiting of its own ships, which it originally had, and the other trade, which had ceased beyond the exploiting of the two ships, which it acquired from the subsidiary company. G

The two ships were replaced, as we know. They were all chartered to the same company and, when the new ships were acquired and the two old ships were sold, the charterers on time charter released the ships which were sold and in return they took a time charter of the diesel ships which had been acquired. In those circumstances, what was the effect of the disposal by the taxpayer company of the two ships which had formerly belonged to the subsidiary company? H

Certain matters found by the commissioners seem to be of importance. They have found there is no goodwill attaching to a tramp ship, as these were, as such, because apparently it is only when a ship is running on a regular run that any goodwill attaches to it. In the case of a tramp ship, it appears that there is no goodwill at all. Consequently, when the assets of the subsidiary company were acquired, all the taxpayer company really acquired were the two ships, without any goodwill. It is quite true the two ships were subject to the time charter to another company, which was common to both these companies, and no doubt the taxpayer company thereby did acquire the advantages and become subject I

A no doubt to the liabilities of the time charter so far as they attached to those two ships.

It is contended on behalf of the Crown and was found by the commissioners that the result of the sale of the two ships was not a permanent discontinuance of the trade of the taxpayer company. I find it impossible to support that conclusion. I do not think it is a matter which is at all easy, but it seems to me that, B when the two ships were sold, the business disappeared which had been acquired from the subsidiary company, i.e., the exploitation of those two ships for profit through the medium of the managing company, Purvis Shipping Co. It came to an end, and therefore I reach the conclusion that there was a permanent discontinuance of the trade formerly carried on by the subsidiary company, with the consequences which these sections will provide.

C *Appeal allowed.*

Solicitors: *Clifford-Turner & Co.* (for the taxpayer company); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

D

E

PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

F *Divorce—Practice—Service—Petition—Adultery charged with infant girl under sixteen years of age—Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 9 (1), *r.* 17 (4).

The President has approved the following Practice Note:

Where a petition or answer contains a charge of adultery by a husband with G an infant girl under sixteen years of age, application should be made to a registrar under r. 9 (1) or r. 17 (4) of the Matrimonial Causes Rules, 1957* for directions whether the infant should be served with the petition or answer.

B. LONG,
Senior Registrar.

Dec. 15, 1960.

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* For the Matrimonial Causes Rules, 1957, r. 9 (1) and r. 17 (4), see 10 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 223, 228.

K. *v.* K.

[Probate, Divorce and Admiralty Division (Cairns, J.), December 2, 1960.]

Husband and Wife—Maintenance—Agreement—Variation by court—" Change in the circumstances in the light of which any financial arrangements . . . were made "—Realisation of expectation held at time of agreement—Whether change in circumstances—Maintenance Agreements Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 35), *s.* 1 (3) (*a*).

The parties were married in 1927 and in 1952 the husband and the wife entered into a written agreement whereby the husband agreed to pay a fixed annual sum to the wife for her maintenance. At the date of the agreement the husband was forty-nine and the wife fifty-six years of age. The wife had suffered for some years from osteo-arthritis. She was not then in employment but it was contemplated that she might undertake voluntary work. The husband's income had always been liable to severe fluctuation and, although he had offered to pay to the wife a third of his gross income each year, she preferred to receive under the agreement a fixed annual sum which was agreed at £750 less tax. In 1960 the wife applied under the Maintenance Agreements Act, 1957, s. 1 (3)*, for the alteration of the financial terms of the agreement by reason of " a change in the circumstances in the light of which any financial arrangements contained in the agreement were made." At the date of her application the wife was in paid employment, but her osteo-arthritis had developed, her expenses amounted to £700 a year, and she expected soon by reason of her age and disability to have to cease employment. The husband's income had substantially increased and, had the wife agreed in 1952 to accept a third of his gross income, she would between 1952 and 1960 have received more than £750 in every year except one and the average would have been nearly £1,600 a year. The husband contended that since the matters now relied on by the wife had been in the contemplation of the parties at the date of the agreement, there was no ground for any alteration.

Held: there was " a change in the circumstances in the light of which any financial arrangements contained in the agreement were made ", within s. 1 (3) (a) of the Maintenance Agreements Act, 1957, when an expectation held at the time of the agreement was realised; accordingly the increase in the husband's earnings and the development of the wife's disability were both changes in circumstances by reason of which there should be some alteration of the financial terms of the agreement, but what that alteration should be would be referred to the registrar and in deciding it the wife's initial expression of preference for a fixed income, rather than a share of a fluctuating one, was a factor which should be taken into consideration.

[As to the power of the court to vary a maintenance agreement on the ground of a change of circumstances, see 19 Halsbury's Laws (3rd Edn.) 889, para. 1470, note (p); and for cases on the subject, see 3rd Digest Supp.

For the Maintenance Agreements Act, 1957, s. 1 (3), see 37 Halsbury's Statutes (2nd Edn.) 495.]

Summons adjourned into open court.

In this case the wife applied under s. 1 (3) of the Maintenance Agreements Act, 1957, for an order varying the terms of an agreement made between herself and the husband on June 4, 1952. The application came before Mr. Registrar Townley Millers who referred to the judge in chambers, pursuant to the Matrimonial Causes (Amendment) Rules, 1957, r. 58a, para. (9)†, the question whether or not the case came within s. 1 (3) (a) of the Act of 1957. Having heard argument in chambers, CAIRNS, J., gave judgment in open court.

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* The terms of s. 1 (3) so far as relevant are printed at p. 131, letter B, post.

† S.I. 1958 No. 2082.

Victor Williams for the wife.

S. Terrell for the husband.

Cur. adv. vult.

Dec. 2. **CAIRNS, J.,** read the following judgment: The relevant words of s. 1 (3) of the Maintenance Agreements Act, 1957, are these:

> " Where an agreement to which this section applies is for the time being subsisting . . . and on an application by either party the High Court . . . is satisfied either—(a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made . . . the agreement should be altered so as to make different . . . financial arrangements . . . the court may by order make such alterations in the agreement . . . as may appear to the court to be just having regard to all the circumstances . . ."

In this case it is common ground that an agreement to which the section applies is subsisting between the parties, who are husband and wife, that the agreement contains financial arrangements and that circumstances have changed in certain respects since the agreement was made. The issue is whether these changes constitute a change in the circumstances in the light of which the financial arrangements were made and this raises the question of the construction to be placed on these words in the Act. The real contest is whether a change contemplated at the time of the agreement gives the court jurisdiction to alter the agreement.

The following facts are established by affidavit evidence. The parties were married on June 24, 1927. There are two children, both grown up and not concerned with this agreement. The agreement was made on June 4, 1952, and provides that the husband will pay to the wife as from Jan. 1, 1952, a monthly sum of £62 10s. less tax for the joint lives of the parties. The husband is a stockbroker who in 1952 was aged forty-nine and the wife was then aged fifty-six and had for some years suffered from osteo-arthritis. She was not then, I think, doing any paid work. The husband's income as a stockbroker has always been liable to severe fluctuation. For this reason, when negotiating the terms of the agreement he offered to pay the wife a third of his gross income each year. She refused and said she would prefer a fixed income. The husband pointed out that in the normal course his average earnings would increase as time went on and that his offer would therefore prove more favourable in the long run but the wife (who was separately represented by a solicitor) insisted that she would prefer a fixed income of £750 less tax and this was agreed. The husband states, and the wife does not deny, that £750 was more than a third of his average annual income during the previous three years. He is here apparently referring to the last three years for which accounts were available (that is to say up to the year 1950-51) when, as appears from the figures which I am about to mention, one third of his average income was £666. For the three years up to 1951-52 the corresponding figure was £844. The husband's gross income at the material times was as follows: 1948-49 £1,451, 1949-50 £1,764, 1950-51 £2,780, 1951-52 £3,059, 1952-53 £2,337, 1953-54 £4,288, 1954-55 £7,594, 1955-56 £5,007, 1956-57 £4,334, 1957-58 £2,100, 1958-59 £9,655. The average yearly income for the first three years of this period works out at £1,998 and the last three years at £5,363.

Both parties have a little capital but the amounts are modest, almost all the husband's capital is invested in his business and there is no evidence of any change in either parties' capital holdings. The husband has two endowment policies charged to secure a loan in excess of the total of their present surrender values. The husband has made some gifts to the wife amounting at least to some hundreds of pounds over the last eight years and has taken out an endowment policy for £2,000 in her favour on which he pays annual premiums of £124 11s. 8d. A

At the time of the agreement it was contemplated that the wife would undertake some work, probably voluntary, for the sake of interest and companionship. She is in fact employed as a book-keeper at £6 15s. a week, but her osteo-arthritis has developed, she is only able to keep mobile by regular fortnightly treatment B and she fears that she may soon have to give up her work by reason of her increasing age and her disability. Her total expenditure now amounts to about £700 and as she now suffers from attacks of dizziness as well as her other disabilities she wishes to live in a centrally heated flat with a companion. When the parties parted there were no grounds on which the marriage could have been dissolved and it was agreed that the responsibility for the failure of the marriage C was equally shared. Since 1954 the husband has been living with a woman whom he wishes to marry. He has repeatedly asked his wife to divorce him but she has refused.

It is contended for the wife that the circumstances have changed mainly because of the great increase in the husband's average income and because of the development of the wife's osteo-arthritis. It is also said that the difference D in ages (the wife being seven years older than the husband) becomes more serious as time passes. It is conceded that the development of the osteo-arthritis was to be expected but it was argued that this must be considered in conjunction with the increase in the husband's income to an extent not expected.

For the husband it is contended that the words

> " change in the circumstances in the light of which any financial arrangements contained in the agreement were made " E

mean an uncontemplated change of circumstances. It is argued that some of the circumstances must change (for instance, the parties get older) and others are fully expected to change (for example, the osteo-arthritis and the husband's income) and the parties must be deemed to have taken such matters into account F —particularly where, as here, a prospective increase of income was actually mentioned in the course of negotiations. It is suggested that the wife, having deliberately chosen a fixed income rather than a fluctuating (and probably in the long run increasing) one cannot now go back on her bargain. It is said that the burden of proof is on the applicant to show that any particular change was not contemplated, and it is pointed out that she has given no evidence G that she did not expect the osteo-arthritis to get worse or that her husband's income has increased more than she thought likely.

It is further argued for the husband that the word " circumstances " must refer to the past, the present and the future; that anything known or expected at the time of the agreement is part of the circumstances in the light of which the agreement is made, and that a change of circumstances occurs only if something unexpected happens. H Thus, if the husband were to suffer a serious accident or to win a large dividend from a football pool, this would be a relevant change of circumstances. So also it would be a relevant change if it were discovered after the agreement that a substantial legacy had been left to one of the parties by a will made before the agreement. On the other hand, if a party suffers natural decay of faculties with increasing age, or achieves increments of salary in an I employment where such increments are normal, or reaches retiring age and (not being in pensionable employment) has no income, in those cases, it is contended, there is no relevant change of circumstances because the agreement was made in the light of the knowledge that those things were likely to happen.

In my opinion the words of the Act are not apt to limit a change of circumstances to an unexpected change. To start with, the word " circumstances ", as a mere matter of English usage, relates to the present and not to the past or the future. At any moment of time, however, the circumstances include the effects of those things which have happened in the past and also include the state of mind of the parties, their knowledge of the past and their expectations for the future. The effect of the words " in the light of " is to direct the attention of the court to those circumstances which are proved to have been, or may reasonably have been inferred to have been, in the minds of the parties when the agreement was made and to have weighed with them in agreeing to the terms to which they did agree. There is a change of circumstances when an expectation is realised. In 1952 there was an expectation that the husband would have a fluctuating but on the whole increasing income, with a starting point of about £2,000 a year average. In 1960 there is knowledge of an actual recent income averaging about £5,000 a year and probably an expectation of a future income fluctuating round about that figure. In my opinion that is a change in the circumstances in the light of which the agreement was made.

I take a similar view about the osteo-arthritis. In 1952 the wife had the expectation of increasing disability from osteo-arthritis. It is irrelevant for me to consider what the position would be if the exact rate of development could be known but obviously this is not so. In 1952 she could not know whether or not in 1960 she would be near the point of being unable to work. As she does now. My opinion is not affected by the fact that the wife chose a fixed income in the knowledge that the husband's income would probably fluctuate. This, it seems to me, is a circumstance that becomes relevant at a later stage of the inquiry. I interpret the registrar's reference to me not as being confined to the question whether there has been a change in the circumstances in the light of which the agreement was made but as including the question whether by reason of that change the financial arrangements should be altered. It is difficult to draw a clear line between deciding whether the agreement should be altered and deciding what alteration is just in all the circumstances, and this last question is certainly one which is reserved to the registrar. I refer to it only because I think that it is necessary to do so in order to say whether the arrangements should be altered at all.

If any alteration is to be made it must be such as appears to the court to be just in all the circumstances and here I think that the circumstances to be considered are those at the time when the agreement was made—sometimes, perhaps, earlier but I can see no reason for going back earlier in the present case—and at all times since. At this stage it is in my view a relevant circumstance that the wife chose a fixed income in preference to a fluctuating one. It is also relevant to consider how the choice worked out for her. If in some years she would have had a far lower income by choosing one-third and in that way might have done well out of the bargain she had made I think it might be unjust that she should be given an increase now. But in fact she would, under the alternative which she rejected, have got over £750 in every year except one (when she would have had £700) and her average would have been nearly £1,600 a year. All these figures are subject to tax. In my opinion it is not the policy of this Act that a wife who has made, with her eyes open, a bargain that has turned out to be a bad bargain, must suffer for it till the end of her life. On the other hand, it may well be that it is not just that she should now be awarded so high a figure as she would have been enjoying today if she had chosen differently in 1952.

There is no need for me to consider the osteo-arthritis or any other factors that might tell in the wife's favour. In my opinon the great increase in the husband's earnings is such as to make some alteration in the financial arrangements just, and in forming this view I have taken into account that the husband has shown some generosity in making presents to his wife and taking out an endowment policy for her. I, therefore, decide that by reason of changes in the circumstances in the light of which the agreement was made the agreement

should be altered and I refer back to the registrar the ascertainment of what A
alteration is just in all the circumstances.

Order accordingly.

Solicitors: *W. Timothy Donovan* (for the wife); *Lewis W. Taylor & Co.* (for the husband).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*] B

INLAND REVENUE COMMISSIONERS *v.* R. WOOLF & CO. (RUBBER), LTD.

C

[Chancery Division (Danckwerts, J.), November 8, 9, 1960.]

Surtax—Undistributed income—" Member "—Debenture stockholder—Person with " interest " in the capital or profits or income—Whether income apportionable among debenture stockholders—If so more than half the income apportionable among not more than five of debenture stockholders—Control by not more than five persons—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 D
Eliz. 2 *c.* 10), *s.* 245, *s.* 255 (1), (2), *s.* 256 (2).

The share capital of a new company formed to take over the assets of an old company (capital £11,500) was £10,000 comprising ten thousand £1 shares, one thousand of which only were issued to seventeen shareholders, the holdings being so arranged that no five shareholders at any one time held more than forty-nine per cent. of its share capital. The new company E
purchased the shares of the old company from the shareholders for £600,000, which was satisfied by the issue of £200,000 six per cent. first mortgage debenture stock and £400,000 six per cent. second mortgage debenture stock, both secured by a specific charge on freehold assets of the company and by a floating charge on all its other assets (including income), with provision for redemption at a premium. The new company purchased F
from the old company the undertaking and assets of the old company for £600,000 in the form of an unsecured debt payable on demand. Considerably more than half the debenture stock of the new company was held by five persons only. The Special Commissioners of Income Tax made a surtax direction on the new company under s. 245 of the Income Tax Act, 1952.

Held: the surtax direction was properly made because— G

(i) by reason of their fixed and floating charges on the new company's freehold property and other assets (including income) the debenture stockholders were persons " having a share or interest in the capital or profits or income of the company " and so were members of the company as defined in s. 255 (2) of the Income Tax Act, 1952, in respect of whom a surtax direction could be made under s. 245; and H

(ii) it was possible for the Special Commissioners to make apportionments of income to those " members " (i.e., including debenture stockholders) for whose benefit, in relation to avoidance of surtax, distribution of income had been withheld, such apportionments being of amounts appropriate to their interests; and the new company was, therefore, one of which " more than half the income . . . could be apportioned . . . among I
not more than five persons " within s. 256 (2), and so was one deemed to be under the control of not more than five persons to which s. 245 applied by virtue of s. 256 (1).

Inland Revenue Comrs. v. *Tring Investments, Ltd.* ([1939] 1 All E.R. 148; [1939] 2 All E.R. 105) applied.

Dictum of Lord Russell of Killowen in *F. P. H. Finance Trust, Ltd.* v. *Inland Revenue Comrs.* (*No. 2*) ([1945] 1 All E.R. at p. 496) applied.

Appeal allowed.

[As to members of a company to whom income can be apportioned on a surtax direction, see 20 Halsbury's Laws (3rd Edn.) 558, para. 1085; and for cases on the subject, see 28 Digest (Repl.) 358, 359, *1580-1586*.

For the Income Tax Act, 1952, s. 245, s. 255 (1), (2), s. 256 (2), see 31 Halsbury's Statutes (2nd Edn.) 232, 243, 244.]

Cases referred to:

Commercial Securities, Ltd. v. *Inland Revenue Comrs.*, (1953), 35 Tax Cas. 15.

F. P. H. Finance Trust, Ltd. v. *Inland Revenue Comrs. (No. 2)*, [1945] 1 All E.R. 492; [1946] A.C. 38; 114 L.J.K.B. 203; 172 L.T. 278; 28 Tax Cas. 209; 28 Digest (Repl.) 371, *1624*.

Inland Revenue Comrs. v. *Tring Investments, Ltd., Inland Revenue Comrs.* v. *Peverell Trust, Ltd.*, [1939] 1 All E.R. 148; *affd.* C.A., [1939] 2 All E.R. 105; [1939] 2 K.B. 503; 108 L.J.K.B. 363; 160 L.T. 343; 22 Tax Cas. 679; 28 Digest (Repl.) 358, *1582*.

Case Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax against directions made on it under s. 245 of the Income Tax Act, 1952, for each of the years ended Dec. 31, 1952, 1953 and 1954 respectively. The question for determination was whether the company was a company to which s. 245 applied, as being a company which was under the control of not more than five persons within the meaning of s. 256 (2) of the Act. The company was referred to by the commissioners as the " new " company to distinguish it from the " old " company which had previously had the same name.

The new company contended that: (i) the holders of first and second mortgage debenture stock of the company were not persons having a share or interest in the capital or profits or income of the company and, accordingly, were not members of the company within s. 255 (2); and (ii) if the debenture stockholders were to be regarded as members of the company, more than half the actual income of the company could not be apportioned to not more than five persons (including the stockholders) under the provisions of s. 248 of the Act and, accordingly, the company should not be deemed to be under the control of not more than five persons within the meaning of s. 256 (2); and in any event the company was not one to which s. 245 applied and the directions appealed against should be discharged.

The Crown contended that: (i) the new company was a family company the debenture stockholders in which had an interest in the capital of the company and were therefore members of the company within the meaning of s. 255 (2); and (ii) the debenture stockholders had interests in the capital and in the income of the company sufficient to warrant the apportionment to them of substantially the whole of the actual income of the company, and the company should be deemed to be under the control of not more than five persons within the meaning of s. 256 (2); and that in any event the company was one to which s. 245 applied.

The commissioners held on the first point that the debenture stockholders had no share or interest in the capital or profits or income of the company and were not members of it. On the second point, they found that more than half the income of the company could be apportioned among not more than five persons only if a substantial portion of the company's income could be apportioned to the debenture stockholders, and they held that the debenture stockholders had no real interest in the company's income since it was the ordinary shareholders who were entitled to dividends declared out of the income and therefore the company was not deemed to be under the control of not more than five persons on the ground that more than half the income could be apportioned among not more than five persons under s. 256 (2) (c). The Crown appealed by way of Case Stated to the High Court.

F. N. Bucher, Q.C., E. Blanshard Stamp and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., and *D. C. Miller* for the company.

DANCKWERTS, J.: This is an appeal against a decision of the Special Commissioners of Income Tax. The question is whether an apportionment of the respondent company's undistributed income can be made by the commissioners under the income tax provisions designed to prevent the avoidance of liability for surtax. The commissioners in fact decided against the Crown and the appeal to this court is therefore by the Inland Revenue.

For many years a company, which the commissioners called the old company, had carried on the trade of rubber manufacturers and waste rubber dealing under the name of R. Woolf & Co. (Rubber), Ltd.

> "At all material times the capital of the old company was 11,500 ordinary shares of £1 each. The old company was one to which s. 21 of the Finance Act, 1922, applied."

That was one of the sections with which this legislation was initiated, and it corresponds to s. 245 of the Income Tax Act, 1952.

> "In February, 1950, Mr. Saul Woolf one of the principal shareholders in the old company died. With a view to making immediate arrangements for the payment of death duties on his estate and also to enable the surviving shareholders in the old company to start making provision for future liabilities to death duties in respect of their own estates, the transactions set out in the next paragraph were entered into. The object of the transactions was to provide for payment of death duties in such a way that the old company's resources would not be depleted by directions made under s. 21 of the Finance Act, 1922, and in such a way that the new company's undertaking would not be imperilled by claims for estate duty made upon it as an accountable person under s. 46, s. 58 and s. 54 of the Finance Act, 1940.
>
> "Full particulars of the objects of the transactions are set out in the letter of Dec. 15, 1953, exhibit 9.
>
> "Just before the transactions hereinafter referred to the shareholdings in the old company were:—

"Executors of Saul Woolf, deceased	2,631
Raphael Woolf	2,631
Judah Woolf	2,631
Solomon Benjamin Woolf	131
Eleanor Anne Woolf (wife of S. B. Woolf)	2,500
R. J. and S. B. Woolf jointly	976",

making the total of 11,500. Those persons were all, I think, related to each other in some way or other.

> "The new company was incorporated, under the name of Rommor (Rubber), Ltd., on Mar. 5, 1951, with a nominal capital of £10,000, divided into ten thousand ordinary shares of £1 each. Of these, one thousand fully paid up shares were issued (by nomination of the brothers Woolf) as to fifty to Mrs. E. A. Woolf and as to the balance to the trustees of sixteen separate family trusts as shown in exhibit 5. These shareholdings were so arranged to ensure that no five shareholders at any time held more than forty-nine per centum of the issued share capital of the new company.
>
> "On Oct. 18, 1951, the shareholders in the old company sold their shares in that company to the new company for the sum of £600,000, which was satisfied by the issue of £200,000 six per cent. first mortgage debenture stock and £400,000 six per cent. second mortgage debenture stock. On Oct. 19, 1951, the new company purchased from the old company the whole of the latter's undertaking and assets (subject to the then existing liabilities) for the sum of £600,000, in the form of an unsecured debt payable on demand. On Oct. 19, 1951, by special resolutions, the name of the new company was changed from Rommor (Rubber), Ltd. to R. Woolf & Co. (Rubber), Ltd., and

> the name of the old company from R. Woolf & Co. (Rubber), Ltd., to Rommor (Rubber), Ltd.
>
> "The trust deed for the £200,000 six per cent. first mortgage debenture stock (exhibit 2) provided inter alia for the payment of interest at six per cent. per annum on the stock outstanding and for the issue of stock certificates to every holder of stock. The stock was secured by a specific charge on freehold properties owned by the new company and also by a floating charge on its general assets."

The clause which confers that last-mentioned charge is cl. 7 of the trust deed:

> "7. The company hereby charges in favour of the trustees all its undertaking property and assets for the time being both present and future (other than the premises hereinbefore specifically charged or other the specifically mortgaged premises for the time being)",

those, of course, being land, and so on,

> "including its uncalled capital with the payment of the stock and the interest and premium thereon and all other moneys intended to be hereby secured. The charge created by this clause shall be a first floating charge and accordingly shall in no way hinder or prevent the company (until the security hereby constituted shall have become enforceable and the trustees shall have determined or become bound to enforce the same) from paying dividends out of profits or from selling leasing or otherwise disposing of or dealing with such assets or any part thereof in the ordinary course of its business and for the purposes of carrying on the same",

except that the company would not be allowed to create further securities which should rank ahead of the charge. Consequently, on these terms the charge covered all property of the company, and, although the company was at liberty to carry on its business and pay dividends in the ordinary way out of its profits, after the charge became enforceable by the appropriate proceedings or, of course, if the company was wound up, then the charge could be enforced on and paid, both as to principal and interest, out of all the company's assets.

Under the terms of the trust deed the new company was bound to pay to the trustees thereof an annual sum of £13,125 as and by way of a fund for redeeming the stock. The new company had power to redeem the stock or any part of it at £105 per cent. In so far as it had not been previously redeemed the stock was to be repaid at £105 per cent. on Dec. 15, 1967. The trust deed for the £400,000 second mortgage debenture stock made similar provisions except that the specific and floating charges were second charges on the new company's freehold properties and general assets respectively: and that the redemption of this stock was postponed until after the first mortgage debenture stock had been redeemed. It appears that the whole of the first debenture stock was redeemed in the three years ended Dec. 31, 1953, and that a start was made on redeeming the second mortgage debenture stock in the year ended Dec. 31, 1954.

The major part of the first mortgage debenture stock was redeemed in the year ended Dec. 31, 1953, in which year the new company sold freehold properties standing in its balance sheet at £178,000. After selling the said property the new company took a lease of the property at £20,000 per annum—a form of transaction which is not very uncommon nowadays. As from Oct. 19, 1951, when it acquired the assets of the old company, the new company carried on the trade previously carried on by the former. The directors of the old company at the time of the change, viz., Messrs. R. J. and S. B. Woolf, were appointed directors of the new company. The interest paid to the holders of both stocks in the material years was deducted in arriving at the actual income of the new company for those years as shown in an exhibit to the Case which sets out the details of computation of that income. It is sufficient, I think, if I say that, after deducting the interest which is mentioned, there was, for the first of the years referred to in the exhibit, a balance of some £114,000.

The position as a result of these arrangements was that the former shareholders of the old company no longer held any shares in the old company at all. Instead of that, five of them between them held all the first debenture and the second debenture stock of the new company, except for some of the second debenture stock which was held by some of the persons who were not shareholders in the old company, viz., a Mrs. O. M. Woolf under R. Woolf Settlement, Mrs. M. M. Woolf under J. Woolf Settlement and Mrs. Woolf's Settlement, and Mrs. E. A. Woolf held some, too. As a result of the changes, five persons held considerably more than half of the whole of the first and second debenture stocks. The shares of the new company, as I have already pointed out, were held as to fifty by Mrs. E. A. Woolf and the balance of 950 by the sixteen settlements which I have mentioned; thus, if the holdings of the debenture stock were material for the purposes of the section which I am about to consider, then the new company had not more than five persons who were entitled to more than a half of the assets of the new company, or so it is argued.

The sections are all now contained in Ch. III of Part 9 of the Income Tax Act, 1952. Section 245 provides:

> " With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

That section states what the purpose of the legislation is and also what the commissioners may do, which is to give directions which will require the income of the year or period to be treated as the income of the individual members.

Nobody with any knowledge of the law, and of company law in particular, could conceive that debenture stockholders or other creditors of any kind were members of a company, but it will be seen from the following sections that a very artificial meaning has been given to the word " member ", which extends what would be the natural meaning to a very large extent. Section 246 (1) contains the test of the adequacy of distributing the income, and provides:

> " In determining under the last preceding section whether any company has or has not made such a distribution of its actual income as is therein mentioned, the Special Commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

I do not think that that is a matter with which I am very much concerned for the purposes of this case. Subsection (2) provides:

> " For the purposes of the said last preceding section, any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company's business or to such

> other requirements as may be necessary or advisable for the maintenance and development of that business, that is to say . . ."

Then are brought in a number of matters which artificially swell the amount and I should refer to sub-paras. (ii), (iii) and (iv) of para. (a).

> "(ii) in redemption or repayment of any share or loan capital or debt (including any premium on such share or loan capital or debt) issued or incurred in or towards payment for any such business, undertaking or property, or issued or incurred for the purpose of raising money applied or to be applied in or towards payment therefor; or (iii) in meeting any obligations of the company in respect of the acquisition of any such business, undertaking or property; or (iv) in redemption or repayment of any share or loan capital or debt (including any premium on such share or loan capital or debt) issued or incurred otherwise than for adequate consideration."

Section 248 (1) provides:

> "Where a direction has been given under s. 245 of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members."

I stress the words "in accordance with the respective interests of the members".

Section 249 (1) provides:

> "Where an apportionment has been made under this Chapter of the income of a company, surtax shall be assessed and charged under this Chapter in respect of the sum so apportioned after deducting in the case of each member any amount which has been distributed to him by the company in respect of the year or period in question in such manner that the amount distributed falls to be included in the statement of total income to be made by that member for the purposes of surtax."

That really is machinery. Section 249 then continues:

> "(2) The income apportioned to a member of a company so far as assessable and chargeable to surtax under this Chapter—(a) shall be deemed for the purposes of surtax to represent income from his interest in the company for the year or other period in question; and (b) shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are hereby authorised to require, and be deemed to be the highest part of that income . . .
>
> "(3) Any surtax chargeable under this Chapter in respect of the amount of the income of a company apportioned to any member of the company shall be assessed upon that member in the name of the company and, subject as hereinafter provided, shall be payable by the company, and all the provisions of this Act, and any regulations made thereunder relating to surtax assessments and the collection and recovery of surtax shall, with any necessary modification, apply to surtax assessments and to the collection and recovery of surtax charged under this Chapter."

That is a sensible provision because ex hypothesi, the income not having been distributed, it is the company that has got the income and not the "member".

Section 250 (1) provides:

> "The Special Commissioners may at any time by notice in writing require any company which appears to them to be a company to which s. 245 of this Act applies to furnish them with—(a) a statement of the actual income of the company from all sources, together with a copy of the company's accounts for any year or other period for which the company's accounts have been made up and such particulars as the commissioners may reasonably require as to the income of the company and the manner

> in which the income has been dealt with; and (b) a statement for the same period of the names and addresses and particulars of the respective interests of all members of the company." A

That is to enable the commissioners to proceed.

Section 255 (1) reads:

> "In this Chapter, 'company' includes any body corporate incorporated in any part of the United Kingdom under any enactment", B

then there are certain references to dissolution and winding-up, which I do not think matter, but sub-s. (2) is of the greatest importance. It provides:

> "In this Chapter, 'member' in relation to any company, shall include any person having a share or interest in the capital or profits or income of the company." C

That is one of the important provisions which I have to construe or apply in the course of this case.

Subsection (3) provides:

> "In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period." D

That was really intended to apply the provisions of computation of income for taxation purposes modified for the purposes of a different period from which it is to be reckoned under the provisions of this Act. Then s. 256 provides: E

> "(1) Section 245 of this Act shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested.
>
> "(2) For the purposes of this section, a company shall be deemed to be under the control of not more than five persons . . . (c) if—(i) on the assumption that the company is a company to which the said s. 245 applies; or (ii) on the assumption that the company and any other company or companies are companies to which the said s. 245 applies, more than half the income of the company (including any income which has been apportioned to it, or could on either of those assumptions be apportioned to it, for the purposes of this Chapter) could be apportioned for those purposes among not more than five persons." F G

Then there is a provision which I do not think adds very much to it, but I will read it:

> "In ascertaining under para. (c) of this subsection whether or not income could be apportioned among not more than five persons, account shall, in cases where an original apportionment and any sub-apportionment are involved, be taken only of persons to whom income could be finally apportioned as the result of the whole process of original apportionment and sub-apportionment." H

I should read s. 256 (3) which is as follows:

> "In determining for the purposes of this section whether a company is or is not under the control of not more than five persons, persons who are relatives of one another, persons who are nominees of any other person together with that other person, persons in partnership and persons interested in any shares or obligations of the company which are subject to any trust or are part of the estate of a deceased person shall respectively be treated as a single person." I

Then there are definitions of "relative" and provisions as to who should be deemed to be a nominee, which I do not think I need read.

Section 257 and s. 258 are not really relevant to the case that I have to consider but are material in the case of possible arguments that might be adduced by comparing or contrasting or otherwise considering the provisions of these sections. Section 257 describes what is meant by an "investment company", and the present company, of course, is not an investment company but a trading company. Section 258 deals with what is to happen in the case of an investment company and provides:

> "(1) For the purposes of s. 246 of this Act, the sums which are to be regarded as income available for distribution among the members of a company, and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business, shall, in the case of an investment company, include any sum expended or applied, or available to be expended or applied, out of the income of the company in or towards the redemption, repayment or discharge of any loan capital or debt (including any premium thereon) in respect of which any person is a loan creditor of the company.
>
> "(2) Without prejudice to the provisions of sub-ss. (2) and (3) of s. 256 of this Act (which relate to the cases where a company is to be treated as one to which s. 245 of this Act applies) an investment company shall be deemed for the purposes of the said s. 256 to be under the control of not more than five persons if any five or fewer persons would, if the company were wound up, be entitled as members or loan creditors of the company to receive more than half of the assets of the company which would be available for distribution to members and loan creditors; and the said s. 256 shall have effect as if, in para. (b) of sub-s. (3) thereof, the words 'this section', and, in the proviso to sub-s. (4) thereof, the references to para. (a), para. (b) or para. (c) of sub-s. (2) thereof, included references to this subsection.
>
> "(3) Where an investment company is deemed by virtue of sub-s. (2) of this section to be under the control of not more than five persons by reason that any five or fewer persons would, if the company were wound up, be entitled as loan creditors to receive more than half of the assets therein referred to (whether or not it would otherwise be deemed to be under such control)—(a) the definition of 'member' shall, for the purposes of this Chapter, be extended so as to include any loan creditor of the company; and (b) for the purposes of s. 248 (1) of this Act (which relates to the apportionment of income of the company) a loan creditor shall be deemed to have an interest in any income of the company to be apportioned under that subsection to the extent that that income, or assets representing it, has or have been expended or applied or is or are available to be expended or applied in redemption or repayment or discharge of the loan capital or debt (including any premium thereon) in respect of which he is a loan creditor . . .
>
> "(4) For the purposes of this section, 'loan creditor' means a creditor in respect of any debt incurred by the company—(a) for any money borrowed or capital assets acquired by the company; or (b) for any right to receive income created in favour of the company; or (c) for consideration the value of which to the company was (at the time when the debt was incurred) substantially less than the amount of the debt (including any premium thereon), or in respect of any redeemable loan capital issued by the company."

Then there is a proviso exonerating bankers from responsibility in this matter.

That, I think, concludes the sections which I have to read, and I cannot help making the observation that the whole of this bundle of sections really presents anybody with the task of dealing with the matter with very great difficulties. So long as one is concerned with legislation which deals with realities, it is possible to reason in a rational manner, but, when one comes to provisions which give artificial and unreal meanings to words which otherwise have an intelligible application, it becomes almost impossible to apply logic to the provisions, and A this case seems to be an outstanding example of that situation. I should add that, in regard to the last provision which I read concerning an investment company, it is obvious that the definition of " member " has been extended to include unsecured creditors, persons who, apart from artificial statutory provisions, are not conceived as having any interest at all as such in the assets of the company. B

The decision of the commissioners in the Case Stated is as follows:

> " The first question for our determination in these appeals is whether or not the debenture stockholders of the new company are to be considered members of the new company within the definition of member in s. 255 (2), Income Tax Act, 1952.
>
> " After considering the arguments addressed to us and all the authorities C to which we were referred we do not think that the debenture stockholders of the new company fall within the definition of member and we so hold. In our opinion they have no share or interest in the capital or profits or income of the new company. Whilst they receive the interest due on their loan to the new company and, in accordance with the terms of their loan, they are entitled to repayment of the capital money with a premium, we do not think that D their relationship to the new company is any more than that of loan creditors.
>
> " In arriving at our conclusion on this first question we have paid particular attention to the words of MACNAGHTEN, J. (1) '. . . I think the word " capital " there may cover not only share capital but also the pecuniary capital of a company, its capital assets.' We do not read those words as laying down that the word ' capital ' in s. 255 (2) is to be taken as synonymous E with capital assets simpliciter. In our view the whole phrase ' pecuniary capital of a company, its capital assets ' means the actual capital of a company in pecuniary terms viz. the assets of the company after deducting its liabilities as contrasted with its nominal issued share capital. If this be right then the debenture stockholders of the new company cannot be said to have any share or interest in the capital of that company." F

With all respect to the commissioners, I think they have allowed themselves to be misled by the words of MACNAGHTEN, J., in *Inland Revenue Comrs.* v. *Tring Investments, Ltd.* (2), in a different context, and I do not consider that the determination which they have made disposes of the matter at all. Let us go back to the definition of " member ", if that be the proper term to apply to it, in s. 255 (2). It is: G

> " In this Chapter, ' member ', in relation to any company, shall include any person having a share or interest in the capital or profits or income of the company."

Authorities to which I have been referred show that a wide meaning is to be given to the words " share or interest " in this statutory provision. It is plain H that it cannot be confined to a share in the share capital of the company, because that would require no such definition, because the member in the ordinary sense, i.e., a shareholder, has obviously got a share in the capital and profits and income of the company. It must have some wider meaning than that, and " interest " seems to me a word of very wide import indeed. It seems to me that where the commissioners have gone wrong in their decision is that they do not appear to I have given any force to the charge which was created under the debenture trust deed in the present case. The charge created a fixed charge on some assets of the company and a floating charge on all the other assets of the company, whether capital, profits or income. So far from the observations of MACNAGHTEN, J., in *Inland Revenue Comrs.* v. *Tring Investments, Ltd.* (2) in any way being contrary to that view, as I see it, they do in fact support the view which seems to be inescapable that, where the individual or company, whatever it may be, has a charge on property, he must be considered as having an interest in the property. I do not see how that conclusion can be avoided and, therefore, I find myself unable to agree with the decision of the commissioners on the first question to be considered.

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(1) *Inland Revenue Comrs.* v. *Tring Investments, Ltd.*, *Inland Revenue Comrs.* v. *Peverell Trust, Ltd.*, [1939] 1 All E.R. at p. 152; 22 Tax Cas. at p. 690; *affd.* C.A., [1939] 2 All E.R. 105.

(2) [1939] 1 All E.R. at p. 152; 22 Tax Cas. at p. 690.

In my view it is plain that the stockholders, through the trustee of the trust deed, have an interest in the assets of this company, and, as I see it, the assets must include the capital, profits and income; and under the definition contained in these sections, they are " members ". Therefore, the first question must be answered adversely to the company.

The other question is a rather more difficult one: whether the situation comes within the provisions of the sections in such a way that, to quote s. 256 (2) (c), which seems to be really the material provision,

> " more than half the income of the company . . . could be apportioned for those purposes among not more than five persons ",

which means, putting it shortly, whether income of the company could be apportioned to the stockholders in the present case. The commissioners say in regard to that point:

> " 2. If we are wrong in the conclusion set out in para. 1 above and the debenture stockholders are members of the new company there arises for decision the question whether that company shall be deemed to be under the control of not more than five persons under sub-s. (2) of s. 256 by virtue of sub-para. (c) thereof on the grounds that more than half the income of the company could be apportioned for the purposes of Ch. III among not more than five persons.
>
> " Such a position could arise only if a substantial portion of the new company's income could be apportioned to the debenture stockholders. In considering whether any of that income could be so apportioned we have applied the test laid down by LORD RUSSELL OF KILLOWEN in *F.P.H. Finance Trust, Ltd.* v. *Inland Revenue Comrs.* (*No. 2*) (3): 'Obviously everyone who falls within the extended definition of member is not necessarily to be included in the apportionment. In my opinion the commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (i) that they fall within the definition, and (ii) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions.'
>
> " On the assumption that the debenture stockholders are within the definition we have considered whether taking into account all their interests in the new company they have any real interest in the company's income. The interest payable on the debenture stock is deductible in computing the company's income and the holders of that stock cannot be said to have an interest in that income by reason of their entitlement to that interest. The sums advanced by the debenture stockholders are secured by charges on the new company's assets but these charges do not in our view give the holders any interest in the income of the company, particularly as we had no evidence that the charges were not fully secured."

That is the first time that the commissioners in their decision have mentioned the charges at all, and the observation whether or not the charges were fully secured seems to me to be irrelevant. The question is whether a charge confers any interest in the income, and it seems to me that, in dealing with this matter, the commissioners have continued to apply the assumption they have made to matters which were really ruled out on the basis of the assumption, i.e., they are still speaking as if the stockholders had no interest in the assets of the company. The assumption to be made, of course, is that, by reason of the stockholders having an interest in the capital or profits or income of the company, as I have held, they are " members " and, therefore, one has to assume for the second purpose on that hypothesis that they have got an interest, as I have indeed held.

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(3) [1945] 1 All E.R. at p. 497; 28 Tax Cas. at p. 246.

To continue to the end of the decision before I conclude my remarks:

> " We have borne in mind in this connexion the preamble to s. 245 and asked ourselves whether it could be said that the income of the new company could be withheld from distribution for the benefit of the debenture stockholders. We think not. The debenture stockholders have no real interest in the company's income. It is the ordinary shareholders of the company who are entitled to dividends declared out of that income and for whose benefit such income would be accumulated."

It seems to me indisputable that the charge conferred by the debenture trust deed extends not only to the capital but also to any income which the company possesses at any given moment for payment, not only of the interest payable yearly on the amount of the loan, but also of the principal sums secured when those should become payable, and, of course, the matter is further advanced in this respect by the fact that the company has a right to redeem at any time, and each year the sum of £13,125 was to be set aside towards a redemption fund. On any of the events which are conditions of the trust deed occurring, the trustees of the trust deed would then be in a position to enforce their security for immediate payment out of all the assets of the company of whatever kind they might be, and the same result would happen if at any time the company went into liquidation. On the other hand, any payments so received by the stockholders would come to the recipients, it would seem to me, not in the form of income or as natural income of the company, but in the form of capital payments paying off the principal of the loan in that way.

It may well be, therefore, that, if I were not trammelled by authority, I should come to the conclusion that it would not be proper and right for the commissioners to appropriate to the stockholders any part of the balance of the company's income after payment of the interest due for the particular year to the debenture stock trustees. Indeed, I think that such a result would be in accordance with my decision in *Commercial Securities, Ltd.* v. *Inland Revenue Comrs.* (4). However, there I was not dealing with the case in the same stage of the matter as it is in the present case. There I was dealing with the propriety of a particular apportionment which had been made. As has been pointed out in the present case, that stage may be reached hereafter, but at present the matter is merely in an earlier stage, and the point which I have to decide, as properly stated by the commissioners, is whether the assessing commissioners could apportion the income among more than five persons; whether, in other words, they could apportion the income or any part of it, and by that, of course, I mean the net income after deducting the interest, among the trustees for the debenture stockholders.

As I said, if I were not bound by authority, as I think I am, I would be inclined to say that they could not; but, unfortunately, there is a decision of the House of Lords in which there are statements by Lord Russell of Killowen which I find bind me to reach a contrary conclusion. That is *F.P.H. Finance Trust, Ltd.* v. *Inland Revenue Comrs.* (*No. 2*) (5). First of all Lord Russell of Killowen states what is the point at issue between the parties and the respective contentions, and I think it is necessary that I should read those (6):

> " The main point at issue between the parties can now be stated. The company contends that the commissioners in apportioning the amount of

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(4) 35 Tax Cas. 15.

(5) [1945] 1 All E.R. 492; 28 Tax Cas. 209.

(6) [1945] 1 All E.R. at p. 496; 28 Tax Cas. at p. 245.

> the income in question among the members ' in accordance with the respective interests of the members ' are bound to apportion it among those members who would have received it, and in the proportions in which they would have received it, if the whole amount had been distributed by the company by way of dividend in accordance with the rights of the members as defined in the memorandum and articles of association of the company. The result in the present case of an apportionment on those lines would be that a very small part of the fund would be apportioned in substantially equal shares among Mrs. Latilla and her daughters, and that the balance (being substantially the whole of the £858,817) would be apportioned to the corporation."

In that case there were ten thousand preference shares which carried a dividend of five per cent. and the right to all the surplus assets in a winding-up, and those were the shares which were held by Mrs. Latilla and her two daughters, and one thousand ordinary shares of £1 each were created which carried a right to sums declared by way of dividend, but with the right on a winding-up to repayment of capital and no more. So, though the preference shares only got five per cent. as far as dividends were concerned, i.e., they got fixed interest, and the thousand ordinary shares got the dividends, if any, the thousand shares had no right beyond repayment of their nominal capital to share in the assets of the company on winding-up. In that case no dividends had ever been declared and enormous sums, amounting to nearly £900,000, had been accumulated as undistributed income. LORD RUSSELL continued (7):

> " On the other hand, the respondents attribute a wider meaning to the words ' the interests of the members '. They contend that the commissioners must take into consideration all the different interests of the members, including voting power and all shares or interests in the capital or profits or income of the company as a going concern or in winding-up, for the purpose of ascertaining who are the persons who in fact are beneficially interested in the income in question, and in what proportions. In short that the commissioners should consider the whole position of members under the company's constitution, including their rights to undistributed profits and otherwise in a winding-up.
>
> " My Lords, in my opinion the contention of the company places far too narrow a construction upon the wide and comprehensive words which the legislature has used, and I can find no language in s. 21 [the corresponding section to s. 245 of the present Act] to justify such a construction, but much to justify a broader interpretation. The foundation of the power given by the section to the commissioners is the fact that the company, for an unreasonable time after the end of the period for which accounts have been made up, has refrained wholly, or in unreasonable measure, from declaring dividends in general meeting, and thus distributing its profits among the persons entitled, according to their rights in dividends so declared. Nothing would have been easier than to provide that the income should be apportioned among the same persons, and in the same manner, as if the income in question had been so distributed by way of dividend. The section, however, does not do this. It first enacts that the income in question is to be treated as if, instead of being the company's income, it were the income of the members. No notional declaration of dividend is envisaged at all. The income (which is now envisaged not as company's income at all, but as income of the members) then has to be apportioned in accordance with the respective interests of the members. What justification can there be for restricting the interests which the commissioners may take into consideration, to rights in declared dividends, when no declaration of dividend, notional or otherwise, is contemplated by the section? I can find none. I can conceive many

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(7) [1945] 1 All E.R. at p. 497; 28 Tax Cas. at p. 245.

> cases in which they might well so act, but I cannot assent to the view that they are compelled so to act in all cases."

In that case, of course, there was no question of any artificial meaning being given to " members ". Both the classes of persons interested in that case were shareholders, so, consequently, the first point which I have had to consider was not really affected by that case, but it seems to me that the observations which follow (8) are pertinent to the question which I am now considering:

> " Obviously everyone who falls within the extended definition of member is not necessarily to be included in the apportionment. In my opinion the commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (i) that they fall within the definition, and (ii) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions. Further, I think that . . . the commissioners may properly be guided by the preamble to s. 21 [s. 245, as it is now] and endeavour to make an apportionment appropriate to their interests to those members for whose benefit in relation to the avoidance of payment of supertax (now surtax), the distribution of income has obviously been withheld. They may well ask themselves the questions (i) upon whom did it depend whether or not the income should be withheld from distribution, and (ii) for whose benefit was the distribution withheld or (in other words) who would avoid payment of surtax by the withholding? If the same individuals figure in each answer, those are obviously the persons who, according to their interests in the company, own the real and paramount beneficial interest in the fund in question. Other members may also have an interest therein, but to a smaller extent."

Then LORD RUSSELL proceeds to consider the facts of the case and comes to the conclusion that, although Mrs. Latilla and her daughters were only entitled to five per cent. during the continuance of the company as a going concern, the one thousand ordinary shares would take all dividends if any were declared, and Mrs. Latilla and her daughters were to be treated as persons for whose benefit the moneys accumulated really existed.

I feel that I am bound to apply those observations of LORD RUSSELL to the present case, and, although I might possibly have reached a different conclusion without the guidance of his opinion, I must in the present case hold it is possible—no more than that—for the commissioners to make an apportionment in the present case among the debenture stockholders of the company. Consequently, it seems to me that I cannot support the conclusions of the commissioners on either of the two points which are for decision, and the appeal must be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Allen & Overy* (for the company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(8) [1945] 1 All E.R. at p. 497; 28 Tax Cas. at p. 246.

PARKER AND OTHERS *v.* BOROUGH OF EALING.

[Chancery Division (Pennycuick, J.), November 29, 30, December 2, 1960.]

Rates—Limitation of rates chargeable—Friendly society's sports ground—Licence to use sports ground at specified times granted by occupier to club—Whether sports ground occupied for the purposes of the club—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (1) (*c*), (2).

A sports ground, or playing field, with a pavilion was owned by, and in the rateable occupation of, a friendly society. The society had granted a licence to a sports and social club to use and occupy the sports ground for the purposes of playing games from 4.30 p.m. on weekdays and all day on Saturdays, Sundays and Bank Holidays. The society had also granted a licence to Middlesex County Council to use the sports ground at certain other times and a licence to a school to use the ground for a few hours weekly in term times. These licences were granted for pecuniary consideration. Section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which provides for the limitation of rates applies, by sub-s. (1) to "... (c) any hereditament consisting of a playing field ... occupied for the purposes of a club, society or other organisation which is not established or conducted for profit ...". It was conceded that the social club was not established or conducted for profit, etc.* On an application to determine whether the sports ground was within s. 8 (1) (c), viz., whether it was occupied for the purposes of the club, so as to qualify for limitation of rates under s. 8 (2),

Held: although the word "occupied" in s. 8 (1) (c) referred to rateable occupation, a hereditament used under licence by an organisation other than the rateable occupier, could be "occupied for the purposes of" the licensee within s. 8 (1) (c); in the present case, however, the use of the sports ground was intermittent, such use did not amount to occupation "for the purposes of" the club within s. 8 (1) (c) and the hereditament did not qualify for limitation of rates under s. 8.

Royal London Mutual Insurance Society, Ltd. v. *Hendon B.C.* ((1958), 3 R.R.C. 76) considered and distinguished.

[As to the limitation on the amount of rates chargeable where hereditaments are occupied by charitable and other organisations, see 32 Halsbury's Laws (3rd Edn.) 160, para. 210; and for cases on the subject, see 38 Digest (Repl.) 533-535, *331-341.*

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 Halsbury's Statutes (2nd Edn.) 394.]

Cases referred to:

Royal London Mutual Insurance Society, Ltd. v. *Hendon B.C.*, (1958), 3 R.R.C. 76; 51 R. & I.T. 285; 122 J.P. 310; 38 Digest (Repl.) 534, *336.*

Waterson v. *Hendon B.C.*, [1959] 2 All E.R. 760; 123 J.P. 423; [1959] 1 W.L.R. 985; 3rd Digest Supp.

Adjourned Summons.

This was an application by originating summons dated Mar. 26, 1959, by the trustees of the Liverpool Victoria Friendly Society who claimed that a hereditament owned by them and in respect of which they were rated as occupiers which was entered and described in the valuation list made on Mar. 18, 1958, for the Borough of Ealing as a sports ground, pavilion and appurtenances, was a hereditament to which s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied; and for the determination of the following questions. First, whether on a true construction of s. 8 (1) (c) of the Act the hereditament was one to which s. 8 applied at all material times from and including the rating year 1955-56 until the date of the summons. Secondly, if so, whether the failure of the defendant rating authority to give the relief from rates provided by s. 8 (2) in A making and levying their rate for the rating years 1956-57, and 1957-58 precluded the plaintiffs from the benefit of s. 8 (2) in subsequent years. The defendant was the corporation of the Borough of Ealing, the local rating authority in respect of the hereditament. The facts appear in the judgment.

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* A concise summary of the concessions is at p. 149, letter F, post.

G. A. Rink, Q.C., and *M. Browne* for the plaintiffs.
P. R. E. Browne, Q.C., and *J. M. Shaw* for the defendants. B

Cur. adv. vult.

Dec. 2. **PENNYCUICK, J.**, read the following judgment: This is an originating summons which raises certain questions under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The plaintiffs are the trustees of the Liverpool Victoria Friendly Society, and the defendants are the Mayor, C Aldermen and Burgesses of the Borough of Ealing. The question summarily is whether a certain hereditament occupied as a sports ground qualifies for partial exemption under s. 8 of the Act as being used and occupied for the purposes of a club.

The facts may be stated shortly as follows. The society in 1921 acquired a property which then comprised some eleven acres. It was situated at Gunnersbury D Lane, in the Borough of Ealing, and comprised a sports ground with a pavilion and other appurtenances usually attached to playing grounds. Some time in 1946 the society caused a block of flats to be erected on the western part of the property, and what was left for use as a playing field is now something over eight acres. In 1947 Middlesex County Council made certain proposals to the society which suggested an intention to acquire the property compulsorily. That E suggestion was turned down on the terms that the county council should have the use of the ground except at week-ends on certain terms. Those terms were specifically set out in a written agreement to which I will shortly refer. In 1949 the society spent some £8,000 to £9,000 on the rehabilitation of the ground. On Oct. 18, 1950, the society entered into a licence agreement with certain individuals as the occupiers of the club known as the Liverpool Victoria Sports F and Social Club. By that agreement the society granted to the club leave and licence " exclusively to use and occupy their sports ground . . . for the purposes and during the periods hereinafter mentioned or such other times as may be mutually agreed " between the society and the club. That licence was to run from June 1, 1950, until the term thereinafter provided. The licensees agreed to pay the sum of £400 per annum during the first year of the licence and £500 thereafter. G Then it was provided that neither the ground nor any part thereof should be used for any purpose

> " other than that of a sports ground for the purpose of playing football, cricket, tennis, hockey, netball and other outdoor games and athletic sports and for no other purpose from 4.30 p.m. on weekdays and all day on Saturdays, Sundays and Bank Holidays and at no other times except with the H consent of the landlord [the society] in writing."

Then there was a provision:

> " The groundsman of the landlords shall have the right to decide whether play is possible owing to the state of the ground."

I

Then the society agreed to pay all rates in respect of those premises.

On Mar. 18, 1951, the society entered into a written agreement with Middlesex County Council under which the society granted to the council a licence to use and occupy for the purpose of providing playing fields for schools on the ground during the period specified in the schedule excluding all Saturdays, Sundays and Bank Holidays or such other times as may be mutually agreed between the council's chief education officer and the society. That licence was for five years from June 1, 1950, and the rent payable under the licence was at the rate of £530

A per annum. This licence also contained a provision that the society's groundsman should have the right to decide when play was possible owing to the state of the ground, and again the society agreed to pay the rates. The schedule sets out in detail the hours during which the ground might be used during the period referred to, but it would not be useful to recite those hours in detail. It is sufficient to say that the hours are, broadly speaking, in the morning and early afternoon B on the days from Monday to Friday inclusive.

That agreement was superseded by another agreement between the society and Middlesex County Council dated Jan. 25, 1956. The broad effect of that agreement is the same, though the amount payable by way of rent was different, being £365 a year after the first six months. The schedule sets out in detail the different periods broadly as contained in the first agreement, but here again, C broadly speaking, the hours during which the county council may use the ground are certain hours in the morning and early afternoons of the days from Monday to Friday inclusive. Evidence has been put in that the combined rents payable by the club and the county council are such as to result in a substantial loss to the society as the landlords of this ground. The only other licence given by the society in respect of the ground was to a school called Beacon House School, D which was to use the ground for one or two hours a week at a rent amounting to something like £11 and £13 a term.

I turn now to s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. I need not read the whole section, but for present purposes the part directly in point is sub-s. (1):

> "This section applies to the following hereditaments, that is to say . . . E (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field . . ."

F Then there follows a provision which I will read later on in this judgment.

Subsection (2) provides for the partial relief from rates in the case of hereditaments to which sub-s. (1) applies. It is conceded for the present purpose that the society is the rateable occupier of the ground, that the ground is a playing field within the meaning of s. 8 (1) (c) and that the club is an organisation "which is not established or conducted for profit and does not (except on special occasions) G make any charge for the admission of spectators to the playing field".

The question, therefore, is: Is the ground occupied for the purposes of this club? It seems to me that in para. (c), the word "occupied" must bear its ordinary significance in the Act of 1955 and refer to rateable occupation. I think that the words "for the purposes of" in this paragraph must in their context refer to the mode of use of the hereditament and may be paraphrased as "in H carrying on the activities of". For example, a hereditament is occupied for the purposes of a shop, factory or school, if its use has been the carrying on of the activities of a shop, factory or school. The same expression "occupied for the purposes of" appears in para. (a) of sub-s. (1), where it must, I think, have that meaning. A simple construction of para. (c) would be that the paragraph only applies where the club, society or other organisation in question is itself, I or a trustee for its use, the rateable occupier of the hereditament. That simple construction is excluded, as counsel for the defendants admits, by the decision of the Queen's Bench Divisional Court in *Royal London Mutual Insurance Society, Ltd.* v. *Hendon B.C.* (1). That decision shows that it is at least possible where a hereditament is used under licence by an organisation other than the rateable occupier for the hereditament to be occupied for the purposes of the licensee.

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(1) (1958), 3 R.R.C. 76.

It remains to consider where a hereditament is used for the purposes of a licensee organisation, in order to come within para. (c), whether the use by the organisation during any given period must be continuous throughout that period, or whether it is sufficient that the use should take place intermittently during the period. On its natural meaning the expression " occupied for the purposes of " an organisation appears to me to indicate continuous use by the organisation. The occupation by the occupier is from its nature continuous and the whole expression " occupied for the purposes of an organisation " seems to me to denote, and to denote only, use by the organisation coterminous in time with the occupation by the occupier. Equally, the expression seems to me inapt to denote whole-time occupation by a rateable occupier except for the part-time use by the organisation.

The only logical alternative would be to say that the use by the licensee during any stretch or stretches of time, however short, is sufficient; for example, the paragraph would apply where the field is licensed for one day to an organisation during the year—for example, for the purposes of a show. On the face of it this is an absurd result, and counsel for the plaintiffs does not attempt to support it. On the other hand, counsel, as it seems to me, has been unable to suggest any line of demarcation which is logically tenable. Apart from authority, my conclusion is that the use of this ground for the purposes of a club limited to evenings during the first five days of the week and to Saturdays, Sundays and Bank Holidays cannot be regarded as an occupation of the hereditament by the society for the purposes of a club. It has, however, been contended by counsel for the plaintiffs with much force that the point is concluded in his favour by *Royal London Mutual Insurance Society, Ltd.* v. *Hendon B.C.* (2). In that case a sports ground with pavilion was owned and was rated as being occupied by an insurance society. It was managed and controlled by a committee formed jointly by two clubs of employees of the society on behalf of the society and of the two clubs. The clubs were not established or conducted for profit. It was used solely by employees of the company and was used for open-air games, no other activity taking place there. It was financed by contributions from subscriptions of members of the clubs, by an annual grant from the society, and by the society's payment of rates, water rates, insurance and Sch. A tax. The Case Stated shows that in respect of the ground occupied by the club under licence no rates had been payable by the society. In the Case Stated it is said (3): " There was no evidence of actual occupation of the ground by the [society] ". On those facts the society contended that the ground was within para. (c). The local authority resisted that on grounds which are important in considering the judgment. The contentions of the rating authority were (4):

> ". . . (ii) that ' for the purpose of a club, society or other organisation ' within the meaning of s. 8 (1) (c) of the Act meant ' wholly or exclusively for the purposes of a club, society or other organisation '; (iii) that the ground was occupied partly for the purposes of the society in that: (a) the inception and the continuing use of the ground by employees of the society depended on the financial grant to the committee made by the society; (b) the payment of the grant could only be intra vires the society if covered by its purposes or objects; (c) the purpose of the grant was, inter alia, to facilitate the recruitment and retention of staff, to maintain good staff relations and to promote the health and welfare of the staff; (d) further or alternatively, the rules of the committee and in particular the rule that the stated object of the committee was to manage the ground partly on behalf of the society provided for the direct interest of the society in the occupation of the ground . . ."

It is against those facts and those grounds of argument that the judgment of the

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(2) (1958), 3 R.R.C. 76.

(3) (1958), 3 R.R.C. at p. 78.

(4) (1958), 51 R. & I.T. at p. 286.

A Divisional Court must be read. LORD GODDARD, C.J., giving the first judgment and after summarising the issues, said this (5):

> " The whole point that is raised here is this: It is said that this is one of the schemes by which the [society] seeks to attract and benefit [its] staff, and if [it] benefits [its] staff with a view to making them a contented and efficient staff that shows that the ground is occupied for the purposes of the [society]. B Quarter sessions have said that considerations of that sort are too remote, and I agree with them. I think the only thing we have to consider here is: Is the ground being used as a playing field; is it occupied for the purposes of a club? [The argument of counsel for the rating authority] really asks us to read into s. 8 (1) (c) the words " occupied exclusively for the purposes of the club, ' or ' occupied substantially for the purposes of the club.' I do C not think we can read in those words, though for myself I am not satisfied that if the word ' exclusively ' had been put in it would have made any difference in this case. It seems to me that this is a sports ground."

I need not read the rest of LORD GODDARD's judgment. HILBERY, J., in the second paragraph of his judgment, says (5):

> D " The argument, apparently, is that because a purpose of the [society] in becoming the occupiers of the land in question was the formation of such a club which might be of benefit to [its] staff who joined it, this made the occupation of the premises of that club not exclusive occupation for the purpose of the club but partly for the purposes of the [society]. In my view, that is far too remote, and in my opinion that is exactly the sort of case that E this subsection was intended to cover. I agree with the conclusion arrived at by quarter sessions that the suggested purposes or advantages to the [respondent society] were too remote."

DONOVAN, J., said (6):

> " I agree . . . I think quarter sessions were clearly right because this F ground is admittedly occupied for the purposes of a club, such a club as is described in s. 8 (1) (c). But the [rating authority] want the words in that section read as ' occupied exclusively for the purposes of the club.' The word ' substantially ' would not do. What the [rating authority] must have read in if they want to succeed is the word ' exclusively ', and they support that contention on these grounds: they say that this land was bought by the G [insurance society]. It was bought to fulfil a commercial purpose, namely, a contented, healthy staff, and they concede that that is so. Obviously, in order to spend this money the [society] had to fulfil some purpose within the four corners of its memorandum of association, but of itself that does not justify the court writing in the word ' exclusively ' where the [rating authority] want it written into this section, that is, as qualifying the words H ' occupied for the purposes of the club,' which is admittedly the case here.
>
> " Another argument against writing in that word ' exclusively ' is this, that in the earlier part of sub-para. (c) of s. 8 (1), dealing with the use of the hereditament, the words are: ' any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games)', and so on. If Parliament had meant the word ' exclusively ' also to I govern the expression ' purposes of a club,' it clearly would have said so. Quarter sessions have taken the view that the alleged purpose or advantage to the [insurance society] is too remote, and I agree, but I would prefer to put it in this way, that this case is within the expression ' occupied for the purposes of the club,' and that is enough. Furthermore, although the land was bought and equipped in the first place to fulfil the purposes of the [society], the actual occupation seems to me to be for the purposes of the club,

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(5) (1958), 3 R.R.C. at p. 79.

(6) (1958), 3 R.R.C. at p. 80.

> and the benefit to the [society] is really a by-product of their occupation, albeit a by-product that no doubt was envisaged from the outset." A

It seems to me that the ratio decidendi of that case was that the hereditament was occupied for the purposes of the club within the natural meaning of those words and the hereditament was not taken out of the paragraph by the concurrent purpose in favour of the society, assuming that purpose existed at all. In order to have taken the hereditament out of the paragraph a factual meaning of the B words would be required, for example, as suggested by the court by the word "exclusively". That decision was not at all addressed to the position where the use by the organisation is intermittent and I do not think there is anything in that decision which is inconsistent with the view which I have taken here, namely, that in such circumstances this intermittent use of the hereditament is not an occupation "for the purposes of the club" within the natural meaning C of the words in para. (c). If the hereditament is not so occupied within the natural meaning of the words, then, so far from express words being required to take it out of the paragraph, express words would have been required to bring it into the paragraph. Counsel for the plaintiffs in his argument suggested the introduction of such words as "major" or "dominant" before the word "purposes" in order to get the hereditament within the paragraph, but those words D are not there.

Before leaving this case I desire to add that I respectfully share the doubts expressed by LORD GODDARD, C.J., in his words (7):

> ". . . I am not satisfied that if the word 'exclusively' had been put in it would have made any difference in this case" E

and by DONOVAN, J., in the words (8):

> ". . . the actual occupation seems to me to be for the purposes of the club, and the benefit to the [society] is really a by-product of their occupation . . .",

in other words, the total purposes which were relied on by the local authority in that case were not, as it seems to me, purposes in the sense that that word F bears in para. (c).

For the reasons which I have endeavoured to give, it seems to me that this ground is not within para. (c) of s. 8 (1).

In the course of the argument counsel for the plaintiffs at one point suggested that the test whether a hereditament was occupied for the purposes of a club might be a subjective one depending in effect on the motive of the rateable occupier, G namely, the society; but counsel gave up that contention, rightly as it seems to me, and I need not deal with it further.

For the purposes of this judgment, I have treated the use by the club as if it were a costly user having regard to the fact that the society is out of pocket in respect of the ground. It seems to me difficult questions would arise where the occupier received a profitable rent from the licensee, but those questions do not H arise here and it is not necessary to consider them.

Counsel for the defendants advanced an alternative contention under the proviso to sub-s. (1) to which I will now refer. The proviso is in these terms:

> "Provided that this section shall not apply to any hereditament to which s. 7 of this Act applies, or to any hereditament occupied by an authority I having, within the meaning of the Local Loans Act, 1875, power to levy a rate."

Middlesex County Council is such an authority. The argument was that in the present case both the licensee, that is the club, and Middlesex County Council, can be treated as occupying the ground and, therefore, the proviso applies. It seems to me, for the reasons which I have already given, that the ground is occupied for the purposes of this section by the society and neither by the club nor by the county council, and therefore that argument would fail.

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(7) (1958), 3 R.R.C. at p. 79.

(8) (1958), 3 R.R.C. at p. 80.

Turning now to the originating summons, the question asked is:

> " Whether on a true construction of s. 8 (1) (c) of the said Act the hereditament aforesaid is one to which s. 8 has applied at all material times from and including the rating year 1955-56 until the date hereof."

That question I answer in the negative. The second question is in these terms:

> " Whether the failure of the defendant rating authority to give the relief from rates provided by s. 8 (2) in making and levying their rate for the rating years 1956-57 and 1957-58 precludes the plaintiffs from such benefit of s. 8 (2) in subsequent years."

That question does not arise on the view which I have taken of the first question, and in any event I have heard no argument on it for the reason that I understand the point is decided in this court against the local authority by a decision of SALMON, J., in *Waterson* v. *Hendon B.C.* (9), but counsel for the defendants has mentioned the point in order to keep it open should this case go further. Therefore, I propose to answer question 1 in the negative and that is the whole of the order.

Order accordingly.

Solicitors: *J. Tickle & Co.* (for the plaintiffs); *Town clerk, Ealing Borough Council* (for the defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

JOHNSON *v.* JOHNSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Cairns, J.), November 22, 23, 1960.]

Magistrates—Procedure—Justices' reasons—Justices' clerk requesting assistance of successful party's counsel to draft reasons—Reasons so drafted approved by justices with minor amendments—Irregularity.

After justices had decided in favour of a wife on her complaint alleging desertion by the husband, he gave notice of appeal. The clerk to the justices wrote to the wife's solicitors requesting the assistance of counsel for the wife by drafting a statement of the justices' reasons. Counsel drew up a statement of reasons, which the justices themselves considered in detail and, subject to small alterations, accepted and adopted.

Held: a practice whereby the statement of justices' reasons was drawn up by counsel or solicitors for the party successful before the justices was irregular and should not be followed; the irregularity was so serious as to make it impossible for the Divisional Court to proceed with the substantive appeal, and accordingly the matter would be remitted to be re-heard by a different panel of justices with whom a different clerk should sit.

Appeal allowed.

[As to the duty of a clerk of the court in matrimonial proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 510, para. 1118 and SUPPLEMENT; and for cases on the subject, see 27 DIGEST (Repl.) 717, 718, *6844-6859*, 734, *7023* and 3rd DIGEST Supp.

For the Matrimonial Causes Rules, 1957, r. 73 (3), see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 256.]

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(9) [1959] 2 All E.R. 760.

Appeal.

The husband, Ronald David Johnson, appealed against an order dated June 8, 1959, of the Dynas Powis petty sessional division of Glamorgan sitting at Barry, whereby they found that the husband had deserted the wife, Beryl Maria Johnson, and ordered him to pay £2 10s. a week for her maintenance and £1 10s. a week for the maintenance of the child of the marriage, the wife being given custody.

The parties married on Mar. 22, 1958. Six weeks after this quarrels ensued, mainly about money matters and the husband complaining of the wife visiting her mother. A child was born on Feb. 21, 1959, after a difficult confinement, and the wife had to go to her mother's home for three weeks after discharge from hospital on Mar. 5, 1959. The husband during this time made no attempt to visit or communicate with the wife but wrote to the wife an undated letter asking her for a divorce. The parties thereupon consulted their respective solicitors and on Apr. 7, 1959, met at the matrimonial home to discuss a reconciliation. The next day a similar meeting took place which resulted in a quarrel, the husband telling the wife to get out, which she did, and she did not thereafter return to the matrimonial home. The wife thereupon issued a summons against the husband on the grounds of desertion and wilful neglect to maintain her and the child of the marriage. The case first came before the Barry magistrates on Apr. 29, 1959, when it was adjourned so that prospects of a reconciliation might be examined with the assistance of a probation officer. No reconciliation was effected, and on June 8, 1959, the hearing was resumed and the justices found that the husband had deserted the wife and made the order as stated above.

On June 9, 1959, the husband's solicitors wrote to the magistrates' clerk and the wife's solicitors intimating that they intended to appeal against the magistrates' decision. On July 9, 1959, notice of appeal was entered and copies served on the clerk to the magistrates and the wife's solicitors. The husband's solicitors received copy notes of evidence from the clerk to the magistrates on Aug. 15, 1959, but not a copy of the justices' reasons. Thereafter the clerk to the magistrates approached the wife's solicitors and asked them to approach counsel who had appeared for her to assist him (the clerk) by drafting the justices' reasons. This was done and on Aug. 27, 1959, the clerk sent to the justices a draft copy of the reasons as prepared by counsel for the wife. On Sept. 7, 1959, the justices met, and in the presence of the clerk went through the reasons paragraph by paragraph; they made two small amendments, one of which added to the final paragraph a statement that the monetary terms of the order made were decided after full consideration by the justices of the financial means of the parties as disclosed in evidence. The justices then indicated to the clerk that the draft reasons as amended represented their views and findings on the matter. The clerk thereupon on Sept. 8, 1959, sent a copy of these reasons to the husband's solicitors and the wife's solicitors.

The authorities cited below were referred to in argument*.

H. W. J. Ap Robert for the husband.
R. G. Waterhouse for the wife†.

LORD MERRIMAN, P.: This is an appeal by a husband from a decision by the magistrates for the Dynas Powis petty sessional division of Glamorgan sitting at Barry on June 8, 1959. At that date they had before them the wife's complaint of desertion and of wilful neglect to maintain. On the latter charge they dismissed the complaint but they found that the desertion was proved and on that ground made an order for the sum of £2 10s. a week and £1 10s. in addition for the child, of whom the custody was awarded to the wife. Nothing has

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*Practice Directions: [1948] W.N. 194; [1953] 2 All E.R. 1306; [1954] 1 All E.R. 230; *Cottle* v. *Cottle*, [1939] 2 All E.R. 535; *Sullivan* v. *Sullivan*, [1947] P. 50; *Darrall* v. *Darrall*, (1948), 92 Sol. Jo. 284; *Padley* v. *Padley*, [1953] 2 All E.R. 1197n.

†Counsel appearing for the wife on appeal was not counsel who appeared for her in the court below.

A been said about the amount of the order. On the contrary, we have been told
that from that day to this the husband has been paying regularly, and I had
better mention now, although we have no power to make an interim order, that
it has been intimated that there will be no difficulty in the future about that.

On the face of it this was a simple case in which the question arose whether
the full statement of the reasons of the justices was justified by the evidence.
B There was a very full and apparently good note of the evidence. I do not propose,
except possibly in one or two instances for the sake of illustration, to refer to the
evidence at all, for the point of this appeal is quite different. It is now common
ground that the clerk to the court, after the magistrates had announced their
finding in open court, as soon as there was question of an appeal, wrote to the
solicitors appearing for the successful wife and asked them to get counsel who
C had appeared for the wife to assist in drawing up reasons (1). The word "assist"
is somewhat of a euphemism for what in fact happened was that learned counsel
drew up the reasons and sent them back to the clerk who, as far as the affidavits
show, did not himself expressly consider them before submitting them to the
justices. There is, however, an affidavit by each of the two justices sitting and
by the clerk, which makes it clear that they went through the reasons, paragraph
D by paragraph, and, indeed, in one instance added a phrase which, without changing
the meaning, emphasised the point and, with regard to the award of money,
stressed the point that they had considered the details of the means of the
respective parties. For my part I am willing to assume that all that is perfectly
accurate and that the magistrates did make themselves parties to the reasons
which had been thus drawn up, but that is not the point. The question is whether
E it is possible to justify the clerk to the court inviting counsel who has appeared
for the winning party to draw up, or even to assist him in drawing up, the reasons
for the magistrates' decision. It really is impossible, to my mind, that the
defeated husband becoming aware of that should feel anything but aggrieved, or,
putting it more fully, feel anything but that the ground was cut under his feet
for the purposes of appeal before this appeal started. We are told, on the responsibility
F of counsel, that there is no novelty in this practice so far as this particular
petty sessional division is concerned. If that is so, the sooner the practice stops
the better, and for my part I say categorically that it must never be repeated.
We do not know, and I am not going to make any assumptions, whether the
practice extends beyond cases in which counsel have appeared for the successful
party. If the same sort of requests for assistance are made to the solicitor advocate
G everything that I have said so far would apply, but I do not know if that is
so and, therefore, I say no more about it.

It may very well be that, although we have not investigated the matter
and I am not dealing with it from that point of view, if left to themselves
the magistrates, or the clerk in collaboration with the magistrates, might
have formulated reasons in much the same sort of way. That again is not
H the point. This is a case in which the rule that justice must not merely be
done—if it has been done in this case—but that it must manifestly be seen to be
done applies in strong measure.

I will mention only two of the reasons. The case turned on two meetings between
the parties at a time when the wife had left home and gone to her mother's,
for what I will assume was a perfectly valid reason, and it is not in that connexion
I that the charge of desertion of the husband arises. Her case was that they
met on two days in April, Apr. 7 and Apr. 8, and it is significant that the desertion
was only charged as from the days following the second of those two meetings.
The point is this, that on Apr. 7 the husband had undertaken, first, that he
would provide some domestic help for the wife and, secondly, that there should
be a mutual giving up of access to their respective people. The wife's case was
that on Apr. 8 the husband had withdrawn the first condition about providing

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(1) See letters E and F and footnote †, p. 154, ante.

domestic help and, on the contrary, had said that the wife must go out to work, A and that as regards the other condition, whilst she herself had expressed herself willing to give up her own parents, with one of whom the husband was asserting he was on bad terms, he himself announced that he could not be expected to give up his grandmother, who was an old lady and who had brought him up. In addition to that, the wife said that he told her to get out. I need not go through all the detail about that. There were other phrases that she used about his having B said in effect that the marriage was broken anyhow and they might as well make a clean break of it now, and so forth, but the gist of the matter was that he had told her to get out. I had better read the material part of the reasons. Reason No. 4 is:

> "We also find that the husband promised that he would try to get assistance for the wife and the home until she had fully recovered from the ill C effects of her confinement. The parties again met on the following evening at the flat but we found on this occasion the husband retracted his promise that he would try to obtain domestic help for his wife and that he told her as soon as she was well enough she would have to go out to work again to help pay for the provision of a house. [They go on:] We find that in the course of an ensuing quarrel the husband told the wife to get out, which D she did, and she has not since returned to live with her husband."

Comment is made, and it is the fact, that the next day the solicitors for the wife, who had already been in correspondence with the husband, wrote a letter in which, while they referred to his imposition of unreasonable conditions in general terms, made no mention at all of the husband having told the wife to E get out. That was mentioned in a subsequent letter, but the comment is that the proper way in stating the reasons would have been to draw attention to the fact and then deal with it, for what it was worth or for what explanation there might be, to call attention to the fact that this cardinal point of the wife having been orally expelled by the husband on the day preceding the letter, found no place in the letter itself.

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Part of the next paragraph which I will read and is the only other one to which I need refer, is in these words:

> "We were further satisfied that the husband's offer to return to cohabitation with his wife which he made at the hearing was not genuine. The husband did not impress us as a reliable witness and we preferred the evidence of the wife when there was any conflict in their evidence." G

It is truly said that that sort of reason, if given by the magistrates, would create great difficulty for an appellant on the hearing of an appeal for the very reason that this court is, on the highest authority (2) obliged to give great weight to the fact that the tribunal from which the appeal comes has had the advantage, that the appellate court has not, of seeing and hearing the witnesses. It is really beyond dispute that a husband, finding that those words have been put into the mouth H of the magistrates by the advocate for the wife, albeit they have approved them themselves, could feel otherwise than aggrieved and it is that aspect of the matter which is all important.

We have been invited to say, and I have been tempted to say, that we should deal with this case on the merits and see whether the reasons, however unfortunately stated in the way that I have mentioned, are supported by the evi- I dence and deal with the case as a case on the usual lines, while at the same time reprehending the practice. I feel, however, that it is impossible for us to deal with it in that way because the point at which this grave impropriety, in my opinion, has occurred is in the essential step in the presentation of this appeal to this court. We insist, and the rules insist, that we should be provided with a note of the evidence and with the reasons of the magistrates for their decision

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(2) I.e., *Watt (or Thomas)* v. *Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484.

A (3). So this irregularity cuts at the very root of the belief which the husband would otherwise be entitled to hold, that he was really getting the words of the magistrates and not the words of his wife's advocate as the preliminary to this appeal.

I repeat that this practice must stop and if it goes further, in the sense that solicitors are asked to do the same thing if there is no counsel appearing in the case, the same remarks apply.

B We have no alternative but to set this order aside and to order a re-hearing by a fresh panel of the magistrates for this division, and I must go further and say that it is impossible in the circumstances to allow the clerk concerned to sit on the new trial. We are assured that there will be no difficulty in obtaining assistance for that purpose from other neighbouring petty sessional divisions, including the City of Cardiff where there is apparently more than one assistant to C the clerk. At any rate, that is our order that there must be not merely a fresh court but a fresh clerk to deal with the re-hearing.

I have already mentioned that it has been made clear, and very wisely, that so long as the re-hearing is brought on with expedition there will be no difficulty about carrying out the intention of the original order that the wife shall have the maintenance which she has hitherto been receiving under the order.

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CAIRNS, J.: I agree that this order must be set aside and that the matter must go back to be re-heard before a fresh panel of justices and my reason for coming to that conclusion is the same as that which has actuated my Lord, namely, that in this case the manner in which the reasons of the justices were prepared for the use of this court on the appeal was such as to amount to a E very grave impropriety.

It is common ground that what happened was that the clerk to the justices requested the solicitors, who had been solicitors for the wife at the hearing before the justices, to instruct counsel, who had appeared for the wife but, I should say, was not the same counsel as has appeared on this appeal for the wife, to draw up a statement of the justices' reasons. The draft so prepared by counsel F was sent through his instructing solicitors to the magistrates' clerk. There is no indication one way or the other whether the magistrates' clerk himself considered that statement of reasons but what he did was to send a copy to each of the justices who had sat for the hearing of the case with a request that the statement of reasons should be approved and returned as soon as possible. It is fair to the justices to say that they did not, on receiving those letters, simply give G their approval to the document and send it back. They have both made affidavits in which they say that they considered the document that had been prepared by counsel and went through it carefully and then met together and went through it together; that one of the justices proposed two additions to the document and that they finally approved the reasons with those additions made to them. I see no reason for not accepting the evidence by way of affidavit that the two H magistrates have given to that effect. Nevertheless, it must be obvious that it is unfair to one party who has lost a case and desires to appeal, and who knows that in the determination of the appeal the reasons given by the justices for their decision will play an important part, that he should have to go into the appeal knowing that these reasons have, in the first instance, been prepared by the opposing counsel. The irregularity is such a serious one that in my opinion I it makes it impossible for this court to deal with the substantive appeal with any assurance that the reasons which are, in fact, presented to the court are precisely those which did lead the justices to come to their conclusion. It appears to me that the only possible way in which the respondent to an appeal in those circumstances could resist an order for a fresh trial would be by saying that once a decision had been given in favour of the wife, that decision having been given by the justices without any consultation with anybody except themselves and possibly with their clerk as adviser, that once that decision is known and the evidence is produced that there was only one way in which the decision could be reached. If it be said, given that evidence and given that decision, there was only one road by which the decision could be reached, then I can see that it might be said that no harm was done because the statement of reasons was really the only statement of reasons that would make sense. A

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(3) I.e., r. 73 (3) of the Matrimonial Causes Rules, 1957.

That is not the position here. There was evidence as to the treatment of the wife by the husband during the period, in particular, from the birth of the child on Feb. 21, 1959, up to the beginning of April, 1959. There was then evidence as to what had happened at two interviews on Apr. 7 and 8, 1959. It might be that the justices, while rejecting in part, or even wholly, the wife's account of what had happened on Apr. 7 and 8 where it differs from that of the husband, might have formed the view that the previous conduct was such that when the wife finally left the husband there was a case of constructive desertion, and if that had been the way in which the reasons had been given we would have to consider whether that did amount to desertion. B C

Another possible finding would have been that there was nothing that the wife had to complain of before Apr. 8 but that the sole basis for finding desertion by the husband was the use of the words " Get out " by him on Apr. 8, 1959. If the reasons had been expressed in that way then we should have had to consider whether the use of those words by themselves was such as to be a sufficient ground for the finding of desertion. In fact, what happened was this: counsel on behalf of the wife drew up a statement of reasons in which on every single issue between the parties he stated the case favourably to the wife; on every point where there was difference between the husband and wife in the evidence given the finding was stated in favour of the evidence that the wife had given. To make assurance doubly sure, counsel had inserted the sentence saying " The husband did not impress us as a reliable witness and we preferred the evidence of the wife when there was any conflict in their evidence ". The effect of such a statement of reasons being put before the justices is clearly this, that while it may be that their decision was really reached on some considerations which might have allowed this court to allow the appeal, the reasons as stated in the document drawn up by counsel may be such as to cut away the ground completely from the feet of the appellant and it might well be that the justices, influenced by the very strong terms of the document itself, might say " Whatever doubts we may have had before on such and such point, there is no doubt left in our minds now ". D E F

It was admitted, very properly, by counsel on behalf of the wife that if in drawing up their reasons the justices had allowed the wife's counsel to come into the consultation room with them and advise them on what they should put into their reasons, it would be impossible for him to resist an order for a fresh hearing. I cannot see any very great difference between that situation and the situation of which we have heard. G

The result is that the court cannot proceed properly on a hearing of the substantive appeal because the court cannot be fully assured that the reasons which are presented to us were the real reasons which led to the decision of the justices on June 8, 1959. I therefore agree that the matter must go back to be re-heard before a fresh panel of justices and I also agree that there must be a different justices' clerk acting on the re-hearing from the gentleman who acted on the previous occasion. H I

LORD MERRIMAN, P.: The appeal will be allowed and the order set aside . . . The wife's complaint of desertion remitted for re-hearing by a fresh panel of magistrates with another clerk . . .

H. W. J. Ap Robert: I am asked to invite your Lordship to consider making some reference to the state of mind of the magistrates as to the source of the notes which came before them. Would your Lordship think fit to make clear that the magistrates did not know that the draft before them came from counsel for one party?

LORD MERRIMAN, P.: I have assumed that throughout.

H. W. J. Ap Robert: It is stated in the evidence.

LORD MERRIMAN, P.: I accept that unreservedly and I had assumed that they did not know. In my opinion the error was the error of the clerk.

CAIRNS, J.: I make the same assumption.

Appeal allowed.

Solicitors: *Ambrose Appelbe*, agent for *D. C. Passmore, Walters & Co.*, Barry (for the husband); *Theodore Goddard & Co.*, agents for *Myer Cohen & Co.*, Barry (for the wife).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

CHANCERY DIVISION.

Practice—Order—Drawing up judgments and orders settled by the Chancery registrars.

1. At the time of bespeaking an order the person bespeaking it shall lodge at the Registrars' Office, in addition to the documents necessary to enable the draft to be prepared, a statement containing:—

(i) the names of all parties concerned,
(ii) (a) the names of their solicitors, if any, or, (b) a statement that they are acting in person, and
(iii) their addresses for service.

2. (A) An order may be bespoken in a letter addressed to the Clerk to the Registrars, Chancery Registrars' Office, Royal Courts of Justice, Strand, London, W.C.2, and sent, properly stamped, through the post or delivered by hand together with all the necessary documents.

(B) Any documents required to be produced to a registrar or lodged at his office may be produced or lodged by post.

3. (A) The documents usually necessary to enable the draft of an order to be prepared are:—

(i) the pleadings, summons, notice, or other document on which it was made
(ii) (a) the original writ, originating summons or other document originating the proceedings, or (b) the duplicate of the last order made in the proceedings
(iii) all the appearances unless they have already been lodged in the chambers of the judge
(iv) all the evidence that was before the court, judge or master that made the order
(v) the indorsed briefs of all counsel where the order was made in court.

(B) The person bespeaking an order shall immediately inform all other parties or their solicitors that they are required to lodge at the Registrars' Office such of the said documents as are in their possession.

4. (A) Whenever a registrar has no queries to raise on a draft, he shall provisionally settle it and shall indorse it "Settled subject to objections by ——" naming the day seven days after the day on which he provisionally settled it.

(B) In the absence of any objection made on or before the day named, the registrar shall cause the order to be engrossed.

(C) Any party or his solicitor that has an objection to the draft shall—
  (i) so inform the registrar, on or before the day named, by letter stating the objection
  (ii) arrange an appointment to settle the draft within five days after the day named
  (iii) duly serve notice of the appointment at the address for service of all the other parties.

(D) In the computation of the periods above mentioned, there shall be excluded Saturdays, Sundays, public holidays, and other days on which the offices of the Supreme Court are closed.

5. Whenever a registrar is of the opinion that the draft of an order requires to be settled before him in the presence of the parties or their solicitors, he shall indorse the draft " Settle before me ". When a draft has been so indorsed, the person having the carriage of the order shall arrange an appointment for the purpose of settling the draft.

6. (A) Whenever it shall be necessary or desirable to arrange an appointment before a registrar, that appointment shall be arranged for a day on which the registrar named in the margin of the order will, according to the rota, be in chambers.

(B) The person arranging the appointment may consult that registrar about the day for the appointment.

7. Whenever a draft of an order has been settled before a registrar and approved by the parties or their solicitors, all parties or their solicitors shall signify their approval thereof by their signatures in pencil on the back of the indorsement thereof.

8. A registrar may if he thinks fit direct that parties or their solicitors shall attend before him on the passing of an order in lieu of directing that they attend before him on the settling of the draft. In that event his indorsement shall be " Pass before me ".

9. (A) In accordance with the existing practice, an order may be engrossed without a draft having first been made, whenever a registrar is of the opinion that it is proper so to do.

(B) In that event, such of the provisions of this Direction as apply to a draft shall apply to that engrossment as if it were a draft in addition to those provisions that apply to an engrossment.

10. (A) Whenever the draft of an order is ready for perusal by the persons entitled to do so, a copy of the draft shall be sent by the registrar to each of those persons.

(B) When a party is acting by solicitors, the copy shall be sent by ordinary post except as hereinafter directed.

(C) When a party is acting in person, the copy shall be sent by registered A.R. post.

(D) With each copy so sent there shall be sent all other necessary and proper documents in the possession of the registrar, unless he shall direct the contrary.

(E) Whenever the engrossment of an order, or the duplicate thereof, is ready, it shall similarly be sent by post.

(F) Whenever a draft, engrossment, or duplicate is sent with a deed, probate, or other like document, it shall be sent by registered post.

11. Any fee that is required to be impressed on an engrossment before the order is passed shall be so impressed before the engrossment is lodged for passing.

12. In this Direction " order " means " judgment or order ".

13. This Direction shall come into operation on Jan. 11, 1961.

J. B. H. WYMAN,
Chief Registrar,
Chancery Division.

Dec. 21, 1960.

Re THE MOTOR VEHICLES DISTRIBUTION SCHEME AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Diplock, J., Mr. W. Wallace and Sir Godfrey Mitchell), November 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, December 1, 2, 5, 6, 7, 8, 9, 21, 1960.]

Restrictive Trade Practices—Reference—Motor vehicles distribution scheme—Price-fixing scheme—Fixed retail prices—Conditions as to appointing distributors of vehicles—Fixed discounts—Introductory commissions—Sales to fleet users—Whether restrictions "reasonably necessary"—Whether removal of restrictions would deny to public substantial benefit—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 21 (1) (*a*), (*b*).

Restrictive Trade Practices—Reference—Costs—Discovery—Suppression of documents—Lump sum awarded—Restrictive Practices Court Rules, 1957 (*S.I.* 1957 *No.* 603), *r.* 76, *r.* 77.

The Motor Vehicles Distribution Scheme Agreement ("the 1957 agreement"), replacing a former similar distribution scheme of 1946, related to the distribution and sale in the United Kingdom of motor cars and commercial vehicles of less than three tons unladen weight. The signatories to the agreement comprised all the United Kingdom manufacturers of such cars and vehicles, and substantially all the concessionaires in the United Kingdom of vehicles of those kinds manufactured abroad and marketed in the United Kingdom. Of the total sales of motor vehicles in the United Kingdom, some ninety per cent. were of vehicles manufactured by companies of five groups, namely, the British Motor Corporation, Fords, Vauxhall, the Rootes Group and Standard Triumph (the "Big Five" manufacturers). The remaining ten per cent. were of cars made by British manufacturers known as "specialist" manufacturers, and of mass-produced and specialist cars made by foreign manufacturers. The general pattern of distribution was the same throughout the industry for those vehicles for which there was any substantial sale. Each manufacturer had appointed a chain of distributors to whom he granted the right to sell his cars or commercial vehicles wholesale to retail dealers in a specified area, and also themselves to sell them retail to the public without limitation of area. Retail dealers with the right to sell cars and/or commercial vehicles to the public by retail only were also appointed by the manufacturer or by the distributor on his behalf. Each distributor and retail dealer (known as a "franchised dealer") so appointed entered into a contract (often referred to as a "franchise") with the manufacturer, whereby he undertook to maintain a specified stock of cars, including demonstration cars and spare parts, and to purchase a specified number of cars in the course of the year. Similarly with commercial vehicles. For many years, practically all manufacturers had endeavoured to ensure that their cars should be sold retail only at prices fixed by themselves, and all franchises contained a condition to this effect. In February, 1946, a joint committee of vehicle manufacturers and retailers had recommended a distribution scheme which was put into operation as soon as vehicles again became generally available for sale to the public, and which continued in operation until it was replaced by the 1957 agreement after the passing of the Restrictive Trade Practices Act, 1956. The 1957 agreement came into operation on Aug. 1, 1957. The restrictions, including wholesale and retail price restrictions, arising under this scheme, are stated below. Other parts of the system of "orderly marketing" were to be found in the terms of the franchises granted by manufacturers to their distributors and retail dealers, and in the rules and stop list procedure of the British Motor Trade Association. Schedule 2 to the 1957 agreement contained a form of trader's application agreement for admission of his name to the " Red Book "* as a registered trader. This permitted the trader to receive a supply of motor vehicles for re-sale by retail, but did not entitle him to be so supplied; it included an undertaking with each of the signatories to the 1957 agreement that, so long as the trader's name remained in the Red Book, the trader would comply with all conditions applicable thereto, a copy of which he had received. There was provision for the agreement to be terminated on the trader's failing to comply with any condition. Under cl. 2 of the 1957 agreement, a person who was unable to obtain a franchise from a signatory was eligible for entry in the Red Book as a non-franchised trader, provided (among other things) that he complied with the minimum conditions as to premises, equipment and staff and signed the trader's application agreement. The provisions for registration as a registered repairer were similar. The 1957 agreement (by cl. 13) required each signatory to incorporate in the terms of his agreement with his own franchised dealers clauses binding such dealers to observe the terms of the distribution scheme agreement. On Nov. 28, 1960 (after the commencement of this reference), the 1957 agreement was varied by a supplemental agreement. The most relevant amendment substituted a provision that each signatory should publish the retail prices of his products. The Registrar of Restrictive Trading Agreements, under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956† referred the 1957 agreement to the court. The following restrictions arose under the agreement.

Restrictions relating to the sale of vehicles to the motor trade. (1) A restriction prohibiting any signatory from selling his products otherwise than subject to a condition as to the price at which they might be re-sold by retail‡. (2) A restriction prohibiting any signatory from appointing as his franchised distributor or retail dealer any person who did not satisfy the requirements as to premises, equipment and staff, etc. (3) A restriction prohibiting any signatory from preventing any dealer§, registered trader or non-franchised trader from purchasing and selling a vehicle manufactured by any other signatory. (4) (a) A restriction prohibiting any signatory from selling any vehicle (i) to a non-franchised trader or a registered trader not possessing a franchise from him except at a discount of ten per cent. or 12½ per cent., as the case might be, of the list price; or (ii) to any motor trader who was not a non-franchised trader or a registered trader at less than the full list price. (4) (b) A restriction prohibiting any signatory from supplying vehicles to his franchised distributors except on terms that any such vehicle (i) if it was sold to a non-franchised trader or a registered trader not possessing a franchise from such signatory should be sold at a discount of ten per cent. or 12½ per cent., as the case might be, of the list price; or (ii) if it was sold to a motor trader who was not a non-franchised trader or a registered trader should be sold at not less than the full list price. (4) (c) A restriction prohibiting any signatory on any such sale referred to in (4) (a) (i) or (4) (b) (i) from imposing a requirement on the purchaser to buy or stock any other of the signatory's products.

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* The " Red Book " was the trade register of traders or non-franchised traders and of registered repairers. " Registered trader " and " registered repairer " meant a franchised dealer whose name was registered as such in the Red Book. " Non-franchised trader " meant any person who was and remained accepted by any signatory or by the distribution scheme committee as complying with the minimum conditions for a car and/or commercial vehicle dealer, but who did not hold a franchise with any of the signatories.

† Section 20, so far as relevant, provides: " (1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

" (2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar . . .

" (3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

‡ See p. 174, letter G, post for the court's construction of cl. 1 (d) of the 1957 agreement out of which this restriction arose. An amendment, directed to making clear that the clause did not mean what on its true construction it was held to mean, was registered during the hearing (see p. 176, letter F, post). The agreement as so varied was also deemed contrary to the public interest (see p. 182, letter B, post.)

§ " Dealer " meant a franchised dealer, whether distribution or retail dealer.

There were some ten thousand registered and non-franchised dealers of whom only about four hundred were non-franchised dealers. Only five or six per cent. of the public in 1959 chose to buy vehicles from a dealer who did not hold a franchise for the make purchased.

Restrictions relating to introductory commission. (5) (a) A restriction prohibiting any signatory from supplying a vehicle to a purchaser pursuant to a sale bona fide introduced by a registered repairer without paying to such registered repairer a commission of five per cent. (5) (b) A restriction prohibiting any signatory from supplying vehicles to his franchised distributor except on terms that if any vehicle was sold to a purchaser introduced by a registered repairer the distributor should pay to the registered repairer a commission of five per cent. and that only in such cases should any introductory commission be paid in respect of its sale.

It was contended in support of these restrictions that the commission was a reasonably necessary inducement to protect the public against injury from inefficiently repaired vehicles.

Restrictions relating to the sale of vehicles to fleet users. (6) (a) A restriction prohibiting any signatory from supplying a vehicle to any registered trader or non-franchised trader except subject to the condition that on re-sale to a fleet user who complied with the conditions set out (viz., in cl. 11 of the 1957 agreement (see p. 172, letter F, post)) it should be re-sold at the discount off list price prescribed in that clause. (6) (b) A restriction prohibiting any signatory from selling any vehicle direct to a fleet user at less than full price except in the circumstances prescribed (viz., in cl. 11 (k) of the 1957 agreement). Between four and ten per cent. of cars sold and between twenty-five and forty per cent. of commercial vehicles sold, were probably affected by these restrictions.

The respondents did not seek to support restriction (1) above, but sought to support restrictions (2) to (4) principally under s. 21 (1) (b), and restrictions (5) and (6) principally under s. 21 (1) (a)*.

Held: the restrictions, whether imposed by virtue of the 1957 agreement or by that agreement as varied by the supplemental agreement of Nov. 28, 1960 (see p. 182, letter B, post), were deemed, under s. 21 (1) of the Act, to be, and were declared to be, contrary to the public interest, because—

(i) (as regards restrictions (2) to (4)) an adequate nation-wide network of dealers would exist whether or not there were a distribution scheme agreement, and, even assuming that one or more of the "Big Five" manufacturers adopted a policy of insisting on their own makes being sold only by their own franchised dealers and of preventing their franchised retail dealers A as well as their distributors from selling any other make of mass-produced car, the public would not lose any benefit or advantage; further, the distribution scheme agreement neither aided nor prevented any manufacturer in introducing a new make of car on the market (see p. 179, letter D, post).

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* Section 21 (1), so far as relevant, provides: "For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say—(a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connexion with the consumption, installation or use of those goods; (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . ."

(ii) (as regards restriction (5)) there was no sufficient evidence to show that these restrictions had had any effect in improving the general efficiency B of motor repairers, or that their removal would make any difference to the efficiency of any of them, or that any specific or substantial advantage to the public as purchasers or users of cars followed from a restriction which required a fixed introductory commission to be paid to a registered repairer (see p. 179, letter I, to p. 180, letter C, post).

(iii) (as regards restriction (6)) although, if the restriction were abolished, C the individual manufacturer might continue to allow fleet user discounts on the same basis, they would be in a position to relate their terms of sale to customers who placed bulk or regular orders to the savings in manufacturing or selling costs resulting from the size or regularity of the order, and there was no reason to think that the aggregate discounts allowed under such a system would exceed the unproved amount of the aggregate annual D discounts now allowed to fleet users as a result of the restrictions, and, therefore, the removal of the restriction would not result in increasing the price of vehicles to the rest of the public (see p. 181, letters C and D, post).

Lump sum awarded for costs under r. 76 and r. 77 of the Restrictive Practices Court Rules, 1957 (see p. 183, letter F, post).

E

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.]

Case referred to:

Thorne v. *Motor Trade Assocn.*, [1937] 3 All E.R. 157, 323; [1937] A.C. 797; 106 L.J.K.B. 495; 157 L.T. 399; Digest Supp.

F

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court the Motor Vehicles Distribution Scheme Agreement, dated Aug. 1, 1957, and varied by a supplemental agreement, dated Nov. 8, 1957, relating to the distribution and sale in the United Kingdom of motor cars and commercial G vehicles of less than three tons unladen weight. The signatories to the agreement were all the United Kingdom manufacturers of such cars and vehicles, and substantially all the concessionaires in the United Kingdom of vehicles of those kinds manufactured abroad and marketed in the United Kingdom. The purpose of the agreement was

> "to ensure a nation-wide network for the supply of motor vehicles and H of skilled service therefor and an ever-ready availability of replacement parts and further to ensure that the public shall not be restricted to the purchase or use of any particular make of vehicle."

The facts are stated in the judgment of the court, and the list of restrictions considered by the court is set out at p. 175, letters D, et seq., post. I

G. T. Aldous, Q.C., *C. F. Mayson* and *W. Aldous* for the parties to the Motor Vehicles Distribution Scheme Agreement.

T. G. Roche, Q.C., and *Arthur Bagnall* for the Registrar.

Cur. adv. vult.

Dec. 21. **DIPLOCK, J.**, read the following judgment of the court: The respondents, some sixty-five in number, are the parties to a distribution scheme agreement dated Aug. 1, 1957, relating to the distribution and sale in the United Kingdom of motor cars and commercial vehicles of less than three tons unladen weight. They comprise all the United Kingdom manufacturers of such cars and vehicles, and substantially all the concessionaires in the United Kingdom of vehicles of those kinds manufactured abroad and marketed here. Of the total sales of motor vehicles in the United Kingdom, some ninety per cent. are of vehicles manufactured by companies of five groups known as the " Big Five ", namely, the British Motor Corporation, Fords, Vauxhall, the Rootes Group, and Standard Triumph. The remaining ten per cent. are of cars generally of higher price than those made by the " Big Five ", including such well-known makes as Rover, Jaguar and Rolls-Royce, made by British manufacturers known as " specialist " manufacturers, and of mass-produced and specialist cars made by foreign manufacturers.

The general pattern of distribution is the same throughout the industry, at any rate for those vehicles of which there is any substantial sale. Each manufacturer has appointed a chain of distributors (not always under that name) to whom he grants the right to sell his cars and/or commercial vehicles wholesale to retail dealers in a specified area, and also themselves to sell them retail to the public without limitation of area. Retail dealers with the right to sell cars and/or commercial vehicles to the public by retail only are also appointed either by the manufacturer or by the distributor on his behalf. Each distributor and retail dealer so appointed enters into a contract with the manufacturer, whereby he undertakes to maintain a specified stock of cars, including demonstration cars and spare parts, and to purchase a specified number of cars in the course of the year. Similarly with commercial vehicles, but, for convenience, we shall hereafter refer solely to cars, save where there is any relevant distinction between the practice in relation to cars and the practice in relation to commercial vehicles. Distributors and retail dealers who have entered into such agreements are known as the " franchised dealers " of the manufacturer, and the agreements are often referred to as " franchises ". Some distributors and many retail dealers hold franchises from more than one manufacturer. It is not common for a distributor to hold a distributor's franchise from two of the " Big Five ", though it is less uncommon for him to hold a distributor's franchise from one of the " Big Five " and from one of the specialist manufacturers, whose cars do not really compete with the mass-produced cars of the " Big Five ". It is quite common for a franchised distributor of one of the " Big Five " to hold a retail dealer's franchise for another of the " Big Five " or for a specialist manufacturer.

For many years, all or practically all manufacturers have endeavoured to ensure that their cars shall be sold retail only at the prices fixed by themselves. All franchises contain a condition to this effect, which has always been enforceable at common law between the contracting parties. Before the passing of the Restrictive Trade Practices Act, 1956, such a condition was not enforceable at law against a person who was not a party to the contract, and the manufacturers resorted to the well-known, and at that time lawful, device of stop lists operated through the British Motor Trade Association (hereinafter called the " B.M.T.A.") to prevent any person in the motor trade from selling cars retail at other than the fixed price. This system, the legality of which was upheld by the House of Lords in *Thorne* v. *Motor Trade Assocn.* (1), was succinctly described by LORD WRIGHT as follows (2):

> ". . . the rules of the respondent association provide that members shall sell such goods [the goods of the manufacturers or sole concessionaire members] at the prices so fixed, neither higher nor lower, and, further, that members shall not sell such goods to any person, whether member or not, who sells such goods at other than the fixed prices, or sells to any person who supplies to another who sells them at other than the fixed prices. In order to carry out these purposes, a list called the ' stop list ' is prepared, containing

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(1) [1937] 3 All E.R. 157, 323; [1937] A.C. 797.
(2) [1937] 3 All E.R. at p. 165; [1937] A.C. at p. 814.

> the names of those who, having acted contrary to the price-maintenance provisions, have come within the scope of the prohibition. This list is also circulated in the motor trade journals, so that all persons in the trade, whether members of the respondent association or not, may know to whom such goods are not to be supplied." A

The system of fixed retail prices has led to wholesale prices being stated by reference to discounts off the fixed retail price, exclusive of purchase tax. There are minor differences between different manufacturers, but, in general, so far as the " Big Five " are concerned, the wholesale price to franchised retail dealers and to distributors in respect of cars which they themselves sell retail is at a discount of 17½ per cent. off the retail price exclusive of purchase tax, while the wholesale price to distributors in respect of cars which they themselves sell wholesale to retail dealers is at an additional discount of four per cent., making a total of 21½ per cent. An additional one per cent. discount is often allowed to a distributor or retail dealer who is willing to restrict the franchises which he holds to the products of one particular manufacturer. B C

Before the war, most manufacturers (Fords were an exception from 1919 to 1928) permitted their distributors or other franchised dealers with wholesale rights to sell their cars to any motor trader who was a member of the B.M.T.A., and so amenable to the stop list sanction, at a discount of ten per cent. off the fixed retail price. In general, also (Fords were at all times an exception as respects their distributors), manufacturers permitted their own franchised distributors and retail dealers to sell other makes of cars for which they held no franchise but obtained on the ten per cent. discount basis. In the result, a member of the public, if he so wished, could, generally speaking, buy any make of car at the price fixed by its manufacturer from any motor trader who was a member of the B.M.T.A., even though he was not a franchised dealer for such car. It was also the practice before the war for manufacturers to permit their franchised distributors and dealers to sell vehicles to fleet users, that is, concerns which operated a number of vehicles, at a discount off the ordinary retail price. The amount of the discount depended on the number of vehicles operated by the fleet user. The discount was generally deducted from the distributors' or dealers' own margin of profit but, in some cases, particularly where the fleet user's discount was in the higher ranges, the manufacturer shared the cost of allowing the discount. D E F

In the latter part of the war, a joint committee of vehicle manufacturers and retailers reviewed the pre-war structure and practices of the trade, and, in February, 1946, recommended a scheme which was put into operation as soon as vehicles again became generally available for sale to the public. This scheme, which was known as " The Distribution Scheme ", and which, for clarity, we shall refer to as " the former distribution scheme ", continued in operation until, after the passing of the Restrictive Trade Practices Act, 1956, it was replaced by the distribution scheme agreement now under consideration by this court. The former distribution scheme was not intended to cover the whole field of the distribution and sale of motor vehicles in the United Kingdom. It provided for one part of a general system of what the motor trade regarded as " orderly marketing ", directed to the strict maintenance of re-sale prices, wholesale as well as retail. The other parts of the system of " orderly marketing " were to be found in the terms of the franchises granted by manufacturers to their distributors and retail dealers, and in the rules and stop list procedure of the B.M.T.A. The former distribution scheme itself dealt, broadly speaking, with four matters: (1) It provided for a trade register (the " Red Book ") of (a) repairers and (b) franchised dealers who might be (i) car dealers, (ii) commercial vehicle dealers or (iii) joint car and commercial vehicle dealers, and laid down certain minimum qualifications as to the premises, equipment and staff required to qualify for registration under each of these categories. (2) It provided that, when vehicles were sold by a manufacturer or his franchised distributor to a registered dealer G H I who had no franchise from that manufacturer, the discount to be allowed should not exceed ten per cent. in the case of certain makes of vehicles, which included all the makes mass-produced in the United Kingdom, and in the case of all other makes should not exceed such other figure as might from time to time be prescribed by the manufacturer or concessionaire of that particular make up to a maximum of 12½ per cent. (3) It provided that registered repairers should be eligible to receive an introductory commission of five per cent. on vehicle sales introduced by them to a franchised distributor. (4) It provided that discounts should be allowed to fleet users on a specified scale varying with the number of cars or commercial vehicles in their fleet.

The only traders who were eligible for registration as registered dealers in the Red Book were those who held a franchise from one or other of the manufacturers. These, and registered repairers, had to be members of the B.M.T.A., whose rules were amended to include sanctions for any breaches of the former distribution scheme. The former distribution scheme itself did not prohibit manufacturers or their distributors from granting trade discounts to motor traders who were not registered dealers, but the rules of the B.M.T.A. did so and applied the stop list sanction in the case of any breach. Neither the former distribution scheme nor the rules of the B.M.T.A. compelled any manufacturer or distributor to sell vehicles to any registered dealer, nor did they prevent a manufacturer from prohibiting his own franchised distributors or dealers from selling cars not of his own make. In practice, however, manufacturers did permit their distributors to sell vehicles to registered traders who had no franchise from them, and, with one exception, they did not prohibit their own franchised distributors or dealers from selling cars of other makes. The only exception was Fords who prohibited their franchised distributors, though not their franchised dealers, from selling any cars of other makes. In practice, also, although the trade discounts of ten per cent. and 12½ per cent. respectively were stated to be maxima in the former distribution scheme, the maximum discounts appear to have been always allowed. The rules of the B.M.T.A. prohibited the payment of introductory commission to anyone but a registered repairer, and it seems probable, although the evidence was not specific on this, that, although the former distribution scheme imposed no obligation on manufacturers or distributors to allow five per cent. introductory commission to registered repairers, such commission at the rate of five per cent. was in practice given. The trade discounts of ten per cent. and 12½ per cent., the introductory commission of five per cent. and the fleet users' discounts came out of the distributor's own discount, and did not affect the price obtained by the manufacturer on the initial sale to his own franchised distributor. The manufacturers and concessionaires, who are the respondents in the present reference, and, indeed, it would appear the motor distributive trade as a whole, were well content with their system of "orderly marketing" based on the maintenance of re-sale prices and attained by the terms of the individual franchises granted by manufacturers to their distributors and retail dealers, the former distribution scheme and the rules and stop list procedure of the B.M.T.A. They wished to continue it, in so far as the law so permitted, after the Restrictive Trade Practices Act, 1956, came into operation.

In anticipation of the passing of the Act and when its probable terms were known, a meeting of manufacturers and concessionaires was called with the perfectly legitimate object of considering to what extent and by what means they could continue to operate the system after the bill had become law. All were anxious to continue re-sale price maintenance and their immediate and urgent problem was to agree on a temporary scheme to adapt their then existing methods of enforcement to the requirements of the Act pending consideration and agreement on a permanent scheme. At that meeting in June, 1956, unanimous agreement was reached on a temporary scheme about which it is unnecessary to say more than that, in broad outline, it provided for each manufacturer to amend the terms of his franchises so as to incorporate as contractual terms the

A then existing rules of the B.M.T.A. prohibiting sales of cars to dealers who did not maintain prices, and for each manufacturer to appoint the B.M.T.A. as his agent to enforce in the courts, under the provisions of the new Act, the conditions as to re-sale prices subject to which his vehicles were sold. The meeting also appointed a sub-committee, consisting of a representative of each of the " Big Five " and a representative of Rovers, to consider and recommend a permanent B scheme to replace the temporary scheme. The distribution scheme agreement of Aug. 1, 1957, is the fruit of this sub-committee's labours.

It is a regrettable and, fortunately, unprecedented feature of the present reference that those responsible for the preparation and presentation of the respondents' case, a task that was confided to the B.M.T.A., have from the outset endeavoured to avoid disclosing to this court the circumstances in which the C distribution scheme agreement was made. At an early stage in the interlocutory proceedings, in accordance with the normal practice as to discovery, a list of documents was filed on behalf of the respondents. This disclosed the existence of the minutes of the above-mentioned meeting of manufacturers and concessionaires and of one subsequent meeting and of one minute of the sub-committee appointed at the first meeting. An unjustifiable claim of privilege in respect of D these minutes was made but was not persisted in. The contents of the minutes so disclosed suggested that there were other relevant documents which had not been disclosed, and an order was made for affidavits of documents to be filed on behalf of those respondents who were represented on the distribution scheme committee. None of those affidavits disclosed any additional minutes of the sub-committee or other documents relating to its proceedings, although all E manufacturers represented on the sub-committee were also represented on the distribution scheme committee. It was only after the eighth day of the hearing, when, as a result of the cross-examination of the respondents' witnesses, it became clear that such minutes and related documents existed, that they were ultimately, and gradually in three reluctant instalments, disclosed. A tentative suggestion was at one stage advanced on behalf of the respondents that these F newly disclosed documents were privileged, but, on the court's requiring that the claim to privilege be made on oath, it was abandoned. It was also argued that they were irrelevant to any issue before the court. We desire to make it clear that all documents which relate to the circumstances in which an agreement containing restrictions referred to this court was made are relevant and, subject to any proper claim to professional privilege, should be disclosed even in the G ordinary case where there is no issue whether the agreement, on its true construction, accurately expresses the real intention of the parties thereto. In the present case, however, the Registrar, in his answer, put forward the contention that, on its true construction, the distribution scheme agreement contained a mutual agreement between the respondents in co-operation with the B.M.T.A. to join together in enforcing the maintenance of re-sale prices of motor vehicles and H parts, and that that was its principal purpose or one of its purposes. The respondents themselves alleged in their reply, in effect, that, if that was the true construction of the agreement, which they denied, it failed to record the real intention of the parties. The real intention of the respondents was, therefore, directly in issue on this reference, and this could only be ascertained by evidence of the oral agreement in fact reached in the course of the negotiations which I resulted in the written agreement as finally drafted and signed. We feel that we are straining the limits of charity when we say that we find difficulty in following the argument that the minutes of the sub-committee which record these negotiations were irrelevant to the issues before the court.

The tactics adopted by the respondents in relation to concealment of documents, in addition to prolonging the hearing, placed several witnesses who had been members of the sub-committee or present at its meetings in an embarrassing position. Deprived of the opportunity of refreshing their memories by reference

A to contemporaneous documents, they appeared to suffer from an almost pathological fear of admitting that they had ever even considered making an agreement between manufacturers that each should maintain, by the imposition of appropriate conditions of sale, the re-sale prices of his own products. After anxious consideration of their evidence and of the contemporaneous documents, we are satisfied that all members of the sub-committee at all relevant times regarded B it as an essential requirement of the distribution scheme agreement which they recommended for adoption that each signatory should maintain, by the imposition of appropriate conditions of sale, the re-sale prices of his vehicles, and that only those should be parties to the agreement who in fact did so. Whether an express undertaking to this effect was to be inserted in the distribution scheme agreement, or whether the matter was to be dealt with by a tacit understanding C between all the parties, the sub-committee left to their legal advisers; but we have no doubt that the true intention of the sub-committee was that each signatory of the distribution scheme agreement should, in fact, maintain the re-sale prices of his vehicles by the imposition of conditions of sale.

The distribution scheme agreement in the form of the draft as finally approved by the sub-committee was executed by the signatories and came into operation D on Aug. 1, 1957. The restrictions contained in the agreement in that form, subject to one minor amendment agreed by the signatories, are the restrictions which were referred by the Registrar to this court. The agreement is a lengthy document which it is unnecessary to set out in full, but, as questions have arisen as to its true construction, it is necessary to refer to some of its clauses in extenso.

The effect of the definition clause is that " dealer " means a franchised dealer, E whether distributor or retail dealer. A " registered trader " means a franchised dealer whose name is registered as such in the Red Book, and a " registered repairer " means a repairer who is registered as such in the Red Book. A new category of dealer called a " non-franchised trader " is defined as

> " Any person who is and remains accepted by any signatory or by the F committee as complying with the minimum conditions for a car and/or commercial vehicle dealer . . . but who does not hold a current dealer agreement [i.e. franchise] with any of the signatories."

" Manufacturer " where the context so admits includes concessionaire for goods of foreign manufacturer. Clause 1 (a) of the agreement provides that any manufacturer or concessionaire of cars or commercial vehicles may become a G signatory to the agreement, and that any signatory may withdraw from the agreement on giving sixty days' notice. Clause 1 (b) provides that the provisions of the agreement shall apply to all cars and commercial vehicles produced or marketed by the signatories as shown in Sch. 1 thereto. The schedule in fact includes all cars and commercial vehicles of under three tons unladen weight which are manufactured or sold by any signatory. Clause 1 (c) is in the following H terms:

> " Each and every signatory agrees not to prevent any dealer, registered trader or any non-franchised trader from purchasing and selling or any registered repairer from introducing the sale of any new vehicle made or marketed by any other signatory at the appropriate discount or commission."

This clause represents a departure from the former distribution scheme in that it I prohibits any signatory from preventing any of his franchised dealers from selling other makes of cars. Neither this clause nor any other provision of the agreement, however, compels any signatory to ensure that his franchised distributors shall supply any of his make of cars to any dealer, registered trader or non-franchised trader. Clause 1 (d) is in the following terms:

> " Each signatory shall prescribe and may at any time vary as he shall in his own unfettered discretion decide the retail prices of his products and the trade discounts that shall be allowed to his contracting dealers or to any

> category thereof, and it shall be an obligation upon the signatories to ensure that the discounts and commissions prescribed hereunder shall be paid or allowed at the rates and in the circumstances hereinafter provided and shall not be paid or allowed at other rates or in other circumstances."

The discounts and commissions referred to in the second part of this paragraph are those prescribed in cl. 8, cl. 9 and cl. 11 of the agreement. Considerable argument has been addressed to us on the true construction of this clause, but we defer dealing with this until we have set out those clauses. Clause 2 (a) of the agreement prohibits any signatory from appointing as a franchised dealer for any category of his vehicles any person who does not comply with the minimum requirements as to premises, equipment and staff set out in cl. 3 of the agreement, and also provides that the signatory shall require any person whom he appoints as a dealer to complete and sign an application and agreement form in the terms set out in Sch. 2 to the agreement. The remainder of cl. 2 provides that a person who is unable to obtain a franchise from a signatory shall be eligible for entry in the Red Book as a non-franchised trader, provided that he complies with the minimum conditions set out in cl. 3, and is not ineligible under cl. 6 (f) and (g), that he completes and signs the agreement and application form set out in Sch. 2, and that his commercial activities shall not have persistently operated against the public interest. He has to obtain a certificate from one of the signatories to the effect that he complies with such conditions, but, if he cannot do so, there is a right of appeal to the distribution scheme committee set up under cl. 5 of the agreement. A similar provision is made for registration as a registered repairer. It will be necessary to look at the terms of the agreement in Sch. 2 in due course. Clause 3 sets out certain minimum requirements as to premises, equipment and staff which must be satisfied in order to be eligible for registration in each of the five categories of registered repairer, non-franchised trader, or car dealer, commercial vehicle dealer and joint car and commercial vehicle dealer. It is unnecessary to deal with these qualifications in detail. Each of the manufacturer witnesses called stated that they regarded them as the absolute minimum requirements, and that they themselves would require more onerous qualifications to be satisfied by any person whom they appointed as a franchised dealer for themselves. Clause 4 requires signatories to ensure in their contracts with their franchised dealers that such franchised dealers will at all times comply with the minimum requirements, and to cause each of their franchised dealers to be inspected at least twice each year in order to ensure that this is so. The committee are made responsible for similar inspections of registered repairers and non-franchised traders. Clause 5 provides for the election of a distribution scheme committee to administer the agreement. The committee so elected in fact consists of representatives of each of the " Big Five " and of the manufacturers of Rover and Jaguar cars. Clause 6 (a) to (e) provides that the committee shall arrange to publish and maintain the Red Book, and includes detailed provisions for the registration of the five abovementioned categories of repairers, traders and dealers. Clause 6 (f) and (g) deal with a different subject, and embody what is known in the trade as the seventy-five per cent. rule which was incorporated in the former distribution scheme. In effect, they provide that, where a person carries on the business of repairing vehicles for the public in premises in which he also repairs vehicles for himself or any associated or subsidiary company or firm, he shall not be entitled to be registered as a registered repairer unless seventy-five per cent. or more of the turnover of the repair workshop is in respect of work done for the public. There is a similar prohibition on the registration as registered traders or non-franchised traders of persons who sell vehicles to associated or subsidiary companies or firms unless seventy-five per cent. or more of the total sales are to members of the public. Clause 7 merely requires each signatory to notify the committee of all dealers appointed or dismissed by him. Clause 8 (a) is as follows:

A
> " Each of the signatories whose names are set out in Sch. 3 will authorise the allowance to any registered or non-franchised trader not being one of his contracting dealers of a discount of ten per cent. of the list price excluding purchase tax of those cars and/or commercial vehicles marketed by him which are specified in Sch. 3 hereto."

B Schedule 3 includes all mass-produced cars and commercial vehicles of under three tons unladen weight manufactured by English manufacturers and certain foreign mass-produced cars. It is to be observed that this differs from the former distribution scheme in that the discount is a fixed discount of ten per cent. and not a maximum. The British Motor Corporation regarded this change as essential to their agreeing to become parties to the agreement. Clause 8 (b) is in similar terms, namely:

C
> " Each of the signatories whose names are set out in Sch. 4 will authorise the allowance to any registered or non-franchised trader not being one of his contracting dealers of a discount of 12½ per cent. of the list price excluding purchase tax of those cars and/or commercial vehicles marketed by him which are specified in Sch. 4."

D Schedule 4 includes all others cars, principally specialist vehicles, but also certain mass-produced cars of foreign manufacture. Here, again, it is to be observed that the discount is a fixed one of 12½ per cent. not a maximum. Clause 8 (c) is as follows:

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> "Any signatory whose vehicles are subject to the provisions of either cl. 8 (a) or cl. 8 (b) hereof may on giving thirty days' notice to the committee require that the discount applicable to his vehicles or any class of them shall be varied as he shall prescribe whereupon the committee shall provide for notice to be given accordingly to all other signatories and to all other persons concerned in such manner as the committee shall in their discretion decide."

F It is, we think, plain on the true construction of this sub-clause that it purports to entitle any signatory, on giving thirty days' notice, to fix the discount to be allowed on his vehicles at any figure he thinks fit, whether less than ten per cent. or more than 12½ per cent. or at a figure in between. The witnesses were unanimous, however, that, notwithstanding that this is what the paragraph says, the intention of all the parties was that the only liberty open to a signatory under this G clause was to change his vehicles or any of them from the ten per cent. category to the 12½ per cent. category and vice versa, and that there was no intention that any signatory should be permitted to fix a discount at any figure other than ten per cent. or 12½ per cent. No satisfactory explanation has been given to us of how it came about that this misleading paragraph, which purports to give to signatories a liberty much wider than it was intended that any of them should H be permitted to exercise, came to be inserted in the agreement in the form in which it was intended to be registered under the Restrictive Trade Practices Act, 1956. Clause 8 (d) provides that vehicles supplied under the terms of cl. 8 may be supplied either directly by the signatory or by his franchised distributor for the area within which the person to whom the vehicle is supplied carries on business. Clause 8 (e) is as follows:

I
> " No signatory shall in consideration of the discount hereby mutually agreed to be allowed to registered traders and non-franchised traders require any such persons to assume any obligation to buy or stock any other of the signatory's products but save as aforesaid the signatory may prescribe such other terms and conditions as he may desire."

Clause 8 (f) provides that no non-franchised trader shall be entitled to the discounts on more than one new car or one new commercial vehicle purchased in any calendar year for his own use. Clause 9 is as follows:

> "In order to encourage the smaller garage businesses to qualify as registered repairers and thus to extend the provision of a comprehensive and efficient repair and maintenance service to the public, the signatories agree to allow and will direct their respective dealers, whom they may have authorised to effect sales of their products at trade terms either generally or within a prescribed area, to allow an introductory commission of five per cent. of the list price (excluding purchase tax) on all new vehicle sales bona fide introduced by a registered repairer to the dealer with trade rights in whose area (if any) the registered repairer carries on business. The vehicle will be sold and delivered to the customer by the dealer concerned and no obligation to stock any of the signatory's products or to undertake and perform any before or after sales services shall in consideration of the said commission be required of the registered repairer. Such registered repairer shall in addition be entitled to such commission as aforesaid on one new car or one new commercial vehicle purchased in any period of twelve months for his own use. Further all registered repairers shall be entitled to a trade discount on spare parts at the rate currently prescribed by the respective signatory."

It is to be observed that this differs from the former distribution scheme in that the payment of the introductory commission is compulsory, whereas under the former scheme it was only permissible. Clause 10 provides that the signatories shall encourage their dealers to support apprentice training schemes. Clause 11 deals with fleet user terms. It provides that the signatories shall authorise their contracting dealers and registered traders and non-franchised traders to grant fleet user discounts to fleet users on the following scale according to the size of the fleets operated by them, namely: twenty-five to ninety-nine cars or commercial vehicles, 2½ per cent.; one hundred to 199 cars or commercial vehicles, five per cent.; two hundred to 499 cars or commercial vehicles, 7½ per cent.; five hundred and over cars or commercial vehicles, ten per cent. Fleets of cars and commercial vehicles are to be separately assessed. The clause sets out a number of conditions subject to which fleet user discount is to be allowed, of which the only one which requires special notice is the provision in cl. 11 (f) (i) that:

> "No discount shall be paid unless the person placing the order shall at the time of placing the order state that the same is given on condition that the said discount shall be allowed."

The clause requires the committee to maintain and publish a register of fleet users and concludes with a para. (k), under which the signatories reserve the right to deal direct with certain specified classes of fleet users. It is to be observed that this discount is payable irrespective of the size of the order placed by the fleet user. He is entitled to the discount appropriate to the size of his fleet on one vehicle of one make which he buys in, say, Inverness, and to the same discount, neither more nor less, on a single order for one hundred vehicles of a single make placed with a single distributor. Clause 12 is as follows:

> "If any signatory shall supply his new vehicles subject to a condition that they shall not be re-sold or offered for re-sale at a price other than that prescribed by that signatory from time to time and shall further prescribe conditions as to the price which may be paid on the re-sale of any such vehicles, for other vehicles taken by way of exchange then such signatory may prescribe that such allowance price shall not exceed such figure as may be published by any agreed organisation, as the current estimated trade purchase price of the used vehicle concerned."

This clause, which is purely permissive, is a survival from an earlier draft of the agreement in which it followed immediately after a former draft of what is now cl. 1 (d). It has not yet been made use of by any signatory. Clause 13 requires

A each signatory to incorporate in the terms of his agreements with his own franchised dealers clauses binding such dealers to observe the terms of the distribution scheme agreement. Clause 14 provides that the committee may make arrangements with other organisations for the administration and implementation of the agreement, and to provide the necessary office accommodation and staff therefor. The committee have in fact appointed the B.M.T.A. at a fee B of £36,000 a year to do this. The B.M.T.A. combines this function with the task of administering and enforcing on behalf of the great majority of manufacturers the price maintenance conditions subject to which their products are sold. The evidence, which was significantly vague on this topic, leaves us uncertain to what extent this task is, in fact, financed by the fee paid to the B.M.T.A. under the distribution scheme agreement. Clause 15 authorises the committee to require C the payment of fees by the signatories, dealers, registered traders, non-franchised traders, and registered repairers, as they prescribe. They have, in fact, prescribed fees for all these categories except the signatories; the cost of administration of the scheme, including the cost of preparing and presenting the respondents' case to this court, thus falls on dealers and repairers and not on the signatories themselves. Clause 16 authorises the committee to arrange for publication in the D trade press of amendments to the lists in Sch. 1, Sch. 3 and Sch. 4.

Schedule 2 contains the form of agreement and application for admission to the Red Book as a registered trader or non-franchised trader which is referred to in cl. 2 and cl. 6. We shall call this the "trader's application agreement". It is unnecessary to set out its full terms, but certain of its provisions require consideration. Paragraph 2 is as follows:

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> "In consideration of our name being accepted for inclusion in the Red Book: (a) It is hereby understood that we shall be permitted (subject to the acceptance of our order) to obtain for re-sale by retail new motor vehicles replacement parts and assemblies therefor marketed in the United Kingdom by any company currently a signatory to the distribution scheme agreement providing always that we shall seek to obtain such vehicles only F from the signatory concerned or from such source as he may prescribe. (b) We hereby undertake with the said signatories and each of them that we do now and will so long as our name and address(es) as set out in cl. 1 hereof remain in the Red Book in any of the above categories continue to maintain and comply with all the conditions applicable thereto a copy of which we hereby acknowledge receipt."

G

It is to be noted that the words in brackets in sub-para. (a) have the effect that the applicant has no right to be supplied with any vehicles. Paragraph 5 provides that the trader's application agreement, and any benefits thereunder, may be terminated by the signatories immediately the applicant shall cease to comply with or maintain all the conditions applicable to his appropriate category or H shall fail to comply with any of the provisions of the trader's application agreement. Paragraph 6 contains a number of undertakings expressed to be made with the signatories and each of them. Of these, the most important are that the applicant will:

> "(f) when selling a new motor vehicle to a retail customer who claims at the time of placing the order to be a fleet user, take such steps as may be necessary I to ensure that a claim for fleet user discount shall be submitted to the signatory concerned in such form as the signatory may require and that unless and until we shall have been so authorised by the said signatory we will not pay or allow any discount to the said customer and then only of the amount so authorised";

and,

> "(h) in the event of any signatory prescribing conditions as to the price at which his products shall be re-sold that we will not offer or adopt any

> means whereby the price paid or to be paid for any such signatory's products is other than his prescribed price."

It is to be noted that sub-para. (h), which is a covenant with all the signatories jointly and severally, enables any signatory to complain if the applicant sells a price-maintained vehicle of any other signatory at a price other than the price prescribed by that other signatory, and thus would enable one signatory to insist on observance by the applicant of the price maintenance provisions laid down by another signatory, even if the other signatory were unwilling to take steps against the applicant to enforce his own conditions, and would enable the trader's application agreement to be terminated under para. 5 thereof on breach of such covenant. Paragraph 9 is an arbitration clause requiring all disputes to be submitted to arbitration by an agreed arbitrator or, in default, before a single arbitrator appointed by the President of the Society of Motor Manufacturers and Traders, Ltd. Arbitration is made a condition precedent to legal proceedings. Breaches by the applicant of price maintenance conditions laid down by any signatory can thus be dealt with in the privacy of the arbitration room instead of in open court.

Schedule 5 contains the form of agreement and application for admission to the Red Book as a registered repairer. We will call this the "repairer's application agreement". It follows substantially the provisions of the application form in Sch. 2, save that the consideration is expressed to be the right to receive an introductory commission of five per cent. on the introduction of a retail customer to a signatory or to one of his franchised distributors. Paragraph 2 (c), after stating that it is understood that the applicant will be permitted to receive an introductory commission of five per cent. on not more than one new car or commercial vehicle purchased for his own use in any period of twelve months, and that he shall not be eligible for fleet user discount on any vehicle on which he has been paid an introductory commission or vice versa, continues:

> "and we agree that subject to the foregoing we will not solicit or seek to obtain new motor vehicles produced or marketed by any signatory other than at full retail price."

Paragraph 5 contains the undertakings with the signatories and each of them corresponding to those in para. 6 of Sch. 2 and, in particular, sub-para. (c) and sub-para. (e) contain undertakings corresponding to those in sub-para. (f) and sub-para. (h) of para. 6 of the trader's application agreement. Paragraph 7 contains a corresponding arbitration clause.

We return now to cl. 1 (d), the true construction of which has been the subject of much argument before us. The Registrar contends that the word "prescribe" in the first line of this clause bears its ordinary natural meaning recorded in the CONCISE OXFORD ENGLISH DICTIONARY as being: "To lay down or impose authoritatively", or in the SHORTER OXFORD ENGLISH DICTIONARY as being: "To lay down as a rule or direction to be followed", and that the expression "the retail prices of his products" means the prices at which his products shall be sold by retail. Accordingly, the provision that

> "Each signatory shall prescribe and may at any time vary as he shall in his own unfettered discretion decide the retail prices of his products . . ."

places on each signatory the obligation to lay down authoritatively (i.e., as a rule or direction to be followed) prices at which his products shall be sold by retail, but reserves to him the liberty from time to time to lay down authoritatively other prices in their stead; that is to say, he is placed under an obligation when selling his products to the trade for re-sale to sell them subject to a condition that they may only be re-sold retail at prices fixed by him. This seems to us to be the plain meaning of the words and it is, in our view, confirmed by a detailed examination of the language of the agreement as a whole, in which the verb "prescribe" or its past participle "prescribed" is used more than thirty times, A as well as by a consideration of what is required to give the agreement business efficacy. In this latter connexion, it is sufficient to point out that the covenant in the second part of cl. 1 (d) itself, imposing on the signatories the obligation

> "to ensure that the discounts [namely, the trade discounts and fleet user discounts] . . . prescribed hereunder shall be paid or allowed at the rates and B in the circumstances hereinafter provided and shall not be paid or allowed at other rates or in other circumstances",

was one which all the witnesses regarded as vital to the successful operation of the distribution scheme agreement. It would, from the business point of view, make nonsense of this covenant if the franchised distributors and dealers of signatories were at liberty to give different discounts so long as they called them not dis- C counts off but reductions in price. Despite counsel for the respondents' sustained attempt to suggest a number of other meanings, unsupported by any lexicographer, for the word "prescribe", he has not succeeded in shaking our view that the plain meaning of the words is as set out above.

Although the distribution scheme agreement was intended to operate as an integral whole, the Restrictive Trade Practices Act, 1956, requires the court to D consider and rule on each separate restriction which it contains. It is, therefore, necessary to list at least the most important restrictions to be found therein, and it is convenient to group them under three heads.

Restrictions relating to the sale of vehicles to the motor trade.

(1) A restriction prohibiting any signatory from selling his products otherwise than subject to a condition as to the price at which they may be E re-sold by retail (cl. 1 (d)).

(2) A restriction prohibiting any signatory from appointing as his franchised distributor or retail dealer any person who does not satisfy the requirements as to premises, equipment and staff, etc., prescribed in cl. 3 and cl. 6 (f) and (g) (cl. 2).

(3) A restriction prohibiting any signatory from preventing any dealer, F registered trader or non-franchised trader from purchasing and selling a vehicle manufactured by any other signatory (cl. 1 (c)).

(4) (a) A restriction prohibiting any signatory from selling any vehicle (i) to a non-franchised trader or a registered trader not possessing a franchise from him except at a discount of ten per cent. or 12½ per cent., as the case may be, of the list price; or, (ii) to any motor trader who is not a non-fran- G chised trader or a registered trader at less than the full list price (cl. 1 (d), cl. 8 (a), (b) and (d)).

(4) (b) A restriction prohibiting any signatory from supplying vehicles to his franchised distributors except on terms that any such vehicle, (i) if it is sold to a non-franchised trader or a registered trader not possessing a franchise from such signatory shall be sold at a discount of ten per cent. or H 12½ per cent., as the case may be, of the list price; or, (ii) if it is sold to a motor trader who is not a non-franchised trader or a registered trader shall be sold at not less than the full list price (cl. 1 (d) and cl. 8 (a), (b) and (d), cl. 13).

(4) (c) A restriction prohibiting any signatory on any such sale as is referred to in (a) (i) or (b) (i) above from imposing a requirement on the purchaser to I buy or stock any other of the signatory's products (cl. 8 (e)).

Restrictions relating to introductory commission.

(5) (a) A restriction prohibiting any signatory from supplying a vehicle to a purchaser pursuant to a sale bona fide introduced by a registered repairer without paying to such registered repairer a commission of five per cent. (cl. 1 (d), cl. 9).

(5) (b) A restriction prohibiting any signatory from supplying vehicles to his franchised distributor except on terms that if any vehicle is sold to a

purchaser introduced by a registered repairer the distributor shall pay to the registered repairer a commission of five per cent. and that only in such cases shall any introductory commission be paid in respect of its sale (cl. 1 (d), cl. 9).

Restrictions relating to the sale of vehicles to fleet users.

(6) (a) A restriction prohibiting any signatory from supplying any vehicle to any registered trader or non-franchised trader except subject to the condition that on re-sale to a fleet user who complies with the conditions set out in cl. 11 it shall be re-sold at the discount off list price prescribed in that clause (cl. 1 (d), cl. 11).

(6) (b) A restriction prohibiting any signatory from selling any vehicle directly to a fleet user at less than full list price except in the circumstances prescribed in cl. 11 (k) (cl. 1 (d), cl. 11).

A careful reading of the distribution scheme agreement will disclose other minor restrictions and also refinements on the restrictions which we have listed. It is, however, unnecessary to specify these in detail. Different considerations apply to these three classes of restrictions and they require separate examination.

Restrictions relating to the sale of vehicles to the motor trade.

Restriction No. (1): No attempt has been made by the respondents to justify this restriction which is contained in the first part of cl. 1 (d), and which we have held, on its true construction, prohibits any signatory from selling his products otherwise than subject to a condition as to the price at which they may be re-sold retail. Since the onus lies on the respondents to satisfy us that it is in the public interest on one or other of the grounds prescribed by s. 21 (1) of the Act, we must, therefore, declare this restriction contrary to the public interest, although in so doing we express no view whether or not it could have been justified if the respondents had sought to do so and had marshalled evidence directed to that end. Instead of seeking to justify the restriction, and, presumably, in anticipation of our ruling as to the true construction of the clause, the respondents in their reply expressed their willingness to amend the agreement so as to make it clear that the clause did not mean what we have held that it says. An amendment directed to this end has in fact been agreed by the signatories and registered during the hearing of this reference. With that amendment we shall deal in due course.

There is, however, an air of unreality about these tactical manoeuvres. The evidence satisfies us that retail price maintenance by the imposition of conditions of sale is essential to the successful operation of the distribution scheme agreement; without retail price maintenance by all manufacturers of any consequence, the agreement just would not work. We are also satisfied that the true intention of the parties to the distribution scheme agreement (as of the sub-committee which approved the draft) was, and continues to be, that each signatory shall, in fact, maintain the retail prices of his vehicles by the imposition of conditions of sale. It would be naïve to suppose that the question whether the distribution scheme agreement is contrary to the public interest will turn on whether this intention is carried out by incorporating an express undertaking to this effect in the distribution scheme agreement as it was in the form originally referred to us (from which any signatory can withdraw on sixty days' notice), or whether it is carried out by a tacit understanding between the signatories as is now apparently proposed.

Restrictions Nos. (2), (3) and (4): A number of benefits was claimed by the respondents to result from these restrictions, several of them being benefits to the motor trade itself to whom we do not doubt that the scheme despite, or perhaps because of, its rigidity, is convenient. The alleged benefits or advantages to the public have been put in a number of ways, but the claim as to the public benefit flowing from the restrictions can, we think, be fairly summarised as follows: The restrictions ensure the existence of a nation-wide network of adequately equipped and staffed dealers capable of providing efficient after-sales service, from any one of whom any member of the public can buy the make of motor vehicle of his choice, notwithstanding that the dealer does not hold a franchise from the manufacturer of the car chosen. These benefits or advantages would be denied to the public as purchasers or users of motor vehicles if the restrictions were removed. There are today some ten thousand registered and non-franchised dealers, of whom only about four hundred are non-franchised dealers. We see no reason to suppose that the number of franchised dealers has been significantly affected by the existence of the distribution scheme agreement, and only four per cent. of the nation-wide network of dealers are not franchised. No evidence has been given to show that the additional outlets for the retail sale of vehicles provided by the four per cent. of non-franchised dealers are necessary or economically desirable, or that, in the absence of a distribution scheme agreement, such non-franchised dealers as in fact fulfil a public need would not continue to be used as retail selling outlets by the manufacturers. An adequate nation-wide network of dealers would exist whether or not there were a distribution scheme agreement.

Sales of vehicles to the public by franchised dealers under their franchises are not affected by the restrictions now under consideration. It is only those members of the public who buy vehicles from dealers who hold no franchise for the particular make purchased who enjoy such benefits or advantages as flow from these restrictions. The evidence shows that, in 1959, only between five per cent. and six per cent. of the public in fact chose to buy vehicles from a dealer who did not hold a franchise for the make of vehicle purchased, the percentage being in some, but not all, cases higher in the case of specialist makes than in the case of mass-produced makes. Whether this low percentage was due to the fact that, in general, there is an adequate network of franchised dealers, at any rate for each of the mass-produced makes, or to the fact that, under conditions of short supply, distributors were reluctant to make vehicles available to other traders at a discount of ten per cent. or 12½ per cent. instead of selling them themselves at full list price, or whether it was due to members of the public having a shrewd suspicion that a dealer who had a franchise for a particular make would be likely to offer them out of his 17½ per cent. or 18½ per cent. discount a better part-exchange price for their own car than a dealer who had no franchise for the make purchased and whose discount was only ten per cent. or 12½ per cent., did not appear from the evidence. The evidence does, however, indicate that the proportion of the public who in fact make use of the alleged benefit of the wider choice of dealers is small.

We do not pause at this stage to consider whether a benefit or advantage to so small a portion of the public would satisfy the requirements of s. 21 (1) (b) of the Act, for the relevant question is not whether the public now enjoy such benefit or advantage but whether they would be denied it if the relevant restrictions were removed. At the basis of the respondents' contention on this part of the case lies the assumption that, if the distribution scheme agreement came to an end, each of the "Big Five" manufacturers and possibly others would (a) refuse to allow their franchised dealers to sell any other make of car, and (b) refuse to allow their own makes of vehicles to be sold by anyone other than their franchised dealers. The respondents have wholly failed to satisfy us that this assumption is valid. We think it likely that Fords would revert to their pre-1957 practice of refusing to allow their distributors (but not their retail dealers) to sell other makes of cars. It is possible, although we are not able to say that it is likely, that one or more of the other members of the "Big Five" might follow suit, although the process would in any event we think be a gradual one. But, since franchised distributors of the "Big Five" are few in number compared with their franchised retail dealers, and since distributors' premises are almost invariably situate in towns, this would not affect significantly the range of choice of the five per cent. or six per cent. of the public who have in the last year or so chosen to buy vehicles from dealers who have no franchise for the make of car purchased. We do not think it likely that any of the " Big Five " manufacturers would prohibit their franchised retail dealers from selling other makes of cars. None of them has done so for the last thirty years, although all were at liberty to do so up to Aug. 1, 1957. We see no reason why they should choose to do so now if the distribution scheme agreement ceased to exist. Even if they did so in relation to competing mass-produced makes, there seems no possible commercial reason why they should do so in relation to specialist makes, including such cars as Rolls-Royce, Bentley, Jaguar and Rover, which do not compete with their own, and whose presence in the franchised dealer's show-room may lend prestige to his business from which the sales of their own makes may profit.

Equally, we are not satisfied that any of the manufacturers is likely to refuse to allow his own make of vehicle to be sold by anyone other than his franchised dealers. No plausible reason has been suggested why manufacturers should. No doubt they would want to be satisfied that dealers permitted to sell their cars were capable of giving an adequate after-sales service, but their own franchised distributors through whom cars would be supplied to such dealers would have no difficulty in ascertaining this, although they would probably insist on a higher standard than that laid down by the minimum requirements of the distribution scheme agreement.

Even assuming, however, contrary to all probabilities, that one or more of the " Big Five " were to adopt a general policy of insisting on their own makes being sold only by their own franchised dealers and of preventing their franchised retail dealers as well as their distributors from selling any other make of mass-produced car, what benefit or advantage would the public lose? Of the five per cent. or six per cent. who buy cars from dealers other than those holding a franchise for the make purchased, about 9/10ths are purchasers of mass-produced cars which are the only cars which would be affected. There is no evidence to suggest that, save in sparsely populated parts of the country, each of the " Big Five " has not already an adequate geographically well-spaced network of franchised dealers from whom their cars can be purchased; and it is only in respect of the Highlands of North-West Scotland that the evidence shows that there are not sufficient conveniently situated retailers to provide a separate franchise holder for each of the " Big Five " makes of cars. It must give considerable satisfaction to the lonely crofters of the Western Highlands to know how often concern for their unique problems is relied on in the Restrictive Practices Court to justify restrictions applicable to the whole of the United Kingdom; but, irrespective of what policy they might adopt in more populous parts of the country, we do not doubt that, if the " Big Five " want to sell their cars in the Western Highlands, they will find means to make them available at convenient distribution points. Elsewhere than in the Western Highlands, the respondents rely less on the inconvenience to the public of travelling some distance for the actual purchase of the vehicle of their choice than on the convenience of being able to get the after-sales service from the local dealer whom they generally employ for repairs. We doubt whether this somewhat shadowy advantage, based on an assumed relationship between car owners and their local repairers analogous to that of patient and doctor, can really be called specific. We are certainly not satisfied that it is substantial.

It was also claimed that these restrictions, and particularly restriction No. (3), made it easier to introduce a new make of car on the market. At first sight this would appear to be a sound claim, but the evidence did not support it. So far as mass-produced cars are concerned, it was common ground that there is no likelihood of any new manufacturer producing such a car in this country, so that, from the practical point of view, any mass-produced car introduced to the United Kingdom market is likely to be one manufactured abroad. Two witnesses who are concessionaires of foreign mass-produced cars were called, both of whom had considerably expanded their sales in the last year or two. Both supported the scheme, but their evidence showed that the proportion of their sales through non-franchised traders and registered traders who did not hold franchises from them was no greater than similar sales of makes of the " Big Five " manufacturers. It would seem that any manufacturer who desires to market a mass-produced car in the United Kingdom and to retain his goodwill must create a distributive network of his own with franchised distributors and dealers equipped with stocks of cars for show and demonstration purposes, and with readily available stocks of spare and replacement parts. The distribution scheme agreement does not either aid or prevent their doing this, and the claim that the restrictions make it appreciably easier to introduce a new make of mass-produced car on the market is not proved by the evidence. No argument or evidence was addressed to us as to the introduction of new specialist makes, since it is not suggested that these would, in fact, derive any benefit from the distribution scheme agreement.

For all these reasons, the respondents have failed to satisfy us that the removal of restrictions Nos. (2), (3) and (4) would deny to the public as purchasers or users of motor vehicles any specific or substantial advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restrictions themselves or of any arrangements or operations resulting therefrom.

The respondents in their pleadings also rely in support of these restrictions on s. 21 (1) (a) of the Act, namely, that they are reasonably necessary to protect the public against injury in connexion with the use of motor vehicles. This argument, based on the assumption that, in the absence of a distribution scheme agreement, manufacturers, despite the damage it would do to their goodwill, would be prepared to sell their vehicles through dealers incapable of giving an efficient after-sales service, was not pressed at the hearing. It is obviously without foundation. Indeed, left to themselves, most, if not all, manufacturers would insist on higher standards than the minima laid down in cl. 3 of the agreement. Also without foundation, and abandoned during the hearing, is the contention raised by an amendment to the respondents' answer relying (3) on para. (e) of s. 21 (1). There is no evidence that the general level of employment in the motor manufacturing industry or the motor distributing trade is affected, one way or another, by the existence of the distribution scheme agreement.

As the respondents have failed to satisfy us in relation to restrictions (2), (3) and (4) of any of the circumstances referred to in para. (a) to para. (g) of s. 21 (1), the question of the balancing clause does not arise, and these restrictions must be declared contrary to the public interest.

Restrictions relating to introductory commission.

Restrictions No. (5) (a) and (b): The restrictions relating to the compulsory payment of five per cent. introductory commission to registered repairers is sought to be justified principally under para. (a) of s. 21 (1). They are said to be an inducement to motor repairers to bring their premises, equipment and staff up to the minimum requirements to qualify for registration as a registered repairer in the Red Book. This, it is said, is reasonably necessary to protect the public against injury from inefficiently repaired motor vehicles. We are not satisfied by the evidence that these restrictions have had any effect in improving the general efficiency of motor repairers, or that their removal would make any difference to the efficiency of any of them.

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(3) Section 21 (1) (e) is as follows: " that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated."

No doubt there is, in some cases, a saving in costs of distribution which constitutes an economic justification for paying some introductory commission to a person who introduces a sale, whether a registered repairer or not; although the evidence suggests that, where it is paid, it may result in the person who buys the car obtaining a lower price for any vehicle which he delivers in part exchange. Some eighty per cent. to ninety per cent. of sales of new cars are nowadays on part-exchange terms. But we have heard no evidence to satisfy us that any specific or substantial advantage to the public as purchasers or users of cars flows from a restriction which requires a fixed five per cent. introductory commission to be paid to a registered repairer, but to no one else, whether he has earned it in the economic sense or not. The balancing clause does not, therefore, arise and restrictions No. (5) (a) and (b) must also be declared contrary to the public interest.

Restrictions relating to the sale of vehicles to fleet users.

Restrictions No. (6) (a) and (b): These restrictions create a privileged class of purchasers entitled to buy cars at a lower price than the general public. To the extent that the reduction in price exceeds any saving in manufacturing or distribution costs incidental to sales to purchasers in this category, it must be met out of the manufacturers' or distributors' and dealers' profits or be reflected in an increased price to persons not within the privileged class, i.e., the public at large. No reliable statistics are available as to the number of cars or commercial vehicles purchased annually on fleet user terms. It has been suggested by the respondents that some ten per cent. of the sales of cars and as much as forty per cent. of the sales of commercial vehicles are made to fleet users, but this estimate is based on a series of assumptions the validity of which is unproven. We think that these figures represent maxima, and that the true proportion may be anywhere between four per cent. and ten per cent. in the case of cars and between twenty-five per cent. and forty per cent. in the case of commercial vehicles. It has not been argued that fleet users in themselves are sufficiently numerous to constitute the " public " as purchasers or users of motor vehicles within the meaning of s. 21 (1) (b) of the Act, and we have, accordingly, not been invited to consider whether these restrictions do afford them greater benefits or advantages in respect of the prices which they pay for their vehicles than those they would obtain under free competition. Nor have the respondents sought to show that the fleet user discounts correspond to any savings in manufacturing or distributing costs resulting from fleet user sales. Indeed, it is implicit in the principal justification for these restrictions that they bear no such relation so far as any individual fleet user sale is concerned.

The respondents rely primarily on s. 21 (1) (a). It is claimed that, by ensuring that a fleet user can obtain the same discount whenever and wherever he purchases even a single vehicle of any make, he is spared the temptation to limit his purchases to a single make and so to use for a particular purpose, for which he needs only very few vehicles, vehicles which are, in fact, unsuitable for that purpose. It is also claimed that it removes the temptation to buy any vehicle in his fleet from any dealer other than one in the neighbourhood where it will be used who will supply an efficient after-sales and repair service during the lifetime of the vehicle. Then follows the non sequitur: that, if fleet users were not removed from these temptations, the public would be in danger to life and limb from the unsuitable and ill-repaired vehicles which fleet users would put on the roads. This proposition needs only to be stated to be rejected.

It was also suggested, although it does not seem to be specifically pleaded, that these restrictions result in keeping down the price of vehicles to the rest of the public. It is said that, under free competition between manufacturers for fleet user business, the discounts to fleet users would increase and, since manufacturers' and motor dealers' profits are cut to the bone, this could only result in a general increase in retail prices of vehicles to the public as a whole. No facts or figures were adduced in support of this contention, except that it was proved that some manufacturers gave fleet user discounts at a higher rate in the 1930's. Conditions today are wholly different from before the war and, in particular, the bargaining power of the "Big Five" manufacturers, who supply the vast bulk of fleet users' vehicles, has been greatly strengthened. If the restrictions were abolished, it may well be that individual manufacturers would continue to allow fleet user discounts on the same basis as now, for the strength of trade custom is strong. But they would be in a position if they so wished to relate their terms of sale to customers who placed bulk or regular orders to the savings in manufacturing or selling costs resulting from the size or regularity of the order, and we have no reason to think that the aggregate discounts allowed under such a system would exceed the unproved amount (estimated at about £7½ million per annum) of the aggregate annual discounts now allowed to fleet users as a result of the present restrictions.

In respect of restrictions (6) (a) and (b), the respondents have failed to satisfy us that they fulfil the requirements of any of para. (a) to para. (g) of s. 21 (1) of the Act. The balancing clause does not arise and the restrictions must be declared contrary to the public interest.

In the result, the respondents have failed to satisfy us that any of the main restrictions contained in the distribution scheme agreement of Aug. 1, 1957, in the terms in which it was originally referred to this court by the Registrar, is not contrary to the public interest; and with the main restrictions also fall all those minor restrictions which are ancillary to the main restrictions. It is unnecessary to refer to them in detail.

It remains to deal with the agreement as varied since the commencement of these proceedings by the amendments agreed by the signatories during the course of the hearing. The principal amendment is to substitute for the first part of cl. 1 (d) the words:

> "Each signatory shall publish the retail prices of his products (but may at any time vary such prices as he shall in his own unfettered discretion decide) . . ."

The remainder of the clause is unchanged. This removes the express covenant by signatories to maintain their retail prices which we have dealt with under restriction No. (1).

The remaining amendments relate to the agreements by registered and non-franchised traders and by registered repairers set out in Sch. 2 and Sch. 5 to the distribution scheme agreement. They delete the words providing that such agreements may be terminated by the signatories for failure by the applicant to comply with the provisions thereof, and delete also sub-para. (h) of para. 6 of the agreement in Sch. 2 and sub-para. (e) of para. 4 of the agreement in Sch. 5. They also change the remaining covenants in those two paragraphs from covenants with the signatories jointly and severally to covenants with the signatories severally. None of these amendments affects restrictions No. (2) to No. (6) contained in the distribution scheme agreement as originally referred, and it is plain that our findings on those restrictions would apply equally to the distribution scheme agreement as varied. Under s. 20 (5) of the Restrictive Trade Practices Act, 1956 (4), we have a discretion whether we make a declaration

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(4) Section 20 (5) is as follows: "The powers of the court under this section shall not be affected by the determination of an agreement effected after the commencement of the proceedings, and where an agreement is varied after the commencement of the proceedings, the court may make a declaration and, if it thinks fit an order under sub-s. (3) or sub-s. (4) of this section, either in respect of the agreement as at the commencement of the proceedings or in respect of the agreement as varied, or both."

in respect of the original agreement or the agreement as varied or both. The A
respondents, having first urged us to make a declaration as to the original agreement as varied, have finally invited us to make a declaration as respects the original agreement and to make no declaration as to the agreement as varied. We found difficulty in following the respondents' arguments in favour of this latter course, but the manner in which this case has from the outset been conducted on their behalf makes it in our view desirable to make it clear beyond a B
peradventure, in a manner which imports the sanctions laid down by the Act, that the agreement as varied as well as the agreement in the form that it was at the commencement of the proceedings is contrary to the public interest.

We will, accordingly, exercise our discretion to declare that all the restrictions contained in the distribution scheme agreement of Aug. 1, 1957, as at the commencement of the proceedings and all the restrictions contained in that agree- C
ment as varied after the commencement of the proceedings are contrary to the public interest.

Declarations accordingly.

T. G. Roche, Q.C.: I ask for an order under r. 76 of the Restrictive Practices Court Rules, 1957, (5). I submit that the matters to which your Lordship has D
referred (6) relating to discovery constitute matters which make it appropriate for me to ask for an order for costs. The reference was on July 4, 1958. Appearance was entered on Aug. 13, 1958. Under r. 18 a list of all documents should accompany the Case (7). No such list accompanied the Case. The respondents' solicitors wrote on Jan. 8, 1959, a letter containing the following paragraph—"You will appreciate that the distribution scheme agreement E
was drawn up, for the purposes of complying with the Restrictive Trade Practices Act, with the assistance of counsel and ourselves. When the agreement was drawn up it was anticipated that it would be the subject of legal proceedings. Accordingly, even if the documents relating to the drawing up of this agreement were of any materiality, such were brought into existence in anticipation of these legal proceedings and are privileged. We are prepared to supply to you copies F
of the minutes of the distribution scheme committee, although we consider that these are not material to the matters involved and are further privileged. You will, however, understand that supply of copies of these minutes will be without prejudice to our contention that the minutes are both immaterial and privileged. Further, there are other documents, including the opinions of counsel, mentioned in these minutes . . ." On July 6, 1959, we got the first G
list of documents. Privilege was claimed. After various proceedings and communications an order was made for discovery by affidavits of documents by nine representatives. There was agreement for a list of the documents in the hands of the Secretariat of the Scheme and that the affidavits might refer to the

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(5) Rule 76 and r. 77 of the Restrictive Practices Court Rules, 1957, provide—
"76. Where it appears to the court that any party has been guilty of unreasonable H
delay, or of improper, vexatious, prolix or unnecessary steps in any proceedings, or of other unreasonable conduct (including, but without prejudice to the generality of the foregoing, a refusal to make any admission or agreement as to the conduct of the proceedings which he ought reasonably to have made), the court may make an order for costs against him.

"77. Where an order is made under the last foregoing rule, the court may direct that the party against whom the order is made shall pay to any other party a lump sum I
by way of costs, or such proportion of the costs as may be just, and in the last-mentioned case may itself assess the sum to be paid, or may direct that it be assessed by the proper officer of the court, from whose decision an appeal shall lie to a judge . . ."

(6) See p. 168, letters B to F, ante.

(7) Rule 18 of the Restrictive Practices Court Rules, 1957, provides—"Every respondent who has entered an appearance shall, within six weeks of his entry of appearance, deliver to the Registrar, and file with the proper officer of the court, a statement of his case, which . . . shall be accompanied by a list of all the documents relevant to the proceedings which are or have been in his possession or power, indicating for which (if any) of those documents he claims privilege and the grounds of the claim."

list. Neither the list nor the affidavits referred to the vital minutes and drafts. If it was desired to claim privilege, they should have been referred to and privilege should have been claimed. Instead they were omitted. They were simply suppressed.

DIPLOCK, J.: I have looked at them for that purpose, and I agree.

T. G. Roche, Q.C.: Whatever may have been the position before the spring of 1959, afterwards the position changed, because the respondents withdrew their first two Cases and put in a third Case. In the Registrar's answer to that Case the question of intention was expressly put in issue, and in January, 1960, the respondents joined issue on that. Thereafter, clearly, extrinsic evidence was going to be called by the respondents that there was no intention to have retail price maintenance. The court has found that evidence to be false. The issue was joined with knowledge that there were in existence documents which proved that the oral evidence which was to be put forward was false.

G. T. Aldous, Q.C.: I understand that no suggestion is made that there should be any award of costs except in respect of non-disclosure of the documents.

DIPLOCK, J.: I think that reliance was also placed on general obstructive tactics.

G. T. Aldous, Q.C.: What is said, I suppose, is that what was done was unreasonable and has added to the costs to some extent. I do not imagine that it is said in any other way. Your Lordship has held that these documents were relevant. I submitted that they were not relevant documents in view of the fact that the construction of documents depends on the clauses of the documents to be construed. Your Lordship has held against me (8), but it was the view which was taken at the time and which I expressed in opening. I must accept before your Lordship's court that what has been done was wrong, but it was not, in my submission, unreasonable within r. 76.

The court retired to discuss the application for costs.

DIPLOCK, J.: We consider that this is a case where we should exercise our discretion under r. 76 and r. 77, since the respondents have been guilty of unreasonable conduct in relation to the discovery of documents and the tactics in relation thereto, both before and during the hearing of this case, which has increased the costs, has prolonged the case and has put some of the witnesses in a very embarrassing position indeed.

We think that the proper order to make is that the respondents should pay the sum of 3,000 guineas towards the costs of the registrar.

Lump sum award of costs accordingly.

Solicitors: *Osmond, Bard & Westbrook* (for the parties to the Motor Vehicles Distribution Scheme Agreement); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(8) See p. 168, letter H, ante.

Re WERNHER'S SETTLEMENT TRUSTS. LLOYDS BANK, LTD. *v.* MOUNTBATTEN (EARL).

[CHANCERY DIVISION (Buckley, J.), December 2, 5, 1960.]

Settlement—Class gift—Distribution period—Rule in Andrews *v.* Partington—*Trust for settlor's children then living or thereafter to be born who should attain the age of twenty-one or, being female, marry—Attainment of twenty-one years by settlor's three children—Settlor still living—Whether trust fund distributable.*

In a settlement dated Mar. 20, 1931, a settlor declared: "The trustees shall hold the fund in trust for all such of the children of the settlor (whether now living or hereafter to be born) as being male attain the age of twenty-one years or being female attain that age or marry and in such proportions that each son shall receive twice as large a share as each daughter." At the date of the settlement the settlor was aged thirty-eight and had three children, a son aged twelve and a half years and two daughters aged eleven and a half and six years respectively. At the date of the summons the settlor was living and had had no further children, his son had attained the age of twenty-one and had died, and his two daughters had attained that age and married. The question arose whether on the true construction of the settlement the rule in *Andrews* v. *Partington** was applicable and the trust fund was distributable or whether any future children of the settlor would be entitled to benefit under the trust.

Held: the rule in *Andrews* v. *Partington* applied, with the consequence that the trust fund was held on trust absolutely as to one half for the son's estate and as to the other two quarters for the daughters, for the following reasons—

(i) in determining whether the rule in *Andrews* v. *Partington* applied to a disposition by settlement, the settlor must be taken to have framed his trust with the rule in mind unless there was something in the settlement that was so inconsistent with the rule as to negative conclusively the assumption that it would apply (see p. 188, letter I, to p. 189, letter A, post).

Re Bleckly ([1951] 1 All E.R. 1064) followed.

(ii) a trust for a class of persons who should attain a certain age and for such persons in shares was a trust which involved a distribution between those persons for the purposes of the rule, even though the trust instrument did not expressly direct distribution at any particular time (see p. 190, letter H, post).

Re Chartres ([1927] All E.R. Rep. 408) applied.

(iii) where in a settlement such words of futurity as "hereafter to be born" were used in describing a class of children who were to benefit, and the words were capable of being given an intelligible and effective meaning by relating them to the period between the date of the settlement and the date of distribution, when the first member of the class should attain a vested interest, it was proper to relate the words of futurity to that period, and so to confine the class of children born before the date of distribution (see p. 190, letters A to D, post).

Scott v. *Earl of Scarborough* ((1838), 1 Beav. 154) applied.

[As to the rule in *Andrews* v. *Partington*, see 34 HALSBURY'S LAWS (2nd Edn.) 271-274, paras. 322, 323; and for cases on the subject, see 44 DIGEST 768-771, *6266-6293*.]

Cases referred to:

Andrews v. *Partington*, (1791), 3 Bro. C.C. 401; 29 E.R. 610; 44 Digest 768, *6266*.

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* (1791), 3 Bro. C.C. 401. See p. 185, letter I, post.

Bleckly, Re, Bleckly v. *Bleckly*, [1951] 1 All E.R. 1064; [1951] Ch. 740; 2nd Digest Supp.

Chartres, Re, Farman v. *Barrett*, [1927] All E.R. Rep. 408; [1927] 1 Ch. 466; 96 L.J.Ch. 241; 137 L.T. 52; 44 Digest 785, *6422*.

Ellison v. *Airey*, (1748), 1 Ves. Sen. 111; 27 E.R. 924; 44 Digest 1166, *10,100*.

Emmet's Estate, Re, Emmet v. *Emmet*, (1880), 13 Ch.D. 484; 49 L.J.Ch. 295; 42 L.T. 4; 44 Digest 769, *6282*.

Gilbert v. *Boorman*, (1805), 11 Ves. 238; 32 E.R. 1079; 44 Digest 768, *6269*.

Knapp's Settlement, Re, Knapp v. *Vassall*, [1895] 1 Ch. 91; 64 L.J.Ch. 112; 71 L.T. 625; 44 Digest 770, *6291*.

Prescott v. *Long*, (1795), 2 Ves. 690; 30 E.R. 845; 44 Digest 786, *6428*.

Scott v. *Scarborough (Earl)*, (1838), 1 Beav. 154; 8 L.J.Ch. 65; 48 E.R. 898; 44 Digest 786, *6430*.

Stephens, Re, Kilby v. *Betts*, [1904] 1 Ch. 322; 73 L.J.Ch. 3; 91 L.T. 167; 44 Digest 773, *6309*.

Whitbread v. *St. John (Lord)*, (1804), 10 Ves. 152; 32 E.R. 802; 44 Digest 768, *6268*.

Adjourned Summons.

This was an application by originating summons dated Aug. 16, 1960, by Lloyds Bank, Ltd., the sole trustee of a settlement dated Mar. 20, 1931, and made between Sir Harold Augustus Wernher of the one part and the trustee of the other part, for the determination of the question whether, on the true construction of the settlement and in the events which had happened, the trust fund comprised in and subject to the trusts of the settlement was then held in trust absolutely and indefeasibly (i) as to one moiety thereof for the estate of George Michael Alexander Wernher, and as to one quarter thereof for the defendant Georgina Phillips and as to the remaining quarter thereof for the defendant Myra Alice Butter; or (ii) whether the trust fund was held in trust for all the children of Sir Harold Augustus Wernher (including any child or children as might thereafter be born) who being male should attain or had attained the age of twenty-one, or being female should attain or had attained that age or marry, in such proportions that each son should receive twice as large a share as each daughter. At the date of the summons Sir Harold Wernher had had three children. The first defendant was Admiral of the Fleet The Rt. Hon. the Earl Mountbatten of Burma, who was the surviving personal representative of George Michael Alexander Wernher, a deceased son of Sir Harold Wernher. The second defendant was Georgina Phillips and the third defendant was Myra Alice Butter who were married daughters of Sir Harold Wernher and had attained twenty-one years of age.

R. Cozens-Hardy Horne for the plaintiff.

R. W. Goff, Q.C., and *E. G. Wright* for the defendants.

BUCKLEY, J.: In this case I have to decide whether the rule which is known as the rule in *Andrews* v. *Partington* (1) applies to a trust which is contained in a settlement which was made by Sir Harold Wernher on Mar. 20, 1931. The rule is stated in HAWKINS ON WILLS (3rd Edn.), at p. 96, in the following terms:

> "Where there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on attaining a given age, or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded."

The rule is there stated, as one would expect in HAWKINS ON WILLS, in terms applicable to a will, but it is clear from the decision in *Re Knapp's Settlement, Knapp* v. *Vassall* (2), that it may equally apply to a settlement inter vivos.

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(1) (1791), 3 Bro. C.C. 401.

(2) [1895] 1 Ch. 91.

The facts of the present case are as follows. When the settlor made the settlement in question he was aged thirty-eight years. He was married, and his wife was of the same age as himself. They had three children, the eldest of whom was a boy aged twelve and a half, the second a girl then aged eleven and a half, and the youngest another girl then aged six. By the settlement the settlor, after defining the expression "the fund" as used in the deed, declared trusts in cl. 2 and cl. 3 of the settlement as follows:

> "2. The trustees shall hold the fund in trust for all such of the children of the settlor (whether now living or hereafter to be born) as being male attain the age of twenty-one years or being female attain that age or marry and in such proportions that each son shall receive twice as large a share as each daughter.
>
> "3. If no child of the settlor shall attain a vested interest in the fund under the foregoing provisions then subject to the trusts powers and provisions hereof and to the powers by law vested in the trustees the fund shall be held in trust for the last survivor of the children of the settlor."

The settlor's son attained the age of twenty-one on Aug. 22, 1939, and has since died. His legal personal representative is the defendant representing his interest in these proceedings. The other two defendants are the two daughters of the settlor. The argument has proceeded between Lloyds Bank, Ltd. as trustee on the one hand, representing the interests of potential future children of the settlor who is still alive, and the defendants on the other hand who now claim to be entitled to have the fund distributed among them.

The decision which gives its name to the rule was one of the then Lord Chancellor, LORD THURLOW, in the year 1791. Like so many decisions after which rules are named, that was not the one which laid down the rule. In fact the Lord Chancellor seems to have been rather antipathetically disposed towards the rule because he said that (3):

> "... where a time of payment was pointed out, as where a legacy was given to all the children of A. when they should attain twenty-one, it was too late to say, that the time so pointed out should [not] regulate among what children the distribution should be made. It must be among the children in esse, at the time the eldest attained such age. He [the Lord Chancellor] had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubted that the same expression meant all the children."

The Lord Chancellor was there recognising that in 1791 the rule was already so well established that it was too late to decide anything else. The rule has been described as a battered veteran, and battered it is, in the sense that it has attracted a large measure of judicial criticism. Nevertheless it retains its full vigour and effect. Early in its history it was recognised as being a rule of convenience not founded on the intentions of the testator. See, for instance, the observations of JESSEL, M.R., in *Re Emmet's Estate, Emmet* v. *Emmet* (4). It is that very characteristic which, I think, has exposed it to a good deal of judicial criticism; because these courts are very accustomed, when dealing with the interpretation of a document, to try to ascertain the testator's intention from the language that he has used, and then to give effect to it unless it conflicts with some inevitable rule of law such as, for instance, the rule against perpetuities. This rule has been explained as one which is directed to dealing with a situation in which the court is confronted with what may appear to be two inconsistent directions by the testator contained in the same disposition.

In *Re Stephens, Kilby* v. *Betts* (5) BUCKLEY, J., said this:

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(3) (1791), 3 Bro. C.C. at p. 404.

(4) (1880), 13 Ch.D. at p. 490.

(5) [1904] 1 Ch.D. at p. 328.

> "Now the rule laid down in *Andrews* v. *Partington* (6) has been repeatedly stated to be a rule merely of convenience. When the rule is adopted the solution arrived at is the result of an endeavour by the court to reconcile two apparently inconsistent directions—the one that the whole class of children shall take, and the other that the fund shall be divided at a moment when the whole class cannot be ascertained."

It is in those circumstances that the occasion for the application of the rule arises. It might, perhaps, have been more logical if the court had resolved the difficulty by holding that so long as the share of any member of the class was liable to be reduced by the introduction of additional members of the class, such member's share was not sufficiently ascertained to justify and call for an immediate distribution of the fund. After all, even if further members of the class came into existence, still the amount of any member's share is not finally ascertained until all the members of the class have achieved vested interests, because the share of each member is liable not only to be decreased by further members coming into existence but also to be increased by the existing members of the class failing to attain a vested interest. Therefore it would be a logical view of the matter if the court could say that, notwithstanding that the testator has directed that the sum shall be distributed at such and such a period, it cannot be distributed until it is known in what shares it should be distributed. However, perhaps in more robust days than the present, this court decided the principle and for the last one hundred and fifty years the rule has been established. Who is to say that the rule has not conferred benefit in more cases, in which nobody has been adversely affected by its application, than cases in which somebody perhaps has been excluded by the rule who might have otherwise qualified for benefit?

More recently, the Court of Appeal in *Re Bleckly, Bleckly* v. *Bleckly* (7) characterised this rule as being a rule of construction. Sir Raymond Evershed, M.R., said this (8):

> "Although this rule is called a rule of convenience (and it may have sometimes been referred to as a rule of law), I think counsel for the trustees was right in suggesting that it is, in truth, a rule of construction. It may be artificial, it may be said to defeat the apparent intention of the testator, but it is a rule of construction and must, therefore, give way to the language of the will in question if the language is sufficiently clear to displace it . . . On the other hand, the rule being now more than two hundred years old (if the authority of *Ellison* v. *Airey* (9) is taken as the right terminus a quo), the will must be read in the light of the existence of the rule, and it is, I think, clear that merely stating that the class to take is 'all or any' the children of A on attaining twenty-one will not be sufficient without more to exclude the application of the rule. If the testator added words of emphasis indicating that the class was to participate at whatever date the members might be born, the result might well be otherwise."

As I understand that judgment of the Master of the Rolls, what he is saying is this. A testator who pens a will in terms which invite the application of the rule must be taken to have had the rule in his mind, and if, notwithstanding the language which he uses, apart from the rule, the language would lead to another result, he may be taken to intend the result which the rule will produce unless it is found that his language is such as would exclude the operation of the rule. Viewed in that way the rule clearly is rightly described as a rule of construction. Certainly it is not an absolute rule which cannot be excluded by a testator such as, for example, the rule against perpetuities. It is a rule whose operation will give way to a sufficient contrary intention. The mere fact that the language A used indicates an intention to include members of the specified class, or all members of the specified class, coming into existence after the date of the document, be it a will or a settlement, is not, I think, in itself enough to exclude the rule. In *Re Bleckly* (10), to which I have just referred, the words were

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(6) (1791), 3 Bro. C.C. 401.

(7) [1951] 1 All E.R. 1064; [1951] Ch. 740.

(8) [1951] 1 All E.R. at p. 1070; [1951] Ch. at pp. 750, 751.

(9) (1748), 1 Ves. Sen. 111.

> "... upon trust to invest ... and to pay the income thereof [to his daughter-in-law, the son's wife,] during so much of her life as she shall remain the B wife or widow of my said son ..."

Subject to that interest the executors were to hold the £10,000 on trust for

> " all or any the children or child of my son ... who shall attain the age of twenty-one years if more than one in equal shares."

That was held by the Court of Appeal not to indicate a contrary intention sufficient C to exclude the rule.

The same formula was used in the much earlier case of *Prescott* v. *Long* (11), where the gift was to five named children and all and other the child and children of his son equally. In *Whitbread* v. *Lord St. John* (12) there were words declaring trusts in favour of the child and children of a certain lady, born, or to be born, as many as there might be, in equal shares and proportions, when and as they D should attain twenty-one or marry. That form of words also was held not to exclude the operation of the rule. In *Gilbert* v. *Boorman* (13), a bequest to A and all the other children thereafter to be born of a child of the testator on their respectively attaining the age of twenty-one was also held not to exclude the rule. I think it is clear, therefore, at any rate in the case of a will, that words of futurity of that sort, or words such as " all or any ", which may be said to suggest E an intention to embrace a wider class, are not a sufficient context to exclude the operation of the rule. The context must, I think, be one which makes it clear, not that the testator intends to benefit all the members of some class of persons who attain the age of twenty-one, but must be a context which shows that all those members are to take whenever born, notwithstanding the rule. It is not sufficient merely to show that the testator or the settlor expressed an intention F to benefit a class of a kind to which the rule is capable of applying and expressed that intention in words which emphatically mean that all the members of the class are to take, unless it is found that the emphasis is expressed in such a way that it is impossible to make it march in step with the application of the rule.

Counsel for the plaintiff in the present case put forward the argument on behalf of his trustees protecting the interests of possible future-born children of the G settlor. His argument went, if I may say so, extremely well, insisting that different considerations arise in the case of a settlement from those that arise in the case of a will. He says that in the case of a settlement a settlor knows the circumstances as they exist at the time when he declares the trusts of the settlement, whereas a testator cannot foresee precisely what the circumstances will be when he comes to die. He says that in the present case the settlement is one H by the settlor on his own children and it would be surprising if he did not intend to include all his children, particularly bearing in mind that at the date when he made the settlement he was only thirty-eight years old and that his eldest child was likely to attain his majority in eight and a half years' time, and that his second child was a daughter who might have married even earlier than that. Counsel for the plaintiff said that the testator might well have had more children I after one or other of his children attained a vested interest in the fund, and that in those circumstances, it would be surprising if the settlor intended to exclude any of the children from benefit under this trust. That may be, but I think that in the case of a settlement, just as in the case of a will, I must apply what the Master of the Rolls said in *Re Bleckly* (14). The settlor must be taken to have framed his trust with the rule in mind unless there is found in the language something so inconsistent with the rule that that assumption is conclusively negatived. The mere fact that the settlor makes a settlement on his own children in terms to which the rule is calculated to apply cannot, in my judgment, mean that the rule should not apply to a settlement of this kind.

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(10) [1951] 1 All E.R. at p. 1065; [1951] Ch. at p. 741.
(11) (1795), 2 Ves. 690. (12) (1804), 10 Ves. 152. (13) (1805), 11 Ves. 238.
(14) [1951] 1 All E.R. 1064; [1951] Ch. 740.

Then counsel for the plaintiff draws my attention to the fact that the settlor used the words " whether now living or hereafter to be born ". Those are words of futurity, he says, which indicate that the settlor had in mind that he might have future children, and they indicate that he wanted those future children to benefit under the trust. The words " hereafter to be born " when read with the words " all such of the children of the settlor . . . who attain the age of twenty-one years " indicate that he wanted all the children whenever born to participate.

I have already referred to *Gilbert* v. *Boorman* (15) where the words " hereafter to be born " were used in a will. Unless there is no period to which the reference to future birth can apply, I do not think that it would be right to take these words as affording sufficient context in the case of a will. " Hereafter to be born " should be intended to refer to the possibility of children being born between the date of the will and the date of the testator's death. It might also, in either the case of a will or a settlement, be taken to refer to the children who may be born after the date of the death or the settlement, as the case may be, when the trusts come into operation and the date when the first child attains a vested interest.

This second alternative is one which was adverted to in *Scott* v. *Earl of Scarborough* (16) in the judgment of Lord Langdale, M.R. (17). The trust in *Scott* v. *Earl of Scarborough* (18) was one which by its terms necessarily excluded the application of the rule, for it was a trust for all and every the children and child of his children A, B, and C

> ". . . now born, or who shall hereafter be born during the lifetime of their respective parents, [as should attain the age of twenty-one or marry with consent] and whether born or unborn when any other of them attain the age or time aforesaid, and their respective executors, administrators or assigns . . ."

The reference to birth during the lifetime of their respective parents as well as the words relating to their being born or unborn at the time some other member of the class should attain a vested interest were both wholly inconsistent with the application of the rule. Lord Langdale, M.R., said (17):

> " The testator has expressed himself in terms which show that he contemplated a division of the fund at the end of twenty years from his death; and if he had described the objects to be his grandchildren (younger children of his children) or all such grandchildren born and to be born, as many as there may be, it would, I think, have followed from the cases which were cited, that the fund would have vested in and have become divisible among the grandchildren answering the description, who were living at the end of the term of twenty years; the generality of the expression ' all my grandchildren ' or ' all my grandchildren born and to be born ' being by construction, and, as it is said, for convenience, limited to the time of distribution, and the words applying to after-born children, being satisfied by giving the benefit of the bequest to those born after the testator's death, and before the period of distribution."

Then he goes on to say that in the case before him the words were as I have stated before. It seems to me that just as in *Prescott* v. *Long* (19), the Master of the Rolls is saying that the words referring to future birth may be related, not only to the period before the testator's death, but to the period between the death and the date of distribution. So, also, in a deed, where the words such as I have here, relating to birth after the date of the deed, are capable of being given an intelligible and effective meaning by relating them to the period between the date of the deed and the date of the distribution when the first member of the class attained a vested interest. Construing the deed in the light of the rule, I think that would be the proper interpretation to be put on the words " hereafter to be born ". Counsel for the plaintiff also relied on cl. 3 and its reference to " the last survivor of the children of the settlor ", and he said that as in that clause the word " children " would extend to all the children of the settlor whenever born, so the word " children " in cl. 2 should be read in that sense. But cl. 3 can only come into play if no child of the settlor attains a vested interest under cl. 2, and, therefore, it can only come into play at a time when the class to take under cl. 2 has never been closed by operation of the rule; and consequently, if cl. 3 ever comes into operation at all it must come into operation in such a way that there could not be any conflict between the proper interpretation to be put on the word " children " in cl. 3 and the proper interpretation to be put on the word " children " in cl. 2, even if cl. 2 be construed in accordance with the rule in *Andrews* v. *Partington* (20).

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(15) (1805), 11 Ves. 238.

(16) (1838), 1 Beav. 154.

(17) (1838), 1 Beav. at p. 168.

(18) (1838), 1 Beav. at p. 156.

(19) (1795), 2 Ves. 690.

Counsel also submitted that there must be in the disposition, in order to bring the rule into play, a direction to distribute at some particular time which comes into conflict with the apparent intention to give to all the children as members of the class of beneficiaries whenever they might be born. His submission is that in this trust one does not find any direction to distribute at any particular time, and, therefore, one is not really faced with the dilemma which the rule is designed to meet.

In that connexion I think I ought to mention the decision of ASTBURY, J., in *Re Chartres, Farman* v. *Barrett* (21). In that case a testator disposed of his income for twenty-one years from his decease, and after the expiration of that period gave two-fifths of his residue in trust for his son's children or remoter issue as his son, R., should by will appoint and in default of appointment in trust for all the son's children who being sons should attain twenty-one or being daughters should attain that age or marry. The twenty-one years' period expired and R. had a son who attained twenty-one before the end of the period and R. released his power of appointment. The question was whether the fund was immediately distributable, or whether it was necessary to wait to see if R. had any other children. It was held that the rule was applicable and that the fund was distributable. In that case the trust was for all R.'s children who should attain twenty-one and being daughters should attain that age or marry, and there were no express words directing distribution at any particular date. True, there was an earlier interest which accrued twenty-one years from the death of the testator, but it would not follow that the distribution would take effect immediately at the end of that period because at the end of that period there might be no child of R. who had attained the age of twenty-one. Nevertheless, ASTBURY, J., found that the rule applied. I think that, where the trust is one for a class of persons who attain a certain age in certain shares, that must in every case be a trust which involves distribution amongst those persons, and that the purpose of the rule is to ensure the distribution to those persons who attain a vested interest at the earliest possible date and not to keep them waiting for that to which they would be fully entitled. That is really the convenience of the rule. It enables beneficiaries in such a case as this to receive the share to which they claim they are entitled without having their benefit withheld from them, it may be for many years, on the chance, which in some cases may be a very bare chance, that some other member of the class may come into existence and so reduce what would otherwise be the share to which the first persons who attain a vested interest have become entitled.

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(20) (1791), 3 Bro. C.C. 401. (21) [1927] All E.R. Rep. 408; [1927] 1 Ch. 466.

Consequently, applying the rule to the present case and construing the language of this settlor, the distribution that he made being one which is capable of being carried into effect consistently with the rule, I reach the conclusion that there is nothing in this settlement which is so inconsistent with the rule as to amount to a clear indication that the settlor intended to exclude it. In those circumstances, the rule must take effect on this settlement.

The result of that will be that I shall declare that on the true construction of the settlement and in the events which have happened the trust fund comprised in or subject to the trusts of the settlement is now held in trust absolutely and indefeasibly as to one moiety thereof for the estate of George Michael Alexander Wernher, and as to one quarter thereof for the defendant Georgina Phillips and as to the remaining one quarter thereof to the defendant Myra Alice Butter.

Declaration accordingly.

Solicitors: *Charles Russell & Co.* (for the plaintiff); *Taylor & Humbert* (for the defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

R. *v.* AMOS.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Streatfeild, Glyn-Jones, Ashworth and Elwes, JJ.), December 2, 1960.]

Criminal Law—Sentence—Borstal training—Obtaining credit by fraud—Committal of offender to quarter sessions with view to borstal training—Maximum sentence for offence twelve months—Whether sentence of borstal training may be imposed—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 13 (1)*—Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 58), *s.* 20 (5)*—Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 28.

On Aug. 16, 1960, the appellant was convicted of obtaining credit by fraud contrary to the Debtors Act, 1869, s. 13 (1), for which the maximum sentence was twelve months' imprisonment. He was committed to quarter sessions for sentence. Quarter sessions sentenced him to borstal training. He was nineteen years of age and there were previous convictions. On appeal against sentence,

Held: although the maximum sentence fixed by statute was a shorter term than the offender would probably undergo, if sentenced to borstal training, yet sentence to borstal training could lawfully be passed (in view of s. 28 (1) of the Magistrates' Courts Act, 1952, and s. 20 (5) of the Criminal Justice Act, 1948*), as the maximum term of imprisonment fixed for the offence was no more than a relevant consideration in deciding whether to impose borstal training; in the present case borstal training was the right sentence and should stand.

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* Section 28 (1) of the Magistrates' Courts Act, 1952, provides: " Where a person is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, then, if on the day of the conviction he is not less than sixteen but under twenty-one years old and the court is satisfied having regard to the offender's character and previous conduct and the circumstances of the offence that it is expedient for his reformation and the prevention of crime that he should undergo a period of training in a borstal institution, the court may commit him in custody to quarter sessions for sentence in accordance with the provisions of s. 20 of the Criminal Justice Act, 1948."

Section 20 (5) of the Criminal Justice Act, 1948, so far as material, reads: " Where an offender is so committed for sentence as aforesaid [viz., under s. 20 (3) of the Act of 1948 which was replaced by s. 28 (1) of the Magistrates' Courts Act, 1952], the following provisions shall have effect, that is to say:—(a) the . . . court of quarter sessions shall inquire into the circumstances of the case and may—(i) if satisfied of the matters mentioned in sub-s. (1) of this section, sentence him to borstal training . . ."

R. v. *Longstreeth* ([1960] 2 All E.R. 864 n.) and *R.* v. *James* ([1960] 2 All E.R. 863) not followed.

Appeal dismissed.

[**Editorial Note.** A person sentenced to borstal training may not, save by special direction, be released before nine months have passed; the period of training is unlikely to be less than fifteen months and can be for three years (compare Prison Act, 1952, s. 45 (2)).

As to committal of an offender to quarter sessions with a view to borstal training, see 25 HALSBURY'S LAWS (3rd Edn.) 227-229, paras. 422, 423; and for cases on the subject, see 14 DIGEST (Repl.) 591, 592, *5884-5887*, *5898*.

As to sentence to borstal training, see 10 HALSBURY'S LAWS (3rd Edn.) 517, para. 943.

For the Debtors Act, 1869, s. 13, see 2 HALSBURY'S STATUTES (2nd Edn.) 298.

For the Criminal Justice Act, 1948, s. 20, see 28 HALSBURY'S STATUTES (2nd Edn.) 369.

For the Magistrates' Courts Act, 1952, s. 28, see 32 HALSBURY'S STATUTES (2nd Edn.) 447.]

Cases referred to:

R. v. *James*, [1960] 2 All E.R. 863; [1960] 1 W.L.R. 812.

R. v. *Longstreeth*, [1960] 2 All E.R. 864 n.; [1960] 1 W.L.R. 812 n.

Appeal.

On Mar. 7, 1960, the appellant, Stephen William Amos, was convicted and fined by a magistrates' court at Reading for stealing cigarettes and cash from a machine. On Apr. 6, 1960, the appellant was convicted by Reading Borough Quarter Sessions of shop-breaking and larceny and was placed on probation for three years, a further case of larceny being taken into consideration. Subsequently the appellant pleaded guilty before Reading Borough Magistrates' Court on Aug. 16, 1960, to committing, on July 25, 1960, an offence of obtaining credit by fraud contrary to s. 13 (1) of the Debtors Act, 1869, and he was convicted also of committing on the same day a second and similar offence in respect of which he was charged together with another accused. The appellant was committed to Reading Borough Quarter Sessions for sentence. On Oct. 21, 1960, quarter sessions sentenced the appellant to borstal training both for the offences which he had committed on July 25, 1960, and concurrently for the offence of shop-breaking for which he had been placed on probation. The maximum period of imprisonment for the offence of obtaining credit by fraud contrary to s. 13 (1) of the Debtors Act, 1869, was twelve months. The appellant appealed. In view of the decision in *R.* v. *James** the appeal was heard before a full court.

The statute and cases set out below† were cited in argument in addition to those in the judgment.

Jane Griffiths for the appellant.

R. M. A. C. Talbot for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant and a young man named Gibson pleaded guilty to obtaining £20 5s. by fraud. The appellant was also found guilty of a similar offence involving £26. They were committed to quarter sessions for sentence and the Reading Borough Quarter Sessions sentenced the appellant to borstal training and made a concurrent order for borstal training in respect of a shop-breaking offence for which he had been put on probation. He now appeals to this court against his sentence by leave of the single judge.

So far as the offences are concerned, the first was committed on July 25, 1960, when he went to a shop and obtained a cycle on a credit sale. He stated that he was twenty-one years old, whereas he was only nineteen, and he gave a false name and address. He paid a deposit and owed a total of some £31 16s. On the evening of the same day he went with Gibson to another shop, they selected another cycle and about the same time on the next evening they returned to the shop together and Gibson produced a rent book. He gave a false name and the rent book was in fact a false document. It is said that when questioned by the police the appellant said: " A simple little fiddle and the law is on to you for it ", and again, " I'd like to get hold of the bastard who put the whisper in".

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* [1960] 2 All E.R. 863.

† Magistrates' Courts Act, 1952, s. 20, s. 21, s. 25; *R.* v. *Apicella*, [1949] 2 All E.R. 813; 34 Cr. App. Rep. 29; *R.* v. *O'Rourke*, (1958), Criminal Law Review 759.

As I have said, the appellant is nineteen years old. He was convicted on Mar. 7, 1960, of stealing cigarettes and money from a machine and was fined £20. Just about a month later he was convicted of shop-breaking and larceny which in fact had been committed before the offence of stealing the cigarettes, when he was put on probation for three years, another offence being taken into consideration. The present offences were committed 3½ months after he was put on probation. The Prison Commissioners reported that he was suitable for borstal training. The probation officer felt that he had in fact only had this young man under him for 3½ months and was anxious to continue in order to see what he could do in the boy's interests. He pointed out that the young man had had no home and that his upbringing had been the cause of his instability, immaturity and irresponsibility. Counsel for the appellant, who has said everything on his behalf, tells us that during the adjournment the probation officer saw this appellant's brother, who said he was prepared to make a home for him. The recorder, on the other hand, took the view, and the probation officer was forced to agree, that this young man was the ringleader. The recorder also took the view that when a man was guilty of further offences of this sort within 3½ months of being put on probation, at which time no doubt he was warned as to the results of committing further offences, he had to be punished, and imposed a sentence of borstal training. The court has come to the conclusion that on the merits, if I may put it in that way, there is no reason whatsoever to interfere with that sentence.

Leave to appeal was given by the single judge, in fact myself, having regard to the fact that at the end of the case counsel for the appellant quite properly drew the attention of the recorder to a recent decision of this court. In fact it was *R.* v. *James* (1), although she did not refer to it by name, in which the court used words which might have conveyed that where the maximum sentence fixed by statute is less than the period for which a man would be detained in borstal, then borstal was an inappropriate sentence. Accordingly the maximum sentence for obtaining credit by fraud being twelve months, it might be said that the concurrent sentence of borstal training in respect of the offences of obtaining credit by fraud was inappropriate.

As long ago as June 23, 1952, a case came before this court of *R.* v. *Longstreeth* (2). In fact no counsel appeared in the case, and the case remained unreported, but LORD GODDARD, C.J., drew attention to the fact that the offence in question there was an offence against the Vagrancy Act, 1824, under which the maximum sentence was three months. He said this (2):

> " That means that if he goes to borstal he will probably be detained fifteen months, and that is what causes the court to wonder whether borstal training ought to be imposed on these youths when the maximum sentence they can receive is one of three months. I dare say it would be very much better that they [that is prisoners of that sort] should go somewhere to be trained but on the whole I do not think it is a satisfactory sentence because it does deprive him of his liberty. If he is sentenced to imprisonment he cannot be deprived of his liberty for more than three months, and, if he behaves himself, that is two months. That is the position, and the court

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(1) [1960] 2 All E.R. 863.

(2) [1960] 2 All E.R. 864n.

> thinks that on the whole they ought to set aside the sentence of borstal [training]."

In *R.* v. *James* (3), which came before this court on June 20, 1960, again no counsel were present, and the court, anxious to follow the decision in *R.* v. *Longstreeth* (4), of which they had a transcript, set aside a sentence of borstal training in respect again of an offence against the Vagrancy Act, 1824. The court in *R.* v. *James* (3) referred to *R.* v. *Longstreeth* (4) and said this (5):

> "In the probation officer's report for which this court called, it is clear that the probation officer does not think that she has reached that stage of stability where she can be relied on not to go to coloured cafés. Accordingly it is just the sort of case where the appellant would benefit from borstal training. Nevertheless this court has, as I have indicated, said that in these circumstances borstal training is the wrong sentence."

In so far as those two decisions imply that where the maximum sentence fixed by statute is less than the period for which a prisoner would undergo borstal training then borstal training is wholly inapplicable, that is clearly wrong. No doubt the maximum sentence fixed by statute is a relevant consideration, but it is no more than that; indeed, were it otherwise, a severe limitation would be imposed on the powers of justices to commit to quarter sessions under s. 28 of the Magistrates' Courts Act, 1952, and, indeed, on the powers of the court under s. 20 of the Criminal Justice Act, 1948.

Unfortunately the decision in *R.* v. *James* (3) has been reported and is in some of the law reports (3), and the court feels that some public statement is necessary to dispel the doubts which have arisen. Having been myself a member of the court in both cases, it is only right that I should say that the court had no intention of limiting the powers in the way in which it is said that they have done; indeed, the sections are perfectly clear and the court could not limit their operation. I have consulted HILBERY and DIPLOCK, JJ., who were members of the court which decided *R.* v. *James* (3), and they have asked me to say that what is now being said has their full approval. This court as at present constituted thinks that it is clear that those cases went too far in so far as they suggested that borstal training cannot be imposed in such circumstances. Accordingly, the recorder in the present case was free to impose a sentence of borstal training and, for the reasons stated earlier, we think it was the right sentence. Accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Boyes, Turner & Burrows*, Reading (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(3) [1960] 2 All E.R. 863.

(4) [1960] 2 All E.R. 864 n.

(5) [1960] 2 All E.R. at p. 864.

LITTLEWOODS MAIL ORDER STORES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), November 16, 17, 1960.]

Stamp Duty—Conveyance on sale—Lease—Whether a "conveyance"—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1—*Finance Act,* 1930 (20 *&* 21 *Geo.* 5 *c.* 28), *s.* 42—*Finance Act,* 1938 (1 *&* 2 *Geo.* 6 *c.* 46), *s.* 50 (1) (*b*).

Stamp Duty—Exchange—Freehold estate exchanged for leasehold interest in same land—Equal values—Whether exchange or conveyance on sale—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1.

As part of a series of transactions between freehold lessors, their lessees and a wholly owned subsidiary company of the lessees which was designed to save payment of greater stamp duty, the lessors accepted a surrender of a lease and granted to the lessees a lease for twenty-two years and ten days at a rent of £6 a year. The lessees assigned this lease to their subsidiary company. The subsidiary granted an underlease to the lessees for twenty-two years at a rent of £42,450 a year, being a rent that was very much greater than that formerly reserved by the surrendered lease. The freeholders and the subsidiary company then executed a deed of exchange, by which the freehold was transferred to the subsidiary company and the lease for twenty-two years and ten days with the benefit of the underlease was transferred to the freeholders.

Held: (i) the assignment was excluded by s. 50 (1) (b)* of the Finance Act, 1938, from the exemption from stamp duty enacted by s. 42 (1) of the Finance Act, 1930, because the surrendered lease was a previous "conveyance" of the beneficial interest in the property by a person (viz., the lessors) who was not an associated company of the lessees; accordingly the assignment attracted ad valorem stamp duty.

(ii) the deed of exchange was liable to 10s. stamp duty as an exchange under Sch. 1 because, there being no suggestion that the values of the freehold and of the leasehold interest were not equal, and there being no pre-existing contract of sale (*Escoigne Properties, Ltd.* v. *Inland Revenue Comrs.*, [1958] 1 All E.R. 406, distinguished), the deed was a genuine exchange notwithstanding that the interests exchanged were different in character.

[For stamp duty on conveyance or transfer on sale or exchange, see 28 HALSBURY'S LAWS (2nd Edn.) 457-465, paras. 972-986 and 466, para. 989; and for cases on the former subject, see 39 DIGEST 278-285, *621-670*.

For the Stamp Act, 1891, Sch. 1, "conveyance or transfer on sale" and "exchange", see 21 HALSBURY'S STATUTES (2nd Edn.) 667, 673; and for the Finance Act, 1930, s. 42, and the Finance Act, 1938, s. 50, see ibid., 959 and 1196.]

Cases referred to:

Coats v. *Inland Revenue Comrs.*, [1897] 1 Q.B. 778; *affd.* C.A., [1897] 2 Q.B. 423; 66 L.J.Q.B. 732; 77 L.T. 270; 61 J.P. 693; 9 Digest (Repl.) 420, *2718*.

Credland v. *Potter*, (1874), 10 Ch. App. 8; 44 L.J.Ch. 169; 31 L.T. 522; 39 J.P. 73; 35 Digest 456, *1974*.

Escoigne Properties, Ltd. v. *Inland Revenue Comrs.*, [1958] 1 All E.R. 406; [1958] A.C. 549; [1958] 2 W.L.R. 336; 3rd Digest Supp.

Oughtred v. *Inland Revenue Comrs.*, [1958] 2 All E.R. 443; [1958] Ch. 678; [1958] 3 W.L.R. 64; *affd.* H.L., [1959] 3 All E.R. 623; [1960] A.C. 206; [1959] 3 W.L.R. 898; 3rd Digest Supp.

Portman (Lord) v. *Inland Revenue Comrs.*, (1956), 50 R. & I.T. 35; 35 A.T.C. 349.

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* Section 50 (1) (b) is set out at p. 197, letter I, post.

Case Stated.

The appellants presented six deeds to the Commissioners of Inland Revenue for adjudication of stamp duty under s. 12 of the Stamp Act, 1891. They did not object to the assessments of duty in respect of four of the deeds, but were dissatisfied with the assessments made in respect of the other two, viz.: (i) an assignment dated Dec. 9, 1958, ad valorem voluntary disposition duty under s. 74 of the Finance (1909-10) Act, 1910, on the estimated value of £400,000 of the leasehold interest assigned, £8,000; the appellants did not object to the valuation of the property assigned at £400,000, but contended that the assignment was exempt from stamp duty under s. 42 of the Finance Act, 1930; (ii) a deed of exchange dated Dec. 11, 1958, as a conveyance on sale of the fee simple by reference to the head of charge " Conveyance or transfer on sale " and to s. 56 (2) of the Stamp Act, 1891, ad valorem duty at the rate of £1 per £50 on £42, 444 x 20, £16,978; the appellants contended that the deed was liable to the duty of 10s. only, under the head of charge " Exchange or excambion—instruments effecting " in Sch. 1 to the Stamp Act, 1891. They appealed by way of Case Stated to the High Court.

R. O. Wilberforce, Q.C., and *K. B. Suenson-Taylor* for the appellants.
B. L. Bathurst, Q.C., and *E. Blanshard Stamp* for the Crown.

DANCKWERTS, J.: In 1958 the appellants, Littlewoods, who are well-known traders, had a term of ninety-nine years from June 24, 1947, at an annual rent of £23,444. Their lessors were a friendly society called the Independent Order of Odd Fellows. In 1958 it appears that the rent of £23,444 per year was less than the rent which might be obtained in respect of property known as Jubilee House in Oxford Street, to which the existing lease related. Apparently the lessors wished to get a higher rent but were prepared to grant a shorter term in order to obtain the higher rent, which would involve getting rid of the existing lease which had some eighty years to run at that time. That was the origin of the transactions which followed and which were carried out by means of six documents dated Dec. 8, 1958, and the following five days.

The object of the particular method of carrying out the transaction which was adopted was to save the payment of greater stamp duty and, as HARMAN, L.J., pointed out in a case (1) to which I was referred, there is nothing illegal in so arranging one's affairs and the documents which one executes that it produces the result of reducing the amount of stamp duty which has to be paid. The six documents were of this nature. On Dec. 8, 1958, a lease by the lessors to the appellants of Jubilee House for twenty-two years and ten days, at a rent of £6 a year, was granted, and that operated as a surrender of the existing lease which had eighty years unexpired, and put an end to the term created by that lease. On Dec. 9, 1958, an assignment by the appellants to a wholly owned subsidiary company called Fork Manufacturing Co., Ltd., of the lease for twenty-two years and ten days at a rent of £6 a year, was executed by the appellants. On Wednesday, Dec. 10, 1958, an underlease was executed by the subsidiary company back to the appellants, of Jubilee House for twenty-two years at the rent of £42,450 per year. On Thursday, Dec. 11, 1958, a deed described as a deed of exchange was made between the lessors and the subsidiary company, and by that deed the subsidiary company assigned to the lessors the lease which it had (that is the lease for twenty-two years and ten days at the rent of £6 per year) subject to and with the benefit of the underlease which had been granted by the subsidiary company to the appellants at £42,450 per year for twenty-two years, and the lessors conveyed their fee simple of Jubilee House to the subsidiary company subject to and with the benefit of the lease.

Then there are two further documents which really are not so important as the others. On Friday, Dec. 12, 1958, a deed of guarantee of legal charge was

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(1) *Holmleigh (Holdings), Ltd.* v. *Inland Revenue Comrs.*, (1958), T.R. at p. 405.

A executed between the subsidiary company and the lessors, and that deed guaranteed payment to the lessors by the appellants of the rent of £42,450 per year reserved by the underlease and charged the freehold reversion with the payment. Then on Saturday, Dec. 13, 1958, a deed of indemnity was made between the appellants and the lessors whereby the lessors were indemnified against payment of stamp duty and penalties. The effect of that, commercially, was that the B lessors had got rid of their freehold and it was held by the subsidiary company and the subsidiary company had got rid of the term of twenty-two years and ten days at a rent of £6 a year to the lessors.

The documents were sent for adjudication and there is no appeal about any of the stamps on any of the documents except two. Those two are the assignment of Dec. 9, 1958, which assigned to the subsidiary company the twenty-two-C year and ten-day lease, and the deed which was described as a deed of exchange. On those two deeds assessment of stamp duty was made, being £8,000 in respect of the assignment and £16,978 in respect of the deed which was called a deed of exchange. The duty has been paid, subject to the appeal by the appellants.

It is clear from the correspondence between the advisers of the various parties that there was no preceding contract at any time before the execution of these D documents, though it is claimed that the parties were co-operating and that their legal advisers were busily engaged in evolving an arrangement which would be found to diminish as far as possible the liability for stamp duty.

As regards the assignment of Dec. 9, 1958, the matter does not depend only on the Stamp Act, 1891. Under that Act, the assignment would plainly have been a conveyance and would have attracted the appropriate duty, but what I E have to consider is whether the claim of the appellants is correct, that it is exempted by virtue of s. 42 of the Finance Act, 1930, which provides:

> " (1) Stamp duty under the heading ' Conveyance or transfer on sale ' in Sch. 1 to the Stamp Act, 1891, shall not be chargeable on an instrument to which this section applies.
>
> F " (2) This section applies to any instrument as respects which it is shown to the satisfaction of the Commissioners of Inland Revenue—(a) that the effect thereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company; and (b) that either—(i) one of the companies is beneficial owner of not less than ninety per cent. of the issued share capital of the other company . . ."

G The reference to being shown to the satisfaction of the Commissioners of Inland Revenue means that the onus is on the person concerned.

The appellants owned practically the whole of the capital of the subsidiary company, although prima facie they were two companies. They came within the description contained in this section and would be exempted from the payment of stamp duty on the conveyance under the section so far as it applies.

H In 1938, however, another provision was introduced by the Finance Act, 1938, s. 50 (1) of which provides:

> " Section 42 of the Finance Act, 1930 (which relieves from stamp duty any instrument the effect whereof is to convey or transfer a beneficial interest in property from one associated company to another, in this section I respectively referred to as the ' transferor ' and ' transferee ') shall not apply to any such instrument, unless it is shown to the satisfaction of the Commissioners of Inland Revenue that the instrument was not executed in pursuance of or in connexion with an arrangement whereunder—(a) the consideration for the transfer or conveyance was to be provided directly or indirectly by a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee; or (b) the beneficial interest in the property was previously conveyed or transferred directly or indirectly by such a person as aforesaid."

A Again the reference to being shown to the satisfaction of the commissioners means that the onus is on the person concerned in the instrument. The " person as aforesaid " was the person referred to in para. (a), which was a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee.

When the lessors granted the lease for twenty-two years and ten days at a B rent of £6 a year, they were persons who were not associated with either the transferor or transferee as regards the appellants or the subsidiary company, and the real point which arises is this: can it be said that the lease which was granted by the lessors for twenty-two years and ten days was the transference or conveyance of a beneficial interest in the property ? The property appears to be the property transferred by the appellants to the subsidiary company by C the assignment of Dec. 9, 1958. Therefore, can it be said, for the purposes of this case, that the granting of that lease by the lessors was a conveyance ? It is obviously not a transfer but it is possible it may be a conveyance.

Counsel for the Crown pointed out that, in the Schedule to the Stamp Act, 1891, a conveyance on sale and other sorts of conveyances are referred to in a different set of provisions from those relating to the grant of a lease, which D appear under the term " Lease or tack ". He has referred me to various other sections which bear on the matter in one way or another, the group beginning, e.g., with s. 54, which is headed " Conveyances on sale ", and the group beginning with s. 75, entitled " Leases ". I do not think, however, that that is really conclusive in regard to the matter which I have to decide. I have to decide really whether, in the context of these statutes, the term " conveyance " does E not include the grant of a lease. The Finance Act, 1930, and the Finance Act, 1938, have probably got to be construed as one with the Stamp Act, 1891, but I do not know that that is really, again, conclusive of the matter. The real question is—what is the meaning of " conveyance " ?

I have been referred to *Escoigne Properties, Ltd.* v. *Inland Revenue Comrs.* (2). That seems to me to be a very different case from the present one, but the point F of it for the purpose of this case is that the observations of the House of Lords do seem to indicate that a wide construction should be given to the meaning of s. 50 of the Finance Act, 1938, which is the important section for the purposes of this document. It is clear from various cases to which I have been referred that the word " conveyance " sometimes is capable of including a lease and sometimes it is not capable of including a lease, the word being used in the more G limited sense of the transfer of real estate to some other person. However, it seems to me that there are cases, and statements in the books, which indicate that it is not improper to describe a lease as a conveyance and therefore a person who grants a lease may be said to have conveyed an estate or property.

In BLACKSTONE'S COMMENTARIES, Vol. 2, at p. 317, BLACKSTONE says:

> " A lease is properly a conveyance of any lands or tenements (usually in H consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor hath in the premises."

Then he says that, if the whole interest is granted, it is an assignment. A lease was treated as being a conveyance in the case concerning the registration of a document, by LORD CAIRNS, L.C., in *Credland* v. *Potter* (3). LORD CAIRNS, L.C., I discusses the matter (4) and comes to the conclusion that a lease is to be regarded as a conveyance, and refers to a consideration of what was the object of the statute and the cases to which it was intended to refer.

On the whole, I have come to the conclusion that a lease is a conveyance and that a person who grants a lease is a conveying party, for the purposes of the present case. Consequently, it seems to me that the assignment of Dec. 9, 1958, did come within the provisions of s. 50 of the Finance Act, 1938, and accordingly the exemption conferred by the Finance Act, 1930, did not apply to the present case. In that respect I think that the Commissioners of Inland Revenue were right in their contentions and the duty is the amount which was required, i.e., £8,000.

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(2) [1958] 1 All E.R. 406; [1958] A.C. 549.

(3) (1874), 10 Ch. App. 8.

(4) (1874), 10 Ch. App. at pp. 11 and 12.

The other point in the case is an utterly different one. It arises in regard to the document which, as I have said, was described as a deed of exchange, and was dated Dec. 11, 1958. It is advisable to refer to that document for its precise terms. It is exhibit D. It is called a deed of exchange and is expressed to be made between the trustees of the lessor friendly society of the one part and the subsidiary company of the other part, and it recites the lease for twenty-two years and ten days and also that the trustees are entitled to the premises comprised in and demised by the lease for an estate in fee simple in reversion expectant on the determination of the term thereby granted. It recites the assignment of that term of twenty-two years and ten days to the subsidiary company. It refers to the underlease being granted by the subsidiary company to the appellants for a term of twenty-two years at the yearly rent of £42,450, and states that the company (viz., the subsidiary company) was entitled to the premises comprised in and demised by the lease for all the residue of the term thereby granted in reversion to the subsidiary company on the determination of the term granted by the underlease. Recital No. 6 recites that the parties thereto have mutually agreed to exchange their said respective estates and interests in the said property. The operative words are as follows:

> “ Now in pursuance of the said agreement for the considerations hereinafter mentioned and divers other good and valuable considerations this deed witnesseth as follows: (1) In consideration of the assignment hereinafter made by the [subsidiary] company to the trustees the trustees as trustees hereby transfer to the [subsidiary] company all that the land and property comprised in the titles above referred to [it is registered land] subject to and with the benefit of the lease but to the intent that any leasehold estate of the [subsidiary] company comprised in title [and there follows a certain number] of which the [subsidiary] company is the registered proprietor shall merge and be extinguished in the freehold estate hereby transferred to the [subsidiary] company.”

That refers to the old lease for ninety-nine years of which there was a period of eighty years unexpired. Paragraph (2) provides:

> “ In consideration of the transfer hereinbefore made by the trustees to the [subsidiary] company the [subsidiary] company as beneficial owner hereby assigns unto the trustees all those leasehold premises comprised in and demised by the lease to hold the same unto the trustees for all the residue now unexpired of the term granted by the lease subject henceforth to the payment of the said yearly rent of £6 and the performance and observance of the covenants on the part of the lessees and conditions in the lease reserved and contained and subject also to but with the benefit of the underlease.”

Then there is a covenant to pay the yearly rent of £6, which does not really matter.

On the face of it that was a perfectly straightforward exchange and nothing else. It is true that it was an exchange of the freehold for the exchange of a term of only twenty-two years and ten days, but that term of twenty-two years and ten days was a valuable property in that it carried with it the benefit of the underlease, and the rent payable under the underlease was £42,450 per year. There is no suggestion that the values were not equal. There is no provision for payment of a sum by way of equity of exchange and there has not been throughout any suggestion that the value of the freehold, valuable as it was, and the value of the leasehold interest were not in the eyes of the parties of equal value.

I have been taken through various provisions of the Stamp Act, 1891, and I really do not think that it is necessary for me to go through them in detail, but the principal argument on behalf of the Crown was that this was a sale, a conveyance on sale, and as it was a conveyance on sale the commissioners were

A entitled to choose whether to assess it as a conveyance on sale or as an exchange, and if it was both it did not matter that it was not only a conveyance on sale but also an exchange. It was said also that it was not an exchange having regard to all the circumstances of the case, and was in fact a conveyance on sale and nothing else.

B I was referred to several cases which seemed to me, however, to be very different. In *Escoigne Properties, Ltd.* v. *Inland Revenue Comrs.* (5), for instance, it was not a case of an exchange. There was a pre-existing contract for sale. In *Lord Portman* v. *Inland Revenue Comrs.* (6) it is plain that, though the document was termed a deed of exchange, in fact it was an implementation of a number of sales and in that case I had no difficulty in reaching a conclusion that the document was properly chargeable as a conveyance on sale. In the same C way, in *Oughtred* v. *Inland Revenue Comrs.* (7), it was plain that there had been sales and that the ultimate document executed by the trustees for the settlement in that case was a completion. None of the facts in those cases seem to me to be fairly comparable with the present case. In the present case there was no preceding contract of sale at all. I cannot find in the facts of this case anything amounting to a sale.

D I have described what was the original object of the parties and the object was carried out by a series of documents which were designed to produce the result of lesser stamp duty being payable than would otherwise have been the case. I see no reason for saying the documents were other than what they purport to be on their face. These documents were very carefully settled, and, if one could point to an earlier contract on sale there might be a different result. E It seems to me in the present case that there was no sale at all and, therefore, it is impossible to say that the deed was not an exchange, and it is impossible to say it really was a conveyance on sale.

That disposes of the matter except for one rather subsidiary point which was raised. It was said that in an exchange one cannot have an exchange except of interests which are of the same character, and there is the authority of BLACKSTONE'S COMMENTARIES, Vol. 2, at p. 323, in favour of that proposition, but I F doubt whether that is the law at the present time. In *Coats* v. *Inland Revenue Comrs.* (8) WILLS, J., saying he would not decide or discuss the matter, none the less did suggest that possibly that was the law, and that exchanges could only be made of freehold interests in land. That seems to me to be going in any case beyond anything that BLACKSTONE said, but, however it may be, I do not think G that the law can be said to be that at the present time. In my opinion the law has progressed beyond that state, and there may be exchanges of many different interests at the present time. There may be cases where there is an exchange of one class of property for another class of property, possibly; I think that there certainly may be an exchange for a different interest in land, an exchange with another interest which may be greater or smaller. Therefore, I do not H think that the residuary point, which, indeed, was not pressed on me for decision, is one with which I need really concern myself. In the result, it seems to me that the document in question is not subject to ad valorem stamp duty, but is to be stamped with a 10s. stamp as an exchange.

Declaration that the assignment was liable to the duty assessed and that the other document be assessed at 10s.

Solicitors: *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the appellants); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(5) [1958] 1 All E.R. 406; [1958] A.C. 549.

(6) (1956), 35 A.T.C. 349.

(7) [1958] 2 All E.R. 443; [1958] Ch. 678; *affd.* H.L., [1959] 3 All E.R. 623; [1960] A.C. 206.

(8) [1897] 1 Q.B. 778.

Re M. (an infant).

[Chancery Division (Cross, J.), November 30, 1960.]

Child—Care—Local authority—Child boarded out with foster parents—Parental rights assumed by authority—Foster parent signing undertaking to allow child to be removed if required—Child made ward of court on application of foster parent—Jurisdiction of court to review decisions of local authority—Children Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 43), *s.* 1 (1) (*a*), *s.* 2 (1)—*Law Reform (Miscellaneous Provisions) Act*, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 100), *s.* 9.

*Statute—Crown—Whether bound by statute—*Parens patriae *jurisdiction as to infants—Children Act*, 1948 (11 *&* 12 *Geo.* 6 *c.* 43).

On Apr. 13, 1956, a local authority received an illegitimate child into their care under s. 1 (1) of the Children Act, 1948, on the ground that he had been abandoned by his mother, and on the same day, under s. 13 (1) (a) of the Act, they boarded out the child with foster parents, with whom he had been living for nearly two years. Both foster parents signed an undertaking, in the form set out in the schedule to the Boarding-Out of Children Regulations, 1955, to allow the child to be removed when required by the local authority. On Apr. 1, 1957, the foster father died, but the child continued to be boarded out with the foster mother. In October, 1957, the local authority passed a resolution under s. 2 (1) of the Act, vesting all the rights and powers of the child's mother in itself. In June, 1960, the local authority formed the view that boarding out the child with the foster mother was not in the child's best interests, and required the foster mother to return him. Despite the undertaking which she had signed, the foster mother refused to return him. In August, 1960, the local authority was given leave by the court to issue a summons for an order of habeas corpus, but on Oct. 14, 1960, on an application being made by the foster mother under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, the child became a ward of court, and the application for habeas corpus was adjourned generally. The local authority then applied for an order, under s. 9 (3) of the Act of 1949, that the child should cease to be a ward of court.

Held: an order would be made under s. 9 (3) of the Act of 1949 directing that the child should cease to be a ward of court because, where a local authority had received a child into its care under s. 1 (1) of the Children Act, 1948, and was acting within the authority's powers under the Act, the court had no right to review the decisions of the authority on what was for the benefit of the child, notwithstanding that the Act was not expressed to bind the Crown (see p. 204, letters H and C, post).

Re A. B. (an infant) ([1954] 2 All E.R. 287) applied.

Per Curiam: since the passing of the Supreme Court of Judicature Act, 1873, a judge in habeas corpus proceedings concerning an infant considers the matter as though he were exercising the Chancery jurisdiction over wards of court, and the Law Reform (Miscellaneous Provisions) Act, 1949, has not altered the general position in any way (see p. 205, letter A, post).

[As to the care of a child by a local authority, see 21 Halsbury's Laws (3rd Edn.) 275, para. 590, and as to the assumption of parental rights by a local authority, see ibid., 277, 278, paras. 592, 593; and for cases on the subject, see 28 Digest (Repl.) 726, 727, *2326*, *2327*.

For the Children Act, 1948, s. 1, s. 2 (1), and s. 13, see 12 Halsbury's Statutes (2nd Edn.) 1105, 1107 and 1114.

For the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, see 28 Halsbury's Statutes (2nd Edn.) 777.]

Cases referred to:

A. B. (an infant), Re, [1954] 2 All E.R. 287; [1954] 2 Q.B. 385; 118 J.P. 318; [1954] 3 W.L.R. 1; 28 Digest (Repl.) 726, *2326*.

R. v. *Gyngall*, [1893] 2 Q.B. 232; sub nom. *Re Gyngall*, 62 L.J.Q.B. 559; 57 J.P. 773; sub nom. *R.* v. *Gyngall, Re Hausherr* (*otherwise Austen*), 69 L.T. 481; 28 Digest (Repl.) 485, *25*.

Wheaton v. *Maple & Co.*, [1893] 3 Ch. 48; 62 L.J.Ch. 963; 69 L.T. 208; 19 Digest 55, *317*.

Summons.

This summons was issued by a local authority in wardship proceedings asking for an order that the infant cease to be a ward of court. The summons was heard in chambers on Nov. 16, 17, 1960, but judgment was delivered in open court. The facts appear in the judgment.

F. P. Neill for the local authority.

J. D. May for the foster mother.

Cur. adv. vult.

Nov. 30. **CROSS, J.**, read the following judgment: This is an infant case but, as it raises a point of some general importance, I am giving my judgment in open court. The child, who is illegitimate, was born on July 10, 1952. In August, 1954, when he was about two years old, his mother brought him to the house of a Mr. and Mrs. X. and asked Mrs. X. if she knew where she could get lodgings. Mrs. X. told her that, if she cared to trust her, she would look after the child for her for a few days while she looked for a house where she and her child would be accepted. The mother said that she would do this and left her child with Mrs. X., who had a number of young children of her own. The mother never reclaimed her child from Mrs. X. but visited him from time to time. Mrs. X. last saw the mother in March, 1955, in the maternity ward of a hospital where she had had another child, and she has heard nothing of her since April, 1955, when she had a letter from her. In April, 1956, Mrs. X. told her local authority that she was looking after a child who had been abandoned by his mother, and the local authority thereupon put the machinery of the Children Act, 1948, into operation with regard to him.

I must now refer to some of the sections of the Act and some regulations made under it. Section 1 (1), so far as relevant, provides that, where it appears to a local authority that a child in their area under the age of seventeen has been abandoned by his parents (which in this case of an illegitimate child means the mother) and that the intervention of the local authority is necessary in the interests of his welfare, it shall be the duty of the local authority to receive the child into their care. Section 1 (2) provides that where a local authority have received a child into their care it shall be their duty, subject to the provisions of Part 1 of the Act (1), to keep the child in their care so long as his welfare appears to them to require it and the child has not attained the age of eighteen. Section 1 (3), so far as relevant, provides that the local authority are not to keep the child in their care if any parent or guardian wishes to take over his care, and s. 1 (4) provides that, where the child in question is ordinarily resident in the area of another local authority, that authority may take over his care. Section 2 (1) of the Act enables the local authority, when it appears to them (inter alia) that the child has been abandoned, to resolve that all the rights and powers of his parents or parent shall vest in them. Section 7 (1) provides that, where a child in the care of a local authority under s. 1 of the Act is a child for whose welfare the Minister of Pensions (2) is responsible, the Minister may at any time require that the care of the child shall be transferred to him, and thereupon the child shall cease to be in the care of the local authority. Similarly, s. 8 provides (3) that, if the child becomes subject to the Mental Deficiency Acts, 1913 to 1938 or the Lunacy and Mental Treatment Acts, 1890 to 1930, he shall thereupon cease to be in the care of the local authority. Section 13 (1) of the Children Act, 1948, provides that a local authority shall discharge their duty to provide accommodation and maintenance for a child in their care so far as is practicable—

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(1) Part 1 of the Act comprises s. 1 to s. 10 inclusive.

(2) See s. 7 (3) of the Act. The Ministry of Pensions is dissolved and the functions of the Minister of Pensions in this regard are transferred to the Minister of National Insurance, who is renamed "the Minister of Pensions and National Insurance"; see the Transfer of Functions (Ministry of Pensions) Order, 1953 (S.I. 1953 No. 1198).

(3) Repealed by the Mental Health Act, 1959, s. 10 (2), s. 149 (2), s. 153 (1), (2), Sch. 8, Part 2.

> "(a) by boarding him out on such terms as to payment by the authority and otherwise as the authority may, subject to the provisions of this Act and regulations thereunder, determine . . ."

Section 14 (1) gives the Secretary of State power to make regulations dealing with the welfare of children boarded out by local authorities under s. 13 (1) (a).

Regulations known as the Boarding-Out of Children Regulations, 1955, were made by the Home Secretary on Sept. 1, 1955 (S.I. 1955 No. 1377), and came into operation on Jan. 1, 1956. Regulation 4 provides that a local authority, which has care of a child and has arranged for his boarding out, shall not allow him to remain boarded out with any foster parents if it appears that the boarding out is no longer in his best interests, and reg. 20 provides that a local authority shall require foster parents to sign an undertaking in respect of any child boarded out with them in the form set out in the schedule to the regulations. This form includes an undertaking by the foster parents to allow the child to be removed from their home when so requested by a person authorised by the local authority.

On Apr. 13, 1956, the local authority received this child into their care under s. 1 (1) of the Act of 1948 on the ground that he had been abandoned by his mother, and on the same day, in discharge of their duties under s. 13 (1) of the Act, they arranged for him to be boarded out with Mr. and Mrs. X., with whom he had in fact been living for nearly two years. Mr. and Mrs. X. signed an undertaking in the form provided by the regulations, including an undertaking to return him to the local authority if requested, and the local authority thereupon began to make payments to them for the child's maintenance. On Apr. 1, 1957, Mr. X. died, but the child continued to be boarded out with Mrs. X. In October, 1957, the local authority passed a resolution under s. 2 (1) of the Act vesting all the rights and powers of the mother of the child in them. In June, 1960, the local authority formed the view that the boarding out of the child with Mrs. X. was no longer in his best interests and asked Mrs. X. to return the child to them. She refused to do so, notwithstanding the undertaking which she had signed, on the ground that she had always cared for him well and that it was not in his best interests that he should be removed from her charge. On Aug. 23, 1960, BUCKLEY, J., sitting as vacation judge in the Queen's Bench Division, gave to the local authority leave to issue a summons for an order for habeas corpus returnable for the first available day of this term, and on Aug. 26 a summons was issued which was originally returnable on Oct. 3, 1960, but was adjourned until Oct. 19, 1960, to enable Mrs. X. to apply for legal aid and to file evidence in answer. Meanwhile, on Oct. 14, 1960, Mrs. X. issued a summons in this Division under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, asking that the child be made a ward of the court and that directions be given by the court with regard to his custody, care and control. As a result of the issuing of this summons the child became a ward of court (4), and when the habeas corpus application came before him on Oct. 19, SALMON, J., adjourned it generally so that a judge of this Division might deal with this matter. Finally, on Oct. 21, the local authority issued a summons in these proceedings for an order that the child cease to be a ward and that summons is now before me.

Since the passing of the resolution under s. 2 (1) of the Act of 1948 the local authority have had all the rights of the mother of the ward. Further, Mrs. X., the foster mother, has signed an undertaking to return the ward to the local authority when requested to do so. These facts, however, though they would give the local authority a prima facie right to have the child returned to them, would not in themselves preclude this court from exercising the jurisdiction delegated to it by the Sovereign as parens patriae and considering whether in the particular circumstances it was in the best interests of its ward that he should be taken away from Mrs. X. with whom he has in fact been living for the past six years. But the question which I have to decide is whether the Children Act, 1948, although not expressed to bind the Crown, does not, by necessary implication, take away or limit the Crown's right to inquire into the well-being of children who have been taken into the care of a local authority. Counsel for Mrs. X. referred me to several cases, such as *Wheaton* v. *Maple & Co.* (5), to show how reluctant the courts are to hold that a statute not expressed to bind the Crown binds it by implication, and submitted that I ought not to hold that the Act of 1948 has had the result contended for by the local authority unless I am satisfied that the intention of the legislature to achieve that result is clear and unmistakable. I agree; but, viewing the matter for the moment as free from authority, I think that the provisions of the Act of 1948 to which I have referred lead inevitably to the conclusion that the prerogative has been restricted. It is not disputed that this child was properly received into the care of the local authority under s. 1 (1) of the Act. The Act makes express provision for such a child passing out of the care of the local authority in certain prescribed circumstances. For example, under s. 1 (3) the child may pass into the care of a parent or guardian, under s. 1 (4) into the care of another local authority, and under s. 7 (1) into the care of the Minister of Pensions; but, subject to the operation of such special provisions, the statute, by s. 1 (2), imposes a duty on the local authority to keep the child in their care so long as his welfare appears to them to require it. If this court took on itself to inquire into the well-being of a child in the care of a local authority, whether the child was boarded out or was in some home run by the local authority, the judge might, theoretically at least, reach the conclusion that the child ought to be removed altogether from the care of the local authority and committed to the care of some other person. If it made an order to this effect, the court would be making it impossible for the local authority to carry out the duty imposed on them by the Act. Counsel for Mrs. X. was disposed to agree that Parliament could hardly have contemplated this possibility, but he argued that, even if the court could not make an order removing the child from the care of the local authority, there was nothing in the Act to prevent it overruling any given decision which the local authority might take with regard to him and directing them to deal with the child in the way in which the court thought best for his welfare, although they thought otherwise. But for the court to impose on the local authority its view of what is best for the child, while leaving the child in the care of the authority, would give rise to an intolerable situation, which, again, I cannot think was contemplated by Parliament. Parliament, as I read this Act, thought that children in the situation of this child ought to be taken care of by the local authority and that the local authority could be trusted to do the best for them. So long, therefore, as the local authority are acting within the powers given to them by the Act, this court, as I see it, has no right, let alone any duty, to inquire into the wisdom of their decisions.

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(4) See the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (2).

So far I have dealt with this case apart from authority, but, in fact, the Act was construed in substantially the same way as I would construe it by a Divisional Court of the Queen's Bench Division in habeas corpus proceedings in *Re A. B. (an infant)* (6). Counsel for Mrs. X., as well as reserving his right to contend in a higher court that that case was wrongly decided, submitted that it was not binding on me. His main ground for so submitting was that, in habeas corpus proceedings relating to an infant, the court today has not so wide a jurisdiction to inquire into what is for the child's welfare as it has if the child is a ward of court;

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(5) [1893] 3 Ch. at p. 64, per LINDLEY, L.J.
(6) [1954] 2 All E.R. 287; [1954] 2 Q.B. 385.

A that, therefore, the Divisional Court did not need to express the views about the statute which it did express, and that what the judges said were merely dicta. I do not agree with this submission. Whatever may have been the position in the past, since the Supreme Court of Judicature Act, 1873 (7), a judge, in habeas corpus proceedings concerning an infant, considers the matter exactly as though he were exercising the Chancery jurisdiction over wards of court: see *R.* v. B *Gyngall* (8); and I do not think that the Law Reform (Miscellaneous Provisions) Act, 1949, which altered the procedure in wardship cases in this Division, has altered the general position in any way. As a subsidiary ground for his submission that the construction put on the Act of 1948 by the Divisional Court was not binding on me, counsel relied on the fact that various authorities to which he referred me, showing the reluctance of the court to hold that the prerogative of C the Crown has been impliedly cut down by a statute, do not appear to have been cited in the Divisional Court. But the Divisional Court had the point at issue plainly put before them, and the fact (if it be a fact) that some authorities bearing on it were not cited cannot make the decision not binding on me, if it would otherwise be binding. I think, therefore, that, even if I had been inclined to take a different view of the effect of the Act, I should have been bound to adopt the D construction which the Divisional Court put on it. In fact, however, I respectfully agree with their view of the matter.

In the result, therefore, I shall direct that this child ceases to be a ward of court. I do not propose to dismiss the originating summons, but I shall make an order under s. 9 (3) of the Law Reform (Miscellaneous Provisions) Act, 1949, ordering that the child ceases to be a ward of court.

Order accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Birmingham (for the local authority); *Preston, Lane-Claypon & O'Kelly*, agents for *Southall & Co.*, Birmingham (for the foster mother).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(7) Repealed (except for s. 25 (2), s. 46, s. 64 and s. 66) by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 and Sch. 6.

(8) [1893] 2 Q.B. 232.

BROWN *v.* BULLOCK (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Danckwerts, J.), November 15, 1960.]

Income Tax—Deduction in computing profits—"Expenses incurred wholly, exclusively and necessarily in the performance of . . . duties"—Bank manager—Subscription to club—Membership practically requisite for employment as manager—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Rules applicable to Sch. E, Sch.* 9, *r.* 7.

It was virtually a requisite of their appointment that managers of a bank should join clubs to foster local contacts, and for forty years the manager of the Pall Mall branch had joined the Devonshire Club. A newly appointed manager joined the club and used it for returning hospitality received by him from bank customers and to take lunch in order to keep in touch with members who were customers of the bank but rarely for any other purpose. He continued as a member of the Royal Automobile Club, where he entertained female customers, and, as a golfer, he also enjoyed the use of its country branch. The whole of his subscription to the Devonshire Club and half that to the Royal Automobile Club were paid by the bank and these sums were treated as part of his income under Sch. E to the Income Tax Act, 1952.

Held: the sums were not deductible in arriving at the bank manager's taxable income for the purposes of Sch. E because—

(i) the subscription to the Royal Automobile Club was partly for the taxpayer's own enjoyment and so was not money expended "wholly, exclusively and necessarily in the performance of" his duties, within r. 7 of the Rules applicable to Sch. E;

(ii) although the whole purpose of membership of the Devonshire Club was to make the bank manager more useful to the bank, when taking lunch and entertaining customers there he was not acting in the performance of his duties as bank manager within r. 7.

Lomax v. *Newton* ([1953] 2 All E.R. 801) and *Griffiths* v. *Mockler* ([1953] 2 All E.R. 805) applied.

Appeal dismissed.

[As to deductible expenses of an office or employment under Sch. E to the Income Tax Act, 1952, see 20 HALSBURY'S LAWS (3rd Edn.) 328, para. 602; and for cases on the subject, see 28 DIGEST (Repl.) 242-247, *1059-1099.*

For the Income Tax Act, 1952, Sch. 9, r. 7 of the Rules applicable to Sch. E, see 31 HALSBURY'S STATUTES (2nd Edn.) 524.]

Cases referred to:

Griffiths v. *Mockler*, [1953] 2 All E.R. 805; 35 Tax Cas. 135; [1953] 1 W.L.R. 1123; 28 Digest (Repl.) 245, *1082.*

Lomax v. *Newton*, [1953] 2 All E.R. 801; 34 Tax Cas. 558; [1953] 1 W.L.R. 1123; 28 Digest (Repl.) 245, *1083.*

Case Stated.

The taxpayer appealed to the General Commissioners of Income Tax for St. James, Westminster, against an additional assessment of £27 to income tax under Sch. E to the Income Tax Act, 1952, made on him for 1954-55 in respect of his emoluments as manager of the Pall Mall branch of the Midland Bank, Ltd., in the city of Westminster. The sum of £27 represented that part of the total annual subscriptions in respect of the taxpayer's membership of the Royal Automobile Club and the Devonshire Club which was paid by the bank. It was not disputed that the £27 formed part of the emoluments of the taxpayer's office or employment. The sole question for decision was whether, in arriving at the amount of the emoluments to be assessed under Sch. E, a deduction of the £27 was allowable under r. 7 of Sch. 9 to the Income Tax Act, 1952. The commissioners held that the expenditure was not wholly, exclusively and necessarily made in the performance of the taxpayer's duties as bank manager as there was some element of personal benefit to the taxpayer, and they confirmed the additional assessment. The taxpayer appealed by way of Case Stated to the High Court.

Hubert H. Monroe, Q.C., and *M. P. Nolan* for the taxpayer.
C. F. Fletcher-Cooke, Q.C., and *A. S. Orr* for the Crown.

DANCKWERTS, J.: This is an appeal against a decision of the General Commissioners for the division of St. James, Westminster, in the county of Middlesex. The taxpayer is the manager of a bank and the question raised is whether, in the assessment of his income to income tax, certain items in connexion with his office or employment can be deducted from his assessable income for the purposes of Sch. E to the Income Tax Act, 1952. The commissioners decided that the expenses were not deductible. It is stated in the Case, para. 3:

> " On appointment as a manager of a branch of the bank [Midland Bank, Ltd.] each manager is instructed that he must foster local contacts and that he should join the club or clubs best suited for that purpose. Membership of such clubs is in almost every case passed from the manager to the succeeding manager as a matter of course. If a prospective manager refused to join a club his refusal would not be accepted without very good reason but would not necessarily mean that he would lose the appointment. Club membership is virtually a condition or requisite of managerial appointment and it would be unlikely that a manager would be appointed who would refuse to join the appropriate club or clubs. Any proposal for membership of a club and of election thereto would, however, be a matter for the manager personally and the club concerned, as in the case of any other member.
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> " 4. The [taxpayer] was appointed the manager of the Pall Mall branch of the bank in June, 1949. The managers of that branch of the bank had been elected members of the Devonshire Club for the past forty years and he (the [taxpayer]) was elected a member on his appointment to the Pall Mall branch. The annual subscription was £21. The [taxpayer's] entrance fee and subscription was debited to the bank's general charges account and was paid regularly by the bank, the [taxpayer] or some other officer of the bank signing the necessary cheque. The [taxpayer] used the club for returning hospitality received by him from customers of the bank. In addition he lunched there fairly frequently so that he might keep in touch with members of the club some of whom were customers of the bank. He used it rarely for any other purpose. He had never been in the billiard room. He had not stayed the night there. The [taxpayer] was already a member of the Royal Automobile Club when he was appointed the manager of the Pall Mall branch of the bank and by agreement with the bank he continued to be a member of that club instead of applying for membership of the Junior Carlton Club of which the former manager was a member but as he would enjoy some personal advantage in the use of the country branch of the club, as he was a golfer, it was agreed that the bank should only pay one half of the yearly subscription of £12 12s. The [taxpayer], with the bank's approval, had joined the Royal Automobile Club when manager of the bank's branch at 431, Oxford Street, the facilities for entertainment at the club of which the [taxpayer] was a member before that being very limited. He used the Devonshire Club to entertain male customers and the Royal Automobile Club to entertain female customers because that club was more suitable for that purpose than the Devonshire Club. He entertained customers on an average about six times a month. He had not used either club in the evening except on a few occasions for the purpose of entertaining customers. His wife had only met him at the Royal Automobile Club when

> he was entertaining a customer. He was entitled to use all the facilities of both clubs at all times and as often as he wished to do so for private social purposes. The [taxpayer] was not a 'clubman' and would be resigning his membership of the Devonshire Club as soon as he retired but he hoped to retain membership of the Royal Automobile Club country club."

The rules of the Devonshire Club are exhibited and the facilities are referred to:

> "(a) Bedrooms. (b) Breakfasts, lunches and dinners. (c) Reading room and library. (d) Billiard room, card room and writing room. The facilities mentioned under (a) (b) and (d) would require to be paid for at rates fixed by the club. The [taxpayer] found the price of lunch at the club high and as a matter of personal preference would not lunch there in the ordinary way."

The rules of the Royal Automobile Club are also exhibited and the facilities there are referred to, which I do not think that I need read through. In regard to those the same thing occurs, that he would have to pay at the rates fixed by the club. The contentions of the taxpayer and the Crown are set out. In para. 10 the commissioners state their decision:

> "We . . . found on the evidence, that although the [taxpayer] was necessarily obliged to incur the expense of the club subscriptions such expenditure was not wholly, exclusively and necessarily made in the performance of his duties as a bank manager as there was some element of personal benefit to the [taxpayer]. We therefore confirmed the additional assessment of £27."

It is not disputed that the amounts of £21 and six guineas were properly included in the taxpayer's taxable income and that the charge fell on them. Therefore, I need not go into the charging sections of the Income Tax Acts. It is only necessary to consider the provisions which relate to deductions. The rule which applies to Sch. E for the purposes of the present case is r. 7 of Sch. 9 to the Income Tax Act, 1952, and it is in these terms:

> "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

That rule has again and again been criticised judicially for being extremely narrow, and it is undoubtedly in terms much more severe and much more narrow than the corresponding rule relating to expenses for the purposes of Sch. D. The terms of the corresponding rule for the purposes of Sch. D are in s. 137, which actually deals with the prohibition of deductions, but para. (a) supplies the necessary words:

> "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation."

In the present case, so far as the payment of part of the subscription to the Royal Automobile Club is concerned, I find it impossible to say that it is a permissible deduction within the meaning of r. 7, because it is clear from the facts that the taxpayer joined the Royal Automobile Club not really necessarily for the purposes, or only partly for the purposes, of his employment or office as a bank manager, and his membership was originally and is now partly for the purposes of his private enjoyment, viz., the facilities provided by the country club and the opportunities to play golf. Although the bank, considering that his membership of that club conferred advantages for the purposes of the bank, have reimbursed him to the extent of six guineas out of the twelve guineas subscription, that seems to me to be purely an arbitrary division on the part of the bank and does not really meet the point that the subscription to that club is not wholly in pursuit and necessarily in performance of the office, because it is partly for the taxpayer's own pleasure. Consequently, it seems to me that the appeal cannot be sustained so far as that element in the case is concerned.

The question of the subscription of £21 to the Devonshire Club is a good deal more difficult. It does seem to be an odd result that the £21 and the six guineas are included as part of the emoluments of the bank manager and at the same time the Crown claim that he should be disallowed the expenditure which he has necessarily to pay out of those emoluments for the very purposes for which the payments are made to him by the bank. It looks suspiciously like having the matter both ways, but, however that may be, I have to construe the words contained in the Act as they stand.

The real purpose of the taxpayer's belonging to the Devonshire Club is to assist him and make him more useful to the bank by reason of his membership, and the phrase which is used by the commissioners, " He used it rarely for any other purpose ", I should regard as not really amounting to a finding that he did not resort wholly to the club in connexion with his office as manager. But that is not the real difficulty. It seems to me that, when the subscription for the Devonshire Club is paid and when the taxpayer visits the club to have lunch there, possibly to entertain customers, he is not really acting in the performance of his duties as manager of the bank. He is no doubt adding to his usefulness as a bank manager, and he belongs to the club and attends the club from time to time for the purpose of his position as bank manager. Nevertheless, though it seems to me rather a hard result, I think I am bound to reach the conclusion that it is not a deductible expense for the purposes of r. 7 and Sch. E. It seems to me that the matter is really concluded by the decisions of VAISEY, J., in *Lomax* v. *Newton* (1) and *Griffiths* v. *Mockler* (2). Those cases seem to me to be very similar to the present. In each of them certain expenses had to be incurred by an army officer because he was an army officer and because his duties compelled him to sustain the expenditure in question. But, though they were obligatory on him in the conditions under which he served, none the less it was held by VAISEY, J., that they were not deductible expenses, because they were not incurred in the performance of the duties of his office as an officer in the army.

It seems to me the same principle must govern the present case, and with great reluctance I come to the conclusion that, as regards the Devonshire Club expenses also, the appeal must fail. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Preston & Naylor* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(1) [1953] 2 All E.R. 801; 34 Tax Cas. 558.
(2) [1953] 2 All E.R. 805: 35 Tax Cas. 135.

QUALTER, HALL & CO., LTD. *v.* BOARD OF TRADE AND ANOTHER.

[CHANCERY DIVISION (Cross, J.), November 23, December 7, 1960.]

Company—Private company—Exempt private company—Loss of exemption—Body corporate holder of shares—Exception for banking or finance company providing capital—Capital reorganisation—Arrangement with finance company to purchase new issue of shares from members entitled thereto—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 129 (4), *Sch.* 7, *para.* 7 (1), *para.* 9.

Statute—Construction—Headings—Central headings—Reference to these in construing ambiguous paragraph.

A company was an exempt private company within s. 129 of the Companies Act, 1948, that is, for present purposes, the company satisfied the basic conditions of exemption stated in Sch. 7 to the Act. On reorganisation of the capital of the company, involving a capitalisation of reserves, certain new preference and " A " ordinary shares, which were to be issued to shareholders as fully paid up on the capitalisation, were purchased by five banking or finance companies. By para. 1 of Sch. 7 to the Companies Act, 1948, the first basic condition for being an exempt private company is that no body corporate is the holder of any of the company's shares, but the condition is subject to exceptions, including an exception, enacted by para. 7 (1)*, where a " banking or finance company acquired the shares . . . or its interest therein in the ordinary course of its business as such and by arrangement with the relevant company . . ." This exception is excluded, by the proviso to para. 7 (1), if banking or finance companies have the right to exercise one fifth or more of the total voting power " at any general meeting " of the company. Under new articles of association adopted by the company, preference shareholders and the " A " ordinary shareholders were entitled to vote at a general meeting of the company only if (a) as regards preference shareholders, the dividend of their shares was six months in arrear at the date of the notice convening the meeting, or (b) as regards both preference shareholders and the " A " ordinary shareholders, the meeting was called to consider a resolution, of a kind specified in the articles, which would affect the rights of these shareholders. On the question whether the company ceased to be an exempt private company,

Held: (i) the words of para. 7 (1) of Sch. 7 to the Companies Act, 1948, read in conjunction with the definition of " banking or finance company " in para. 9† of Sch. 7 were not clear and unambiguous, with the consequence that the court was entitled to look for assistance in construing the paragraph to the central heading under which it was printed in Sch. 7, viz., " exception for banking or finance company providing capital ", and the words " providing capital " meant providing it for the company and did not include the purchase of shares by finance companies from shareholders; therefore, the exception did not apply and the company had ceased to be an exempt private company.

(ii) if the company had come within the exception in para. 7 (1) of Sch. 7, it would not have been taken out of the exception by the proviso to para. 7 (1), because the words " any general meeting " in the proviso should be construed as " any and every general meeting ".

[As to an exempt private company, see 6 HALSBURY'S LAWS (3rd Edn.) 357, 360, paras. 701, 707.

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* The relevant terms of para. 7 (1) of Sch. 7 to the Companies Act, 1948, are printed at p. 212, letter B, post.

† The relevant terms of para. 9 are printed at p. 212, letter E, post.

For the Companies Act, 1948, s. 129, and Sch. 7, para. 1, para. 7 (1), para. 9, see 3 HALSBURY'S STATUTES (2nd Edn.) 559, 857, 859, 860.]

Case referred to:

Penrhyn's (*Lord*) *Settlement Trusts, Re, Penrhyn* v. *Robarts*, [1923] 1 Ch. 143; 92 L.J.Ch. 145; 128 L.T. 442; 42 Digest 654, *634*.

Adjourned Summons.

The plaintiff company, Qualter, Hall & Co., Ltd., applied to the court by originating summons to determine the question whether, on the true construction of s. 129 of and Sch. 7 to the Companies Act, 1948, the company had, in the events which had happened, ceased to be an exempt private company within the meaning of s. 129 (4).

The company was incorporated in November, 1910, under the Companies (Consolidation) Act, 1908, as a private limited company, with the object of acquiring and carrying on a family business. Until a reorganisation of the capital of the company in 1955, all the issued shares of the company were held by thirteen members of the family, and the company was an exempt private company within the meaning of s. 129 (4) of the Companies Act, 1948. As a result of the reorganisation, the capital of the company was increased by the capitalisation of reserves and new shares were created and credited as fully paid-up to the members of the company. Pursuant to an arrangement between the company and Estate Duties Investment Trust, Ltd., the members sold these shares to the latter company and to four other banking or finance companies. The Board of Trade expressed the view that the company had ceased to be an exempt private company within the meaning of s. 129 (4), and the Registrar of Companies accepted that view.

Sir Milner Holland, Q.C., and *R. B. S. Instone* for the plaintiff company.

E. Blanshard Stamp for the defendants, the Board of Trade and the Registrar of Companies.

Cur. adv. vult.

Dec. 7. **CROSS, J.**, read the following judgment: The question raised by this summons is whether the plaintiff company, Qualter, Hall & Co., Ltd., is an exempt private company within the meaning of s. 129 of the Companies Act, 1948, which exempts certain private companies from the requirements laid down by s. 127. One of the conditions of exemption is that the conditions contained in Sch. 7 to the Act are satisfied as to the persons interested in the company's shares and debentures (1). The parts of Sch. 7 which are relevant to this case are the following. Paragraph 1 reads:

> " The basic conditions as to the shares or debentures of the company whose exemption is in question are—(a) that no body corporate is the holder of any of the shares or debentures; and (b) that no person other than the holder has any interest in any of the shares or debentures; but these conditions are subject to the exceptions provided for by the following paragraphs of this Schedule."

Paragraph 2 (1) is:

> " The rules contained in the following sub-paragraphs of this paragraph shall apply for the purposes both of the basic conditions and of the exceptions from those conditions."

Paragraph 2 (2) is:

> " Where any share or debenture or any interest in any share or debenture is subject to a charge in favour of a banking or finance company by way of security for the purposes of a transaction entered into in the ordinary course of its business as such—(a) any interest under the charge, whether

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(1) Under s. 129 (2) (a).

> of the banking or finance company or a nominee for it, shall be disregarded; and (b) if the banking or finance company or its nominee is the holder of the share or debenture, the person entitled to the equity of redemption shall be treated as the holder, whether he has a present right to redeem or not."

Paragraph 7, which is headed "Exception for Banking or Finance Company providing Capital", is as follows:

> "(1) The first of the basic conditions shall be subject to an exception for any shares or debentures held by or by a nominee for a banking or finance company, where the banking or finance company acquired the shares or debentures or its interest therein in the ordinary course of its business as such and by arrangement with the relevant company or its promoters: Provided that this exception shall not apply if the banking or finance company has the right (or, where there is more than one such company holding shares or debentures to which this exception has to be applied in determining the relevant company's right to be treated as an exempt private company, they have between them the right) to exercise or control the exercise of one-fifth or more of the total voting power at any general meeting of the relevant company."

Finally, para. 9 of Sch. 7 defines the expression "banking or finance company" as

> "any body corporate or partnership whose ordinary business includes the business of banking and any other body corporate whose ordinary business includes the business of lending money or of subscribing for shares or debentures . . ."

Then there follow some other words which are not material here.

Before the reorganisation of its capital, which took place in July, 1955, the capital of the company consisted of £115,000 divided into eighty-five thousand six per cent. non-cumulative redeemable preference shares of £1 each, of which sixty thousand had been issued and were fully paid, and three thousand ordinary shares of £10 each, all of which had been issued and were fully paid. All the issued shares were held by thirteen members of the Hall family. In this circumstance, it was accepted by the Registrar of Companies that the conditions contained in Sch. 7 to the Act were satisfied, and that the company was an exempt private company.

As the balance sheet of the company as at Oct. 31, 1954, showed substantial reserves and unappropriated profits, the directors considered whether the capital structure should not be reorganised so as to reduce the disparity between the nominal amount of the paid-up share capital and the real value of the capital employed in the business, and at the same time to provide the principal shareholders with funds with which the estate duty prospectively payable on their deaths in respect of their holdings could be met without jeopardising the future of the company as a family business. After discussion with the directors, the auditors of the company prepared a memorandum outlining a possible scheme for the capitalisation of the reserves under which further preference and ordinary shares would be issued by the company, credited as fully paid-up, and sold to financial institutions by the shareholders entitled thereto. A copy of this memorandum was sent to Estate Duties Investment Trust, Ltd., which investigated the company's affairs in detail in order to ascertain whether the scheme was one in which it would be prepared to take part and to recommend other financial institutions to join. The directors of the company provided Estate Duties Investment Trust, Ltd. with all the information which it required for this purpose, since they were of the opinion that the proposed reorganisation would not only be to their personal advantage as shareholders but would also ensure the continuity of the company's business under family control. In the result, Estate Duties Investment Trust, Ltd. and four other financial institutions decided to become shareholders in the company, and the company's capital structure was reorganised pursuant to a series of resolutions passed by the company on July 22, 1955.

The effect of these resolutions was, stated briefly, as follows. (i) The capital of the company was increased from £115,000 to £165,000 by the creation of twenty-five thousand 6½ per cent. cumulative preference shares of £1 each and twenty-five thousand "A" ordinary shares of £1 each. (ii) The existing eighty-five thousand non-cumulative redeemable preference shares were converted into eighty-five thousand 6½ per cent. cumulative preference shares and amalgamated with the twenty-five thousand newly created 6½ per cent. cumulative preference shares. (iii) The existing three thousand £10 ordinary shares were converted into thirty thousand "B" ordinary shares of £1 each. (iv) A sum of £75,000, forming part of the undivided profits of the company standing to the credit of the general reserve account, was capitalised and the directors were authorised to appropriate such sum to the members who should be registered immediately after the passing of the resolution as holders of the thirty thousand "B" ordinary shares of £1 each resulting from the sub-division and conversion into such shares as the former three thousand ordinary shares of £10 each in the capital of the company in proportion to the amount paid up on the said "B" ordinary shares held by them respectively, and to apply the said capitalised sum in paying up in full at par the fifty thousand unissued 6½ per cent. cumulative preference shares of £1 each and the twenty-five thousand unissued "A" ordinary shares of £1 each in the capital of the company, such shares to be allotted and distributed, credited as fully paid up, among the said members in the proportion aforesaid. At the same time the company adopted a new set of articles, by art. 72 of which the "A" ordinary shareholders and the preference shareholders are entitled to receive notice of general meetings of the company but are not entitled to attend and vote at such meeting unless either (a) as regards the preference shareholders at the date of the notice convening the meeting, the dividend on their shares is six months in arrear, or (b) as regards both the "A" ordinary shareholders and the preference shareholders, the business of the meeting includes the consideration of a resolution for reducing the capital of the company, or winding-up the company, or sanctioning a sale of its undertaking, or varying or abrogating any of the special rights attached to the "A" ordinary shares or to the preference shares, or altering the voting rights attached to any class of shares, or altering the provisions of the memorandum of association of the company with respect to the objects of the company.

At a directors' meeting held on July 22, 1955, after the passing of these resolutions by the company, the directors resolved that the £75,000 should be capitalised and applied in the payment up in full of the preference and "A" ordinary shares referred to in the resolution, and allotted and distributed amongst the "B" ordinary shareholders in the manner contemplated by the resolution. The chairman explained that, as a result of arrangements made with Estate Duties Investment Trust, Ltd., the latter had agreed with the members entitled to the shares in question to purchase from them one-third of each of the fifty-thousand preference shares and twenty-five thousand "A" ordinary shares, and to place the other two-thirds with four other companies who were also banking or finance companies as defined in para. 9 of Sch. 7 to the Companies Act, 1948. The exempt private company status of the company, the chairman continued, would thus be preserved, but the members concerned would have to renounce their respective interests in the shares in favour of Estate Duties Investment Trust, Ltd. and the companies with whom they had placed the remainder of the shares. Letters of authority and request in respect of the allotment of the preference shares and "A" ordinary shares to which the members in question were respectively entitled, duly signed by them, were then received by the meeting, and it was resolved that, pursuant to the foregoing resolutions and to such letters, the fifty thousand unissued 6½ per cent. cumulative A preference shares of £1 each and the twenty-five thousand unissued "A" ordinary shares of £1 each be allotted to the five banking or finance companies concerned, in the proportions set out in the schedule to the directors' resolution. In the result, therefore, on payment to each of the shareholders concerned of the appropriate purchase price, five companies, which are admittedly banking or finance companies within the meaning of Sch. 7 to the Act, became together B entitled to fifty thousand preference shares and twenty-five thousand "A" ordinary shares in the company. The advisers of the company clearly did not expect that its status as an exempt private company would be affected by this transaction.

The Board of Trade, however, has taken the view that as from July 22, 1955, the company ceased to be an exempt private company because (a) para. 7 of C Sch. 7 applies only to cases in which the banking or finance companies provide capital for the company, and not to cases such as this, where the shares are bought from shareholders who are entitled to have them allotted to themselves; or, alternatively, (b) in any event, the proviso to para. 7 applies in this case, since the banking and finance companies in question have the right to exercise more than one-fifth of the total voting power at general meetings of the company D called to consider such resolutions as are expressly referred to in art. 72.

On the first point, counsel for the company contended that the words, in para. 7 (1), "acquired the shares or debentures or its interest therein . . . by arrangement with the . . . company or its promoters" naturally included a purchase of the shares or debentures or of some interest in them from the holders by arrangement with the company as well as an issue of shares or debentures E by the company in consideration of money paid to it; that, had it been the intention of Parliament to confine the exception to the latter case, it would not have used such vague words as "acquired . . . by arrangement with the . . . company" but would have spoken of subscribing for shares or debentures; that the reference to an acquisition of an interest in the shares or debentures was inappropriate to the limited construction contended for by the Board of Trade; F and, finally, that, though there might possibly be cases of purchases of shares from shareholders which would not fall within the exception because the shares had not been acquired by arrangement with the company, the purchases in this case had been by arrangement with the company, which had, in effect, initiated the whole scheme.

Counsel for the Board of Trade did not dispute that, if the company was G otherwise right in its contention on this point, the acquisition of the shares in question in this case had been by arrangement with the company. He contended, however, first, that the words "providing capital" in the title to para. 7 meant providing capital for the company, and that the title defined the scope of the paragraph. He also contended that the words "in the ordinary course of its business as such", in para. 7 (1), read in conjunction with the definition H of a banking or finance company, showed that the shares or debentures must be acquired by the banking or finance company in the course of its business of lending money or of subscribing for shares. He submitted that the reference to an "interest" in the shares or debentures was as consistent with the construction for which he was arguing as that for which counsel for the company was arguing; and that the word "acquired" was used rather than "subscribed" I because a word was needed which would cover debentures as well as shares, and the acquisition of a partial interest as well as the whole beneficial interest in the shares or debentures in question.

I accept the submission of counsel for the Board of Trade as to the meaning of the words "providing capital" in the heading to para. 7. The words themselves are quite inapt to describe the payment of the purchase price of shares by a purchaser to his vendor, and, appearing as they do in a Companies Act, they seem to me to relate simply and solely to the provision of capital for the company.

A Counsel for the company suggested that, if "providing capital" meant providing capital for the company, the company in this case obtained additional capital through the capitalisation of its reserves. Even if, however, that operation could properly be described as a provision of capital, which I doubt, the provision was made by the company for itself, and not for it by the banking and finance companies, so that, even so, what was done here would not come B within the scope of the title. But, though a title to a section in an Act can give a clue to the meaning of an ambiguous passage in the section, it cannot control the meaning of the words used in the section if they are clear and unambiguous: see *Re Lord Penrhyn's Settlement Trusts, Penrhyn* v. *Robarts* (2). Then is para. 7, read apart from the title, clear and unambiguous? I do not think so. If one reads into it, as one must, the definition of a banking or finance company, it is, C to my mind, a question of doubt whether a purchase of shares by a finance company whose ordinary business includes purchasing shares as well as subscribing for them is or is not within it. Do the words "as such", in para. 7 (1), refer, in the case of a finance company, to the words "the business of lending money or of subscribing for shares" (3), or do they refer to the business of such a company as a whole, provided only that that includes the business of D lending money or of subscribing for shares? I think that one can fairly look at the title of the paragraph for assistance in resolving this doubt.

Two further considerations incline me to accept the contentions of the Board of Trade in preference to those of the company on this point. The first is that para. 7 creates an exception to a general rule and should, therefore, in cases of doubt, be construed against the party who relies on it. Secondly, I think E that the construction contended for by counsel for the company might in some cases make the paragraph very hard to work. A purchase of shares in a private company can hardly, in practice, be carried through without the consent of the company; but what degree of approval or co-operation on the part of the company will justify one in saying that the shares have been acquired by arrangement with the company? In cases of doubt the court can, I think, F fairly incline to put on this paragraph a meaning which makes it easily workable by the Registrar of Companies in preference to one which might give rise to many difficult border-line cases.

In view of the conclusion which I have reached on the first point, it is not strictly necessary for me to deal with the proviso to para. 7 (1), but, as this case will probably go further, I think that I ought to express a view on it. The G question turns on the meaning to be given to the words "any general meeting". Do they mean any and every general meeting or any one general meeting out of many possible general meetings? Section 132 (1) of the Companies Act, 1948, contains the words "the total voting rights of all the members having . . . a right to vote at general meetings of the company . . ." Both sides agree that this means at all general meetings of the company. In the proviso to para. 7 (1), H on the other hand (as in s. 195 (10) (b) (ii) of the Act), the reference is to the right to exercise some fraction of the voting power "at any general meeting". Counsel for the Board of Trade argues that Parliament would not have used different words to say the same thing, but I do not think that one can attribute much weight to this sort of argument when dealing with a document as long and complicated as the Companies Act, 1948. I prefer to ask myself what I answer the directors of these finance companies would give to the question "Have you, between you, the right to exercise one-fifth or more of the voting power at any general meeting of this company?" I think that they would answer: "No, not as things are. If the preference dividend falls into arrear, then we shall have that right, but at present we can only control one-fifth or more of the voting power at a general meeting called exclusively for the purpose of considering resolutions of the types mentioned in art. 72 (b) ". I do not think that they would treat the question as meaning: " May there be a general meeting of this company at which you will have the right to exercise one-fifth or more of the voting power? " I appreciate that to construe " any " as meaning " any and every " makes it very easy for a company which wishes to do so to evade the proviso by giving a finance company voting control on all issues which are likely to arise while withholding it on some matter of no moment. But, putting the matter at its highest against the company, the word " any " is ambiguous, and, since it occurs in a proviso to the exception, the benefit of any doubt as to its meaning should, I think, be given to the company rather than to the Board of Trade. If, therefore, I had thought that this case fell within the exception, I should not have held that it was taken out of it by the proviso. As it is, however, I shall declare that the company ceased to be an exempt private company as from July 22, 1955. A B C

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(2) [1923] 1 Ch. at p. 147, per P.O. LAWRENCE, J.
(3) In para. 9 of Sch. 7; see p. 212, letter E, ante.

Declaration accordingly.

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *Wake, Smith & Co.*, Sheffield (for the plaintiff company); *Solicitor, Board of Trade.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*] D

SPARROW *v.* FAIREY AVIATION CO., LTD.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), November 11, 1960.] E

Factory—Dangerous machinery—Duty to fence—Component on machine forming a fence preventing operator's body touching machinery—Hand tool coming into contact with machinery—Whether breach of duty to fence in that fencing not secure against hand tool—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 c. 67), *s.* 14 (1). F

The plaintiff, an experienced lathe operator employed by the defendants, was machining metal discs of some four inches diameter to form sealings for petrol filler caps. The jaws of a chuck were within the boss of a disc, viz., a hole that the plaintiff had bored in a disc, and were holding the disc rotating in the lathe while he finished the disc by removing burring with a hand tool. There was only one-sixteenth inch clearance between the front of the jaws and the disc from which he was removing the burring. The tool caught against the jaws and the plaintiff's hand was thrown against the machinery or the disc (but did not come into contact with the jaws) and was injured. In an action for damages for breach of statutory duty under s. 14 of the Factories Act, 1937, viz., failure to fence securely a dangerous part of machinery, G

Held: the obligation imposed by s. 14 (1)* of the Factories Act, 1937, was so to fence a dangerous part of machinery as to prevent the body of the operator coming into contact with it, and in the present case the jaws of the chuck (if they were a dangerous part of machinery) were sufficiently fenced by the component that was being worked to prevent contact with the plaintiff's body; accordingly the defendants were not in breach of s. 14, notwithstanding that the fencing, constituted as stated above, was not such as would prevent a tool coming into contact with the jaws of the chuck and that the injury to the plaintiff had been caused by the tool in his hand so doing. H I

Dictum of LORD MACMILLAN in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* ([1946] 2 All E.R. at p. 96) applied.

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* The relevant terms of s. 14 (1) of the Factories Act, 1937, are printed at p. 218, letter B, post.

[As to the statutory duty to fence machinery securely, see 17 Halsbury's Laws (3rd Edn.) 70-72, paras. 122, 123.

For the Factories Act, 1937, s. 14 (1), see 9 Halsbury's Statutes (2nd Edn.) 1009.]

Cases referred to:

Hoare v. *M. & W. Grazebrook, Ltd.*, [1957] 1 All E.R. 470; [1957] 1 W.L.R. 638; 3rd Digest Supp.

Lenthall v. *Gimson & Co. (Leicester), Ltd.*, (May 24, 1956), unreported.

Lewis v. *High Duty Alloys, Ltd.*, [1957] 1 All E.R. 740; [1957] 1 W.L.R. 632; 3rd Digest Supp.

Nicholls v. *Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 24 Digest (Repl.) 1091, *419*.

Action.

In this action the plaintiff, Leslie Frederick Sparrow, claimed damages for personal injuries which he sustained in an accident, on or about Sept. 27, 1956, at the factory premises of the defendants, his employers, Fairey Aviation Co., Ltd. The plaintiff was an experienced turret lathe operator. On the day of the accident he was machining a batch of sealings for petrol filler caps on a lathe. The sealings, which were made of soft metal, were delivered to the plaintiff in the form of discs each of the diameter of 4¾ inches. The plaintiff's job was to drill a 2½ inch diameter hole in the centre of each sealing and to flatten one face of the sealing and to flatten and enlarge the other face to form a rim round the central hole. The operation was done by first setting the component between three external jaws of the chuck of the machine, the jaws gripping the outside edge of the component; in this position one face of the component was machined and a hole was drilled in the centre of the component. When the whole batch was treated in this way, the external jaws were removed and another set of jaws was fitted to the chuck to grip the component from inside the central hole. The component, turned to face the other way, was fitted on the jaws and the other face was then machined and the edge of the component chamfered off. The last stage of the operation was to remove any burring from the edge of the central hole caused by the drilling. This could have been done after the component was removed from the machine, but for quickness it was customary to remove the burring while the machine was still rotating by applying a hand tool called a scraper, which consisted of a blade and a wooden handle, to the edge of the hole and moving the tool downwards to " blend off " the burring. At the time of the accident the plaintiff was removing burring with a scraper from the edge of a hole in a component which was being gripped by three internal jaws so that there was only one-sixteenth of an inch clearance between the front of the jaws and the front of the component. The point of the plaintiff's tool caught against the rotating jaws inside the hole and the tool was thrown out of control causing the plaintiff's hand to be thrown either against the component or the chuck and injured. The plaintiff's hand did not come into contact with the jaws themselves.

In his statement of claim the plaintiff alleged against the defendants breach of their common law duty as employers, and breach of their statutory duty under s. 14 of the Factories Act, 1937, to fence securely the machine. At the trial of the action counsel for the plaintiff abandoned all allegations of breach of common law duty and relied solely on breach of s. 14 of the Act of 1937.

P. R. Pain for the plaintiff.

Desmond Ackner for the defendants.

STREATFEILD, J., having stated the facts, found that the plaintiff was not guilty of contributory negligence in using a tool to remove the burring, for that was the recognised practice, nor was he guilty of contributory negligence in failing to reset the machine and clamp the jaws on the outside instead of the inside of the component. His Lordship continued: The case against the defendants is that they were guilty of a breach of their statutory duty under s. 14 of the Factories Act, 1937, and that is the only cause of action which I have to consider, although I am bound to say that from my point of view it might have been simpler to have come to a conclusion on the question of the safe system of work; but that is no longer relied on and I therefore cannot consider it. The question is: Was there a failure to fence a dangerous part of this machine and, if so, did that amount to a breach of s. 14 inasmuch as it was the cause of this accident? Now, s. 14, a well-known and somewhat over-worked section of the Factories Act, 1937, imposes the obligation on employers to fence

> " Every dangerous part of any machinery [and to fence it] securely . . . unless it is in such a position or of such construction as to be as safe to every person employed . . . on the premises as it would be if securely fenced."

First of all, I have to consider whether these jaws were a dangerous part of the machine. I am referring to the jaws which grip the component on its inside periphery. The jaws are sticking out from the surface of the chuck. So long as they do stick out they are undoubtedly a dangerous part of the machine in the ordinary sense, so that when the machine is set in motion—and I agree with counsel for the plaintiff one must consider the machine in motion rather than at rest—at five hundred revolutions, with parts sticking out of the surface on the chuck, that would be a serious danger. There would be an obligation to fence the jaws. But in one sense these jaws were fenced. They were fenced by the component itself because when the component was put on to the jaws which gripped it on the inside hole, the projecting parts of the jaws were completely buried. The jaws were fenced and were securely fenced so long as somebody did not put his finger in the hole. If somebody had injured himself by putting his finger into the hole, then it could not have been argued that that was secure fencing. That is why I am careful to say that in one sense the dangerous part was fenced by the component itself—short of someone putting his finger into the hole and getting it injured against the dangerous part, the component would, I think, amount to a fencing. I have to consider, however, what is the object of s. 14. I do not think that I have to enter into what would be a rather invidious task of choosing between the judgment of Lynskey, J., in *Hoare* v. *M. & W. Grazebrook, Ltd.* (1), in which he followed the judgment of Finnemore, J. (2), and the judgment of Ashworth, J., in *Lewis* v. *High Duty Alloys, Ltd.* (3). Those two learned judges came to opposite conclusions (4). The basis really was this—in each case there was part of the machine which, by itself, was not dangerous at all unless it was taken in juxtaposition with the component; but when a component was being worked in the machine and the part of the machine came near to the fixed component, then according to Lynskey, J., the part became dangerous, or according to Ashworth, J., the part, not being dangerous itself, did not become dangerous by coming near to the component. This case is quite different from either of those cases because in this case the component was rotating together with the dangerous part itself or the alleged dangerous part itself. It is not a question of possibly being dangerous at one moment and not dangerous the next. It was either dangerous all the time or not at all.

I have to consider what is the object of s. 14, and the answer to that question must be found in the decision of the House of Lords particularly in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (5). Lord Macmillan in the course of his speech (6) refers to s. 14:

> " The question of importance in the case is whether the statutory duty imposed by s. 14 of the Act of 1937 to fence securely every dangerous part

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(1) [1957] 1 All E.R. 470.

(2) In *Lenthall* v. *Gimson & Co.* (*Leicester*), *Ltd.*, (May 24, 1956), unreported.

(3) [1957] 1 All E.R. 740.

(4) The decision in *Hoare* v. *M. & W. Grazebrook, Ltd.* ([1957] 1 All E.R. 470) was preferred by Winn, J., in *Eaves* v. *Morris Motors, Ltd.* ([1960] 3 All E.R. at p. 659).

(5) [1946] 2 All E.R. 92; [1946] A.C. 493.

(6) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.

A of any machinery is fulfilled when the dangerous part is so fenced as to prevent the operator from coming into contact with it . . . But the fencing did not prevent a fragment of wood flying off while the saw was working. Was it the statutory duty of the respondents so to fence the saw as to prevent this possibility? In my opinion, the statute imposes no such duty. The obligation under s. 14 to fence the dangerous part of a machine, as I B read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it, and this obligation was in the present instance amply fulfilled."

LORD SIMONDS referred to the duty in this way (7): " The fence is intended to keep the worker out, not to keep the machine or its product in ". It is quite true that the House of Lords was dealing with the situation either of the component C being thrown out or part of the machine being thrown out from the machine and hitting the operator, but I cannot ignore the opinion of LORD MACMILLAN when he puts it that the obligation under s. 14 is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it.

Now, that being the case, if this was a dangerous part, was it so fenced as to D prevent the body of the operator coming into contact with it? In a sense, it was fenced by the component itself, that being the fence which in fact did prevent the body of the operator coming into contact with the dangerous part. The fence would appear to have fulfilled s. 14 of the Factories Act, 1937. What happened here may be a very fine distinction, but here a part, which was a dangerous part and which was fenced in such a way as to prevent the body of the operator or some E part of his body coming into contact with it, in fact was not so fenced as to prevent a tool coming into contact with it. I am afraid that, with some reluctance, I must give effect to the submission of counsel for the defendants that that is the answer to it on the facts. If the injury was caused by the tool rather than some part of the plaintiff's body coming into contact with the dangerous part that is not enough. In those circumstances, as I have said with some reluctance, F I feel bound to hold that the dangerous part was fenced sufficiently within the meaning of s. 14 of the Factories Act, 1937. It was a very cruel misfortune to the plaintiff that he was injured, not by physical contact with the dangerous part, but because a tool that he had in his hand came into contact with it, yet that must be the end of this case.

I have already indicated that the case, I think, might have been simpler from G my point of view had I to consider whether it was a dangerous system of work to allow a person on piecework, working rapidly, to use a tool in accordance with the practice in this factory and to use it in circumstances when an error of only one-sixteenth of an inch might bring disaster on him. It might have been easier, but unfortunately that issue is not before me and from the way the case has been presented I am bound to hold that there was no breach of s. 14 of the Factories Act, 1937. Therefore the defendants must succeed.

Judgment for the defendants.

Solicitors: *W. H. Thompson* (for the plaintiff); *Hextall, Erskine & Co.* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(7) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.

HENRY BRIGGS, SON & CO., LTD. (in voluntary liquidation) A
v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Reid, Lord Tucker, Lord Morris of Borth-y-Gest and Lord Hodson), November 14, 15, December 21, 1960.]

Profits Tax—Computation of profits—Franked investment income—Dividends B *from subsidiary company—" Functions " of company alleged to consist wholly of holding property—Colliery company's undertaking nationalised—Subsequent activities devoted to obtaining compensation pending liquidation —Whether company carrying on a trade or business—Finance Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 54), *s.* 19 (4).

The taxpayers, a parent company, held all the shares of a subsidiary C company, which carried on the trade or business of coal mining until Jan. 1, 1947, when it was nationalised under the Coal Industry Nationalisation Act, 1946. Thereupon the subsidiary became entitled to receive the statutory compensation, and no effort was thereafter made by the subsidiary to embark on any other trade, but the whole energies of its directors were devoted towards the ascertainment and obtaining of the compensation to D which it was entitled. It was the intention of the directors that the subsidiary should go into liquidation so soon as the compensation was received. In the meantime the subsidiary received interim income payments, and dividends were paid to the taxpayers. The taxpayers claimed that the dividends so received were franked investment income* and, therefore, exempt from the profits tax. It was accepted that the dividends would be E franked investment income if the subsidiary was a company whose functions " consist wholly or mainly in the holding of investments or other property " within the meaning of those words in the Finance Act, 1937, s. 19 (4)†.

Held: the functions of the subsidiary did not consist wholly or mainly in the holding of investments or other property within s. 19 (4), because its activities were directed merely to collecting its compensation, but neither F to the conduct of, nor to the holding of property for the purposes of, any trade or business involving the profitable use of property; therefore the dividends were not franked investment income and were not exempt from the profits tax.

Decision of the COURT OF APPEAL ([1960] 1 All E.R. 800) affirmed.

[As to the trades or businesses chargeable to the profits tax, see 20 HALSBURY'S G LAWS (3rd Edn.) 613, para. 1198; and as to investment income liable to the profits tax, see ibid., 620-622, paras. 1211, 1213; and for cases on the subject, see 28 DIGEST (Repl.) 374-380, *1635-1660*.

For the Finance Act, 1937, s. 19, see 12 HALSBURY'S STATUTES (2nd Edn.) 374.]

Cases referred to: H

Carpet Agencies, Ltd. v. *Inland Revenue Comrs.*, (1958), 38 Tax Cas. 223; 3rd Digest Supp.

Inland Revenue Comrs. v. *Butterley Co., Ltd.*, [1956] 2 All E.R. 197; [1957] A.C. 32; [1956] 2 W.L.R. 1101; 36 Tax Cas. 411; 28 Digest (Repl.) 377, *1645*.

Inland Revenue Comrs. v. *Buxton Palace Hotel*, (1948), 29 Tax Cas. 329; 28 I Digest (Repl.) 375, *1638*.

Inland Revenue Comrs. v. *Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58; 174 L.T. 162; 29 Tax Cas. 155; 28 Digest (Repl.) 431, *1893*.

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* " Franked investment income " is defined by the Finance Act, 1937, Sch. 4, para. 7 (1A), as substituted by the Finance Act, 1947, s. 32 (1); see 12 HALSBURY'S STATUTES (2nd Edn.) 384. The exemption for franked investment income is a consequence of para. 7 (1) of Sch. 4 to the Act of 1937.

† The terms of s. 19 (4) of the Finance Act, 1937, are printed at p. 222, letter C, post.

A **Appeal.**

Appeal by the taxpayers, Henry Briggs, Son & Co., Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., PEARCE and HARMAN, L.JJ.), dated Mar. 11, 1960, and reported [1960] 1 All E.R. 800, affirming an order of UPJOHN, J., dated Apr. 28, 1959, dismissing the appellants' appeal by way of Case Stated from a decision of the Special Commissioners of Income Tax. The taxpayers B appealed to the Special Commissioners of Income Tax against assessments made on them to the profits tax for chargeable accounting periods commencing Jan. 2, 1947, and ending on July 18, 1951, when they went into voluntary liquidation. The facts are set out in the opinion of LORD REID.

Sir John Senter, Q.C., D. C. Miller and *N. P. M. Elles* for the appellants.

J. G. Foster, Q.C., and *A. S. Orr* for the Crown.

C Their Lordships took time for consideration.

Dec. 21. The following opinions were read.

LORD REID: My Lords, the question in this case is whether certain dividends paid to the appellants by Briggs Collieries, Ltd. (which I shall call "Briggs") during the chargeable accounting periods commencing on Jan. 2, D 1947, and ending on July 18, 1951, ought to have been included in the computation of the appellants' profits for the purposes of the profits tax.

Briggs was a wholly owned subsidiary of the appellants formed in 1939 to acquire certain collieries, including those previously owned by the appellants. It continued to work these collieries until Jan. 1, 1947, the vesting date under the Coal Industry Nationalisation Act, 1946. Thereupon it became entitled E to receive the statutory compensation payable on nationalisation. Briggs never carried on any business other than its colliery business, either before or after the vesting date. It was generally realised, as VISCOUNT SIMONDS explained in *Inland Revenue Comrs.* v. *Butterley Co., Ltd.* (1), that a long period would elapse before the statutory rights to compensation were finally settled. After the vesting date, it was necessary to prepare and submit a large body F of information with a view to the determination of the amount of compensation and it appears from the Case Stated that

> "the directors found that the preparation and prosecution of the claims for compensation under the Coal Acts were of such complexity and demanded so much time, that they felt they should devote all the time and energy of the small number of personnel remaining in the service of the company G towards these objects."

The directors, or most of them, were directors both of the appellants and Briggs, and it does not appear very clearly from the Case Stated whether this work was done by Briggs or by the appellants, but for the purposes of this case I shall assume that it can be regarded as having been done by Briggs, which H was responsible for the proper presentation of the necessary material. The Case Stated sets out:

> "It was always the intention that so soon as Briggs had recovered the compensation to which it was entitled under the Coal Acts it should go into liquidation . . ."

In fact, Briggs was put into liquidation on Oct. 17, 1952, although the last I payments of compensation were not made until 1955.

The appellants' contention is that the dividends which they received from Briggs were franked investment income, and ought for that reason to have been excluded from the computation of their profits. The parties are agreed that the decision of the case depends on whether s. 19 (4) of the Finance Act, 1937, applied to Briggs. If it did, the dividends in question were admittedly franked investment income and ought, therefore, not to have been included in the computation of the appellants' profits. But the Crown's contention is A that s. 19 (4) did not apply to Briggs. The relevant parts of s. 19 are as follows (2):

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(1) [1956] 2 All E.R. at p. 199; 36 Tax Cas. at p. 442.

> " 19. *Charge of national defence contribution.*—(1) There shall be charged, on the profits arising in each chargeable accounting period falling within the years of charge to the national defence contribution from any trade or business to which this section applies, a tax (to be called the 'national B defence contribution') of an amount equal to twenty-five per cent. of those profits.
>
> " (2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom. C
>
> " (4) Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company or society."

D If the provisions of s. 19 (4) could be considered in isolation, I would be in some doubt, and I might think that they applied to Briggs. The right to statutory compensation is admittedly property, and that right was held by Briggs in the sense that Briggs owned it; and, if the word " function " has its ordinary rather wide and vague meaning, I would think that it was a function of Briggs to own and, perhaps, to " hold " that property until the compensation E was received in cash. Indeed, it had no other function after the vesting date, and I would find it difficult to suppose that a company in being has no function at all. But if the words " holding " and " functions " were given such wide meanings in this context, the result would be that, whenever any company ceases to carry on its ordinary business but does not immediately start a new business or go into liquidation, s. 19 (4) would apply to it (except F in the unlikely case of such a company having no assets). Its function would be to hold such assets as it possesses and it would have no other function. But it was pointed out that such a result cannot be reconciled with other provisions in the Act. I need not enter into a lengthy explanation of why that is so because counsel for the appellants admitted that he could not defend that result; if that were correct, *Carpet Agencies, Ltd.* v. *Inland Revenue Comrs.* (3) must G have been wrongly decided and he accepted that case as having been rightly decided. In so doing, I think that he was right.

It is necessary, therefore, to see whether more limited meanings can reasonably be given to those words in this context so as to make this subsection accord with the rest of the Act and with its apparent purpose. The Act of 1937 imposed a new tax which was then called " National Defence Contribution "; its name H was later changed to " Profits Tax " and a number of changes were made in its incidence, but s. 19 is still in its original form and it seems to me unnecessary to consider in this case any of the subsequent changes. The tax was not a tax on income. It was a tax on the profits of all trades or businesses, whether carried on by companies or by individuals. But careful provision was made to exclude income of individuals derived from property or investments. It was I common long before 1937 to find companies whose sole or main purpose was to make money by investing their capital in property or investments with a view to receiving income and capital appreciation. Although such companies carried on business in the ordinary sense, they might not have been held to be carrying on a business within the meaning of s. 19 (2), and sub-s. (4) may have been necessary to bring them into the charging section. That was the view of

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(2) As amended by the Finance Act, 1942, s. 36 and Sch. 9, and by the Finance (No. 2) Act, 1947, s. 7.

(3) 38 Tax Cas. 223.

LORD GREENE, M.R., in *Inland Revenue Comrs.* v. *Desoutter Bros., Ltd.* (4). But whether that is so or not, as the Act only set out to tax profits from trades or businesses, one might expect that any extension of its scope by a deeming provision would only extend to companies conducting something analogous to a trade or business with the object of making profits. Section 19 (4) is a charging provision and, therefore, if it is reasonably capable of being read in that narrower sense, this affords an additional argument for so reading it.

The Court of Appeal and UPJOHN, J., reached that result by giving to the word " functions " a meaning which is, to my mind, narrower than its ordinary meaning. I do not at all dissent from their view, but I would prefer to lay more stress on the word " holding ". It appears to me that, in this context, the phrase " the holding of investments or other property " does not mean simply the owning of investments or other property. The word " holding " often involves the idea of retention permanently or for an indefinite time, and I think that that is involved in the use of that word in the context. I have said that the apparent purpose of sub-s. (4) is to bring within the scope of the charge companies conducting something at least analogous to a trade or business. From that point of view, there appears to me to be an essential distinction between companies whose function or purpose or objective is to make profit by continuing to hold their assets in the form of investments or property and companies which are not trying to make profitable use of their assets but whose whole activities are directed to realising their assets as soon as possible. In the former case, the company's activities are of a business character. They will almost always involve some degree of active management. Circumstances may for a time require the company to remain quiescent, but it still has the purpose of deriving profit from continuing to hold its assets in the form of investments or property. But, in the latter case, the function or purpose or objective of the company is not to continue to hold investments or property but to cease holding its assets in that form as soon as they can be turned into money. Briggs had to assemble a great deal of information after the vesting date and it had to wait a long time before it received the money due to it, but its whole activities were directed to the realisation of its property rights. So I would hold that, if it had any functions after the vesting date, those functions consisted in collecting the money due to it and not in the holding of property.

In the end, the problem is not to determine the meaning of any particular word but to determine the meaning and scope of the subsection read as a whole, and it does not matter whether one begins by considering the word " functions " or by considering the word " holding ". Whatever be the starting point, I agree that the subsection is not wide enough in its scope to apply to Briggs after the vesting date.

In my judgment, therefore, this appeal should be dismissed with costs.

LORD TUCKER: My Lords, the position of the subsidiary company which has been referred to throughout as " Briggs ", on Jan. 1, 1947, when the Coal Industry Nationalisation Act, 1946, came into force, is thus described in the Case Stated:

> " With the vesting of its assets in the National Coal Board on Jan. 1, 1947, the colliery trade of Briggs ceased, and the cessation provisions of the Income Tax Acts at that date contained in s. 31, Finance Act, 1926, were applied. The board was reduced to four persons. Three of the directors who resigned from the board did so to take up posts with the National Coal Board, and a member who left the board in 1947 also took up employment with the National Coal Board. All executive and managerial staff below board level were transferred to employment under the National Coal Board on or shortly after Jan. 1, 1947. *No effort was made by Briggs to embark upon any other*

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(4) [1946] 1 All E.R. at p. 59; 29 Tax Cas. at p. 160.

> *trade, but the whole energies of its directors were devoted towards the ascertainment and obtaining of the compensation to which it was entitled under the Coal Acts. This process was long and arduous, involving the furnishing of many particulars and the making of extensive valuations* . . . It was always the intention that so soon as Briggs had recovered the compensation to which it was entitled under the Coal Acts it should go into liquidation, and it was in fact put into liquidation on Oct. 17, 1954."

The last-mentioned date should have been 1952.

The short, but difficult, question, involved in this appeal, is whether the words which I have italicised in the quotation above describing the operations of Briggs from Jan. 1, 1947, to Oct. 17, 1952, should, in the light of the company's intention throughout to go into liquidation on obtaining the compensation to which it was entitled, be held sufficient to constitute Briggs a company the functions of which consisted " wholly or mainly in the holding of investments or other property " within the meaning of s. 19 (4) of the Finance Act, 1937. It has been held in *Inland Revenue Comrs.* v. *Buxton Palace Hotel* (5) and *Carpet Agencies, Ltd.* v. *Inland Revenue Comrs.* (6) that the word " functions " involves some activity beyond the mere holding of investments and that the activities must be appropriate to some business such, for instance, as the making of money by holding investments. As I understood counsel for the appellants, he did not ask your Lordships to overrule these decisions but submitted that the findings quoted above were sufficient to satisfy the required test.

My Lords, I confess that I think that there is much substance in his contention, but, as your Lordships and the courts below are unanimous in taking the contrary view, I am not prepared to dissent and, in agreeing to the dismissal of this appeal, would do so on the ground adopted by UPJOHN, J., in the concluding paragraph of his judgment where, after saying Briggs might have decided to engage in some other trading activity or become an investment trust company he says:

> " If it does neither, but resolves to wind up, it does not seem to me to gain any new character in the sense of carrying on an activity of holding property as being appropriate to its business. It really has no business. It seems to me it is carrying out a residual function as a colliery company. It can no longer trade as such: it can only receive its compensation and die."

LORD MORRIS OF BORTH-Y-GEST: My Lords, it is not in dispute that the dividends paid by Briggs Collieries, Ltd. to the appellants would constitute franked investment income if Briggs Collieries, Ltd., in respect of the periods after Dec. 31, 1946, fell within the scope of sub-s. (4) of s. 19 of the Finance Act, 1937. Did its functions consist wholly or mainly in the holding of investments or other property? If they did, then the holding of the investments or property would be deemed to be a business carried on by the company.

On Jan. 1, 1947, the colliery assets owned by Briggs Collieries, Ltd. were transferred to the National Coal Board. There accrued to the company a right to receive compensation in respect of such assets. It was inevitable, however, that time would elapse before the full or final amounts of the compensation could be paid. The colliery trade of the company ceased, but the company made no effort to embark on any other trade. Throughout the period subsequent to Dec. 31, 1946, it was the intention of the directors of the company that it should go into liquidation so soon as it recovered the compensation to which it was entitled. In fact, the company went into liquidation before the final payments of compensation were received. The process of ascertaining and obtaining its entitlement of compensation was long and arduous, and all the energies of the directors were devoted to this process.

In that state of affairs, it being recognised that the company's rights to receive compensation constituted " property ", did its " functions ", in the respective chargeable accounting periods, consist in the "holding" of property? In considering the meaning of sub-s. (4), it seems to me that attention should not be separately focused on any of the individual words contained in it but that the intendment of the subsection should be ascertained by reading it as a whole. The subsection would, doubtless, cover a trust investment company (compare the observations of LORD GREENE, M.R. (in reference to another statutory provision in identical terms), in *Inland Revenue Comrs.* v. *Desoutter Bros., Ltd.* (7)). The question arises whether the words of the subsection are apt to cover Briggs Collieries, Ltd. even though it had not the features of what would ordinarily be called a trust investment company. Inasmuch as the directors of Briggs Collieries, Ltd. had to be active and energetic in order to formulate and present their claims for compensation, it can be said that they had functions to perform. It can also be said that they had the purpose of claiming and recovering the compensation which was payable. It can further be said that, until the time arrived when compensation payments were complete, the company intended to retain its property rights and to retain them in successive chargeable accounting periods. While recognising these circumstances, the question to be decided is whether the functions of the company consisted wholly or mainly in the holding of property. The wish of the directors was that the company should come to an end as soon as possible. The company had come into existence in order to carry on the trade or business of colliery proprietors. When that trade or business could no longer be conducted, there was no plan or purpose of carrying on any other or different trade or business; all that remained was to receive compensation. The position was, if I may say so, well expressed by the learned judge (UPJOHN, J.) when he said that the company was carrying out a residual function as a colliery company and that, being unable any longer to trade as such, it could only "receive its compensation and die."

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(5) 29 Tax Cas. 329.

(6) 38 Tax Cas. 223.

It is to be observed that the subsection does not provide that the mere ownership by a company of investments or other property brings about the result that such ownership is to be deemed to be a business carried on by the company. There is only such a deeming if the "functions" of the company consist wholly or mainly in the "holding" of investments or other property. The conjunction of the words "functions" and "holding" suggest, to my mind, something more than a mere ownership of some property and certainly something more than an enforced or involuntary ownership of rights to receive compensation money which ownership it is hoped will be terminated at the earliest possible moment by the receipt of the money. The company did not set out to acquire or to own investments or property, and just as there was nothing intentional or purposeful in its acquisition of its rights to compensation, so there was no intention or wish to continue to own such rights but, on the contrary, there was an eager wish for an early settlement followed by a dissolution. In these circumstances, I cannot think that the company was one of which it could aptly be said that its functions consisted wholly or mainly in the holding of investments or other property.

I would dismiss the appeal.

LORD HODSON: My Lords, I am in entire agreement with the reasons given by my noble and learned friend, LORD REID, for the dismissal of this appeal, and I concur in the result. *Appeal dismissed.*

Solicitors: *Thicknesse & Hull* (for the appellants); *Solicitor of Inland Revenue* (for the Crown). [*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(7) [1946] 1 All E.R. at p. 59; 29 Tax Cas. at p. 160.

HOLLAND v. HOLLAND.

[Court of Appeal (Willmer and Upjohn, L.JJ.), December 5, 6, 1960.]

Divorce—Estoppel—Desertion—Constructive desertion—Previous cruelty charge against husband dismissed—Cross-prayer by husband, in previous suit for restitution of conjugal rights—Answer by wife alleging "just cause" and repeating particulars of alleged cruelty—Cross-prayer dismissed on ground of insincerity—Allegation of "just cause" not expressly rejected—Subsequent suit by husband charging desertion against wife—Cross-prayer by wife charging constructive desertion against husband—Same allegations as in previous suit raised by wife as particulars of "just cause" and constructive desertion.

The parties were married in 1941. In October, 1955, the wife left the husband and in November, 1955, she filed a petition for divorce on the ground of the husband's cruelty. The husband, by his answer, denied the charge of cruelty and cross-prayed for a decree of restitution of conjugal rights. The wife, in her reply, alleged that she had just cause for leaving the husband and repeated, by way of particulars, exactly the same allegations as had been put forward as particulars of cruelty in the petition. At the trial in 1957, the allegation of cruelty and the allegation of just cause were apparently treated as standing or falling together, and the only matters argued were (a) in regard to the allegation of cruelty, and (b) the question of the husband's sincerity in asking for restitution of conjugal rights. In his judgment, dated Mar. 4, 1957, the commissioner rejected the wife's allegation of cruelty and dismissed her petition. He did not deal expressly with her allegation of just cause in reply to the husband's cross-prayer but rejected the cross-prayer on the ground of insincerity. Later in 1957 the wife applied to the High Court for an order for maintenance under s. 23 of the Matrimonial Causes Act, 1950, and, in her affidavit, as her justification for living apart from the husband, she repeated the allegations which she had made against him in her petition for divorce. In a judgment given in May, 1958, on preliminary issues in the maintenance proceedings (the issues having been formulated with the agreement of counsel for the parties and by direction of the judge), it was held that the wife was precluded by the judgment of the commissioner in her previous divorce proceedings from alleging just cause for remaining apart from the husband; and her originating summons was dismissed by consent. In May, 1960, the husband filed a petition for divorce on the ground of the wife's desertion. By her answer the wife alleged just cause for leaving the husband and cross-prayed for a decree in her favour on the ground of constructive desertion by the husband. By way of particulars of just cause and of constructive desertion, she repeated the same allegations as she had put forward in the previous divorce proceedings as particulars of cruelty. On appeal from the dismissal of an application by the husband to strike out the paragraphs of the answer containing those allegations on the ground that they were res judicata,

Held: it was necessarily implicit in the judgment of the commissioner in the previous divorce proceedings that he found as a fact that the wife had left the husband without reasonable cause, and, though the court was not necessarily bound to apply estoppel in matrimonial proceedings, it was not in the public interest in the present case that the wife should be allowed to raise the same allegations again (see p. 232, letters H and I, post); therefore the allegations made by the wife in her particulars should be struck out.

Thompson v. *Thompson* ([1957] 1 All E.R. 161) and *Fisher* v. *Fisher* ([1959] 3 All E.R. 131) considered.

Per Willmer, L.J. (Upjohn, L.J., dubitante): although the proceedings in 1957 were maintenance, not divorce, proceedings, the wife was also estopped from raising these allegations again by the judgment of May, 1958, in those proceedings, as the particular question whether in the previous divorce proceedings there had been a finding of absence of just cause against the wife had been decided on the preliminary issue (see p. 234, letter E, post).

Appeals allowed.

[As to estoppel in divorce proceedings by reason of previous judicial determinations, see 12 HALSBURY'S LAWS (3rd Edn.) 277, para. 533, and 294, para. 581, and 15 ibid., 183, para. 356; and for cases on the subject, see 27 DIGEST (Repl.) 375, 376, *3089-3098*.]

Cases referred to:

Dixon v. *Dixon*, [1953] 1 All E.R. 910; [1953] P. 103; [1953] 2 W.L.R. 748; 3rd Digest Supp.

Fisher v. *Fisher*, [1959] 3 All E.R. 131; [1960] P. 36; [1959] 3 W.L.R. 471; 3rd Digest Supp.

Hill v. *Hill*, [1954] 1 All E.R. 491; [1954] P. 291; 118 J.P. 163; [1954] 2 W.L.R. 473; 3rd Digest Supp.

Thompson v. *Thompson*, [1957] 1 All E.R. 161; [1957] P. 19; [1957] 2 W.L.R. 138; 3rd Digest Supp.

Interlocutory Appeals.

The husband, who had presented a petition for a decree of divorce on the ground of the wife's desertion, appealed from (i) an order made by MARSHALL, J., on Nov. 3, 1960, granting leave to the wife to amend her answer; and (ii) an order made by MARSHALL, J., on Nov. 11, 1960, dismissing a summons by the husband to strike out certain paragraphs of the wife's answer. It was agreed by the parties that the first appeal should be allowed if the second appeal was allowed. The facts appear in the judgment of WILLMER, L.J.

R. F. G. Ormrod, Q.C., and *M. H. Jackson-Lipkin* for the husband.

N. N. McKinnon, Q.C., and *T. K. Homer* for the wife.

WILLMER, L.J.: In this case, we have before us two appeals from orders of MARSHALL, J., the orders being dated respectively Nov. 11 and Nov. 3, 1960. The order of Nov. 11, which was the principal order, was an order dismissing a summons to strike out a number of paragraphs in a wife's answer to a husband's petition for divorce. The summons to strike out those paragraphs was brought on the ground that the wife, so it was said, was estopped from raising the matters contained therein by reason of those matters having been determined in previous proceedings. As I understand the argument of counsel for the husband, he concedes that, if his appeal against that order fails, he must also fail on his appeal in relation to the order of Nov. 3, which was an order merely granting leave to amend the wife's answer.

The matter has a somewhat lengthy history. The husband was married to the wife on Dec. 27, 1941. There are two children of the marriage, but no question arises at the present stage in relation to the children. The marriage turned out to be an unhappy one, and on Oct. 5, 1955, the wife left the husband. Since that date they have not lived together. On Nov. 28, 1955, the wife filed a petition for dissolution of the marriage based on allegations of cruelty. In those proceedings the husband, by his answer, denied the charge of cruelty, and in his turn cross-prayed for a decree of restitution of conjugal rights. The wife, by her reply to that plea, alleged that she had just cause for leaving the husband, and by way of particulars of just cause she repeated in her reply the same allegations as had been put forward as particulars of cruelty in her petition. Those proceedings came to trial before Mr. Commissioner BUSH JAMES, Q.C., in 1957, and by his judgment delivered on Mar. 4, 1957, he rejected the wife's allegations of cruelty and dismissed her petition. He also rejected the husband's cross-prayer for restitution. Although the trial was a somewhat lengthy one, the learned commissioner's judgment was relatively brief and did not go into any detail with regard to the specific allegations which had been made by the wife. It is fair to say that the exact grounds for the learned commissioner's decision may well be regarded as somewhat obscure. He did find that the wife's health had been affected, which is, of course, a matter highly relevant to a charge of cruelty; but he was not satisfied that any impairment to the wife's health was due to the husband's conduct. He could, of course, have rejected the wife's allegations of cruelty on the ground that he did not accept her evidence as to the incidents alleged to have occurred; or he could have come to the same conclusion if he accepted her evidence that the incidents occurred but decided that in the circumstances they did not justify a charge of cruelty. It certainly is not clear by what process he arrived at his conclusion. He did not state in terms whether he accepted or rejected the wife's story. A B

So far as the cross-prayer was concerned, the learned commissioner, at the inception of his judgment, laid stress on the importance of sincerity on the part of the husband. He said in the second sentence of his judgment: C

> "The husband has to convince me that his application for an order for restitution of conjugal rights is a genuine one . . ."

At the end of his judgment, when he came to state his conclusion on the husband's cross-prayer, he said only this: D

> "... I am not satisfied by the husband's attempt to get an order for restitution of conjugal rights. It is an order which the court is always most reluctant to make and it is disobeyed in ninety-nine out of a hundred cases, but that is neither here nor there. If I thought I ought to make it, I should make it, but I do not think I ought."

E

That was all that he said about the cross-prayer for restitution, and he did not, in terms, deal with the allegation of just cause which had been put forward by way of reply on the part of the wife.

The argument before us in support of this appeal has been that, as a matter of necessary inference, the learned commissioner must have found that there was no just cause for the wife leaving; for, unless he took that view, the question of the husband's sincerity could not arise and would not be a relevant matter to consider. If it be right that he must be taken to have found that there was no just cause for the wife leaving the husband, it would follow that the act of the wife in leaving the husband would be an act of desertion. That was how the matter was left at the end of those proceedings. F

Later in the same year, on July 10, 1957, the wife took out an originating summons for maintenance in pursuance of s. 23 of the Matrimonial Causes Act, 1950. In those proceedings she filed an affidavit, in the course of which she sought to account for the fact that she was living separate and apart from her husband. Her justification, as put forward in that affidavit, was to repeat practically, if not exactly, word for word the allegations which she had made in support of her petition for cruelty in the earlier case. The issue raised by the originating summons came on for trial before SACHS, J., in May, 1958. It became apparent as soon as the case came on for trial that it was important to determine the question whether the wife had just cause for leaving the husband, and, in relation to that question, whether the wife was estopped by reason of the judgment of the learned commissioner in the earlier case from alleging that she had just cause. In those circumstances, with the agreement of counsel and by direction of the judge, three issues were formulated for determination as preliminary questions. The third issue formulated does not, I think, matter for the purposes of the proceedings before us today, but the first two are important and I will read them. The first is whether the wife G H I

> "is precluded from relying at the trial hereof on the allegations set out in para. 8 to para. 23 inclusive of her petition filed in this Honourable Court on Nov. 28, 1955, and in the further and better particulars thereof filed in this Honourable Court on Mar. 27, 1956, as just cause for leaving and/or

> remaining apart from the [husband] by reason of the rejection of the said charges and dismissal of the said petition by Mr. Commissioner BUSH JAMES, Q.C., on Mar. 4, 1957."

The second is whether

> " in rejecting the [husband's] prayer for a decree for restitution of conjugal rights the learned commissioner found that the [wife] had failed to establish the allegation in her reply dated Sept. 10, 1956, that she had just cause for remaining apart from the [husband] . . ."

Those questions were tried as a preliminary cause, and the learned judge came to a conclusion which was embodied in his order. I think that it would be best to read the exact terms of the order in so far as it relates to those two questions:

> " (1) that the [wife] is precluded from relying at the trial hereof on the allegations set out in para. 8 to para. 23 inclusive of her petition filed in this Honourable Court on Nov. 28, 1955, and in the further and better particulars thereof filed in this Honourable Court on Mar. 27, 1956, as just cause for leaving and/or remaining apart from the [husband] by reason of the rejection of the said charges and dismissal of the said petition by Mr. Commissioner BUSH JAMES, Q.C., on Mar. 4, 1957.
>
> " (2) that in rejecting the [husband's] prayer for a decree for restitution of conjugal rights the learned commissioner found that the [wife] had failed to establish the allegation in her reply dated Sept. 10, 1956, that she had just cause for remaining apart from the [husband], and that the [wife] is precluded at trial from raising any contention to the contrary."

In consequence of that, the wife being precluded in those proceedings from alleging just cause, it followed that she had to be regarded as being in desertion, and, therefore, as having no right to receive maintenance from her husband. As a result, the originating summons which she had brought was dismissed by consent, but on terms that the husband provided maintenance for the children. Nothing, I think, turns on the fact that the husband agreed to provide maintenance for the children. There was no appeal from that decision of SACHS, J., which is a matter very much relied on by counsel for the husband in support of this appeal.

Matters rested for another two years, and then on May 31, 1960, more than three years by that time having elapsed since the wife left the husband, the husband filed the present petition praying for divorce on the ground of the wife's desertion. The wife, by her answer, has alleged that she had just cause for leaving the husband, and she has also sought by way of cross-prayer a decree in her favour on the ground of constructive desertion. By way of particulars, alike of just cause and of constructive desertion, she has again in these proceedings put forward precisely the same allegations as she had put forward in the particulars of cruelty in her original suit.

To complete the history of the matter, the next event to record is the order of Nov. 3, 1960, whereby the wife obtained leave to amend her answer by adding an additional paragraph alleging in the alternative that desertion by her husband began from the date of the hearing before Mr. Commissioner BUSH JAMES, Q.C. That is based on an allegation that the husband, in the course of giving his evidence on that occasion, said that he was only prepared to receive the wife back on certain conditions. As has been pointed out to us by counsel for the husband, if the wife was at that time already in desertion this amendment will not help her. I do not propose to elaborate that point because the contrary has not been argued by counsel for the wife. It follows that the important question is that which arises on the summons to strike out the wife's allegations on the ground of estoppel per rem judicatam. If the wife is estopped from putting forward in these proceedings the same allegations as were put forward in the previous proceedings, then it will not be open to her to say that she had just A cause for remaining away from her husband, still less would it be possible for her to make a case of constructive desertion against him. Therefore, the determination of this preliminary question, whether the wife is to be allowed to make these averments, must necessarily have a decisive effect on the course of this case. MARSHALL, J., decided, in favour of the wife, that there was no estoppel in this case. He arrived at that conclusion, putting it shortly, because B he did not feel that he could say that, as a matter of necessary implication, the learned commissioner, in the original proceedings, had found against the wife's allegation of just cause.

The question of estoppel per rem judicatam, particularly in relation to matrimonial proceedings, is not an altogether easy subject, but we have had the benefit and guidance of two decisions of this court in *Thompson* v. *Thompson* (1) C and *Fisher* v. *Fisher* (2). *Thompson* v. *Thompson* (1) was a case in which there had been, in the first instance, proceedings brought by the wife for maintenance under s. 23 of the Matrimonial Causes Act, 1950, and in the course of those proceedings she had alleged that her husband had treated her with cruelty, thereby causing her to leave home. That question came before Mr. Commissioner GRAZEBROOK, Q.C., who rejected the allegations of cruelty, and found that the D wife had no just cause for absenting herself, and consequently he dismissed her summons for maintenance. Later, the husband presented a petition for divorce founded on allegations of cruelty against the wife, and he included in those charges of cruelty a specific charge that she falsely and maliciously gave evidence of cruelty on his part in the previous proceedings. The wife, by her answer to the husband's suit, denied that she was guilty of cruelty, and herself made E charges of cruelty against her husband on which she based a prayer for judicial separation. Her allegations of cruelty were the same as those which she had made in the course of the previous maintenance proceedings. In those circumstances, the husband (as in the present case) issued a summons to strike out those parts of the wife's answer, on the ground that they had already been determined against her, so that she was estopped per rem judicatam. In the event, this F court held that no part of the answer should be struck out. I have read and re-read the judgments delivered by the members of this court, but I am bound to say that it is not altogether easy to extract from the report exactly what the ratio of the decision was. The three members of the court (DENNING, HODSON and MORRIS, L.JJ.) approached the question in rather different ways, but I think that the effort of the learned reporter in the headnote (3) fairly represents G the effect of the decision. Two propositions appear to be established, each of which had the authority of two members of the court. I think that it would be convenient if I read the two paragraphs in the headnote which deal with the two separate conclusions to which I have referred (4):

> " Per DENNING and MORRIS, L.JJ. Though, prima facie, the doctrine of estoppel per rem judicatam should apply to prevent this wife from repeating H the charge of cruelty which had failed after full investigation in the previous proceedings, such estoppel did not bind the court, which ought in the divorce proceedings to investigate the charge afresh, having regard to the husband's charge of perjury against the wife in his petition."

The second ground is per HODSON and MORRIS, L.JJ.:

> " The allegation of cruelty put forward by the wife in the divorce proceed- I ings should not be struck out on the ground that she had previously failed to establish the same charge in the maintenance proceedings, for the subject of litigation was not the same in the two sets of proceedings."

I do not think that it is necessary to quote from the judgments of the various members of the court. I can paraphrase the view expressed by DENNING, L.J.,

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(1) [1957] 1 All E.R. 161; [1957] P. 19.
(2) [1959] 3 All E.R. 131; [1960] P. 36. (3) [1957] P. 19. (4) [1957] P. at p. 20.

A as really amounting to this: there are two conflicting matters of public interest to be considered, namely, (a) the public interest that litigation should come to an end, and (b) the public interest (enshrined in s. 4 (1) of the Matrimonial Causes Act, 1950) that the court shall perform its duty of inquiring into the validity of charges made in matrimonial proceedings of this sort. Prima facie, the public interest that litigation should end must prevail so as to estop any B party from alleging that which has previously been found against that party. But that rule is subject to this exception, that the court, in the exercise of its power and duty to inquire, must always retain a discretion to hold in a particular case that such party is not precluded from raising the same allegations again. In the course of his judgment DENNING, L.J., illustrated this proposition very aptly by reference to previous cases, and I would refer in particular to two of those C cases, namely, *Dixon* v. *Dixon* (5) and *Hill* v. *Hill* (6). The interesting thing about those two cases is that they were both decisions of DAVIES, J., at first instance. Both raised the same question, namely, whether a party was estopped per rem judicatam in respect of allegations which had been the subject of a previous decision. The difference between the two cases was substantially this. In *Dixon* v. *Dixon* (5), as here, there had been only a very brief judgment on D the part of the learned commissioner who had tried the previous proceedings, and it was a judgment from which it was very difficult to find exactly what facts had been found, or, indeed, what the exact grounds of the decision had been. By contrast, in the later case of *Hill* v. *Hill* (6), the judgment in the previous proceedings had been a very full judgment, in which the various allegations which had been made had been specifically considered and rejected by the trial E judge. In the first case DAVIES, J., held that he could not strike out the allegations on the ground of estoppel; but in the second case he held that there was an estoppel, and he consequently struck out the offending paragraphs. I respectfully adopt the view expressed by DENNING, L.J., that those two cases furnish useful illustrations of the way in which, in varying circumstances, this court should proceed in matrimonial proceedings where the question of res judicata is raised.

F The other two members of the court in *Thompson* v. *Thompson* (7), as I have already indicated, thought that the particular case before them turned on the fact that the proceedings then in question, being proceedings for divorce, were something different from the maintenance proceedings which had been the subject of the previous suit. MORRIS, L.J., I think, makes that clear when in the course of his judgment he discusses (8) what was the " res " which was supposed G to have been the subject of previous adjudication.

The other case where there has been a recent decision of this court is *Fisher* v. *Fisher* (9). That case arose out of rather different circumstances. The previous proceedings had arisen from a husband's petition for nullity on the ground that the marriage had not been consummated. The wife put in an answer denying that, but she also cross-petitioned for a decree of dissolution on the ground of H her husband's cruelty. The learned commissioner who tried the case found against the husband's allegations and held that it was a valid marriage. As to the wife's cross-charge of cruelty, he apparently came to the conclusion that she had proved her facts, i.e., he accepted the allegations which had been made by the wife against the husband, but held that in the circumstances they did not justify a decree on the ground of cruelty; he, therefore, rejected the wife's I answer as well as the husband's petition. Afterwards, after the lapse of the necessary three years, the husband instituted proceedings for divorce on the ground of desertion, and, in those circumstances, he was met by an answer from the wife denying desertion and cross-praying for a divorce in her favour on the ground of constructive desertion. The particulars which she relied on in that case

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(5) [1953] 1 All E.R. 910; [1953] P. 103.
(6) [1954] 1 All E.R. 491; [1954] P. 291.
(7) [1957] 1 All E.R. 161; [1957] P. 19.
(8) [1957] 1 All E.R. at p. 175; [1957] P. at p. 45.
(9) [1959] 3 All E.R. 131; [1960] P. 36.

A to justify her charge of constructive desertion raised precisely the same allegations as had been raised in the previous proceedings, with the addition of some further allegations of expulsive conduct on the part of the husband.

It was in that situation that the matter came before this court, consisting of HODSON, SELLERS and HARMAN, L.JJ., who came to the conclusion that the wife was not estopped from making those allegations again in the desertion proceedings, B for the reason that the question of desertion had never been investigated in the previous proceedings; in other words, that there had been no relevant examination of the allegations made by the wife. The fact that the wife's evidence had been accepted in the previous proceedings was, I think, clearly not without its relevance. The decision of this court in that case was, as it seems to me, an illustration of the second proposition established by *Thompson* v. *Thompson* (10); C it turned on the view which this court formed that the previous proceedings and the proceedings then before the court were of a wholly different nature, in that the res which had been the subject of previous adjudication was not the same as that which now fell to be decided.

Those authorities were before MARSHALL, J., when he decided this case, and he referred specifically in his judgment to *Fisher* v. *Fisher* (11). If I read his judgment D aright, he sought to apply the decision in *Fisher* v. *Fisher* (11), and on that basis came to the conclusion that the issue of just cause was something which had never been determined by the court in the previous proceedings. In this, I think, he fell into error. I confess that I have difficulty in following the view expressed by MARSHALL, J., as to what the result of the proceedings before Mr. Commissioner BUSH JAMES, Q.C., was. As I have already indicated, it seems to me that the issue E of sincerity to which the learned commissioner applied his mind was a relevant issue only on the basis that it was established that the wife had no just cause for leaving the husband. If she had just cause, the question of the husband's sincerity would never have had to be considered. His prayer for restitution would have failed in any case.

Counsel for the wife, in the course of his argument, very fairly told us that, F according to his instructions, the argument before Mr. Commissioner BUSH JAMES, Q.C., proceeded on the basis that what was relied on in support of the allegation of just cause was precisely the same as that which was relied on in support of the allegation of cruelty. They were apparently treated at the trial as standing or falling together. In those circumstances, counsel says, the question of just cause was never considered, because it disappeared out of the case when the G learned judge rejected the charge of cruelty. It seems to me, however, that counsel's argument is really destructive of the whole basis on which the judgment of MARSHALL, J., proceeded. If what was being investigated under the heading of cruelty was precisely the same as what was being investigated as constituting just cause, and if, as was the fact, the issue of cruelty was decided against the wife, it follows inexorably, I should have thought, that the issue of just cause must have H been decided against the wife. If that be so, then I cannot find myself in agreement with MARSHALL, J. It seems to me inevitably to follow from the judgment of the learned commissioner that, although he does not say it in actual words, he must be taken to have dismissed the wife's allegation that she had just cause for leaving the husband. If that be the correct view, I can see no ground on which it would be proper to allow that matter to be investigated again. The proceedings I in which the charges were investigated before were divorce proceedings. So too are these. There is thus no question of the res, the subject of previous adjudication, being something different. No doubt, as was pointed out by two members of this court in *Thompson* v. *Thompson* (10), the court is not necessarily bound to apply the rule of estoppel in matrimonial proceedings, having regard to its duty to cause inquiry into all the circumstances. But I cannot think that in this case, where these very same charges were investigated at a time when the events were, presumably, relatively fresh in the memory of the parties, there could be any ground for failing to apply the ordinary rule as to estoppel so as to allow these allegations to be ventilated again.

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(10) [1957] 1 All E.R. 161; [1957] P. 19.
(11) [1959] 3 All E.R. 131; [1960] P. 36.

That is really sufficient to dispose of this case. I do not think that the judgment of the learned judge can be supported on the ground on which he put it. In my view, it must inevitably follow, having regard to what we have been told as to the course taken at the original trial, that the learned commissioner must, by necessary inference, have dismissed the allegations put forward in support of the plea of just cause. On that ground, I think that the husband is entitled to succeed on this appeal.

For my part, however, I think that there is a second ground on which this appeal should be allowed, and it is the ground which counsel for the husband put in the forefront of his argument before us. It seems to me that it is quite impossible to ignore the judgment of Sachs, J., which he gave in the maintenance proceedings in 1958. So far as Marshall, J., is concerned, he referred in his judgment to the judgment of Sachs, J., in the maintenance proceedings and said:

> ". . . whilst recognising fully the persuasive quality of his judgment in that case, as it is not binding on me I find myself with regret unable to follow it."

It may be—I do not know, because there seems to be a difference of recollection between counsel on this matter—that the argument was not put to Marshall, J., in quite the same way as it has been put to us. But, as it has been put to us, the husband's argument satisfies me that the judgment of Sachs, J., in itself created an estoppel, which should be held to preclude the wife from re-litigating these allegations in the present proceedings. Any question as to the correct interpretation of the judgment of the learned commissioner was, in my judgment, finally determined after argument by the decision of Sachs, J., in the maintenance proceedings. I have already read the actual questions which were formulated for decision in the maintenance proceedings, and the actual orders made as a result of the learned judge's determination in those proceedings. It is, I think, necessary to add that the determination of those issues was quite necessary for the purpose of deciding the question then in issue, namely, whether the wife was entitled to maintenance under s. 23 of the Matrimonial Causes Act, 1950; for, if she was absent from the husband without just cause, clearly she would not be entitled to claim maintenance.

The vital question to determine is what was the " res " which was the subject of the judgment of Sachs, J. I think that that question can readily be answered by referring to three short passages in his judgment. The opening sentence reads:

> " In these proceedings, initiated by the wife under s. 23 of the Matrimonial Causes Act, 1950, the court has been asked to decide as a preliminary issue whether any estoppels arise out of certain previous proceedings between the same parties."

That amounts to saying that the parties had specifically submitted that particular controversy to the arbitrament of the court. A little later in his judgment the learned judge says:

> " No additional fact or factor is relied on in the wife's affidavit as giving her good cause for remaining separated from her husband; and it was on that footing that this preliminary issue was sought by counsel to be determined and it was agreed by the court that it should be so determined."

I read that to make it clear that what was being dealt with by Sachs, J., was precisely the same matter as had been dealt with by Mr. Commissioner Bush James, Q.C. The learned judge's conclusion is expressed towards the end of his judgment, and his finding in this respect was carried into the order, the terms of which I have already read. He said:

> " To my mind, reading the judgment [of the learned commissioner] fairly A and with the idea of making sense of it, there is a necessary implication that the court must have decided that the wife had failed to establish good cause."

In those circumstances, the parties having submitted a particular issue (carefully drafted, I think, with the assistance of counsel) to the arbitrament of the court—very much as though the question had been submitted to arbitration—it is difficult to see why they are not bound by the result of that submission in the B absence of an appeal. It is only necessary to emphasise once more that the determination of that issue was one of vital significance in the maintenance proceedings which were then on foot.

It has been argued by counsel for the wife that it is quite wrong for us to rely on the decision of SACHS, J., as an estoppel per rem judicatam, because on the authority of *Thompson* v. *Thompson* (12)—and more particularly on the authority C of what was said by HODSON, L.J., in that case, proceedings in maintenance are something different from proceedings in divorce. That argument, I think, would be valid, and I should feel bound to follow the view expressed by HODSON, L.J., if the matter before us today was simply a question whether the decision in the maintenance proceedings of necessity estopped a party from raising the same matter again in divorce proceedings. I fully accept the view expressed by D HODSON, L.J., on that, which, in effect, equated maintenance proceedings in the High Court with maintenance proceedings before the magistrates, and, as such, different in kind from proceedings for the dissolution of marriage. But, as it seems to me, that is not the point in this case. Here there was submitted to SACHS, J., a specific and particular issue, namely, what did the learned commissioner in the original proceedings decide? He was invited to decide that E particular question: he did decide it, and, in the absence of an appeal, it seems to me that he decided that question once and for all. In those circumstances, I take the view that, quite apart from the main ground on which I have rested my judgment, this also furnishes a valid ground for holding the wife estopped from raising over again these matters which she has twice raised before.

As I have previously remarked (13), there is a fundamental matter of public F interest which arises in a case such as this, namely, the public interest that litigation should cease. It would, I think, be a disaster (and not merely a disaster for the husband here) if the wife were to be allowed, after all this lapse of time, to bring up again now precisely the same allegations as she made in the original proceedings based on cruelty. I do not think that the duty to inquire laid on the court by s. 4 of the Matrimonial Causes Act, 1950, requires that the G wife should be allowed to ventilate all these allegations again. Should the court be in any difficulty when the case comes on for trial, it is always open to it, as is well known, to invoke the assistance of the Queen's Proctor. I do not think, therefore, that it is in the public interest that the wife should be allowed to raise these same allegations all over again. In these circumstances, on both the grounds which I have stated, I am of opinion that the learned judge's judgment H was erroneous, and that the appeal should be allowed.

UPJOHN, L.J.: I agree. I do so, however, on the narrow ground that it was necessarily implicit in the judgment of the learned commissioner in the first divorce proceedings that he found as a fact that the wife had left her husband without reasonable cause. If that opinion be justified, then, for my I part, I can see no reason why either the interest of the public or the duty of the court to act under s. 4 of the Matrimonial Causes Act, 1950, requires a further investigation of precisely and exactly the same allegations in a second set of divorce proceedings. I would for that reason hold that the wife is estopped from raising these allegations in the second set of divorce proceedings. The judgment of Mr. Commissioner BUSH JAMES, Q.C., in the first divorce proceedings has been somewhat severely criticised, but it must always be remembered that a judgment is delivered in reference to the pleadings and in reference to the conduct of the parties before the court. With reference to the pleadings, in her petition the wife set out in para. 8 to para. 23 a large number of allegations alleged to form cruel conduct on the part of her husband on which she based her petition for divorce; but in her reply to the husband's answer, in which he cross-claimed for restitution of conjugal rights, she admitted that she left the matrimonial home on Oct. 5, 1955, and that she had ever since failed to return to the matrimonial home, and she said that she had good cause for not so returning. In support of that case, the wife repeated (by reference) para. 8 to para. 23, inclusive, of her petition and of the further and better particulars given thereunder; therefore, she was relying precisely on the same facts as entitling her to stop away from her husband as those which she said amounted to cruelty.

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(12) [1957] 1 All E.R. 161; [1957] P. 19.

(13) See p. 231, letter A, ante.

We have been told that, when the matter came on for hearing before the learned commissioner, only two matters were argued: one was cruelty on which the wife failed, and the other was the sincerity of the husband in presenting to the court his petition for restitution, and it was held that he was insincere, so that his petition failed. That, I think, was why the commissioner's judgment took the form which it did. Those were the only two matters argued before him, and it seems to me that it necessarily follows that the parties took the view that, if the facts relied on by the wife did not amount to cruelty, those facts would not amount to a good cause for the wife staying away from her husband. I cannot feel any doubt that, if the commissioner had come to the conclusion that the husband was sincere, he would have granted a decree of restitution to the husband, because it would be common ground that the wife had failed in her allegations which she said entitled her to remain apart from the husband. Accordingly, although there is no express finding in the judgment, I think that it is necessarily implicit that the commissioner did find that the wife had left without good cause, and I think that SACHS, J., in the subsequent application under s. 23 of the Matrimonial Causes Act, 1950, came to a perfectly correct decision. Having reached that conclusion, and the matter having been litigated once in divorce proceedings, I see no reason to allow exactly the same allegations to be litigated in divorce proceedings for a second time.

With regard to the other matter which has been fully argued before us, that is to say, whether the wife is estopped by reason of the judgment of SACHS, J., I for my part would reserve that matter for future consideration, should it ever arise. I think that there are difficulties in the way of the husband in sustaining that point. As WILLMER, L.J., has pointed out, in *Thompson* v. *Thompson* (14), although all the judges decided the case in the same way, the reasons given were rather different. DENNING, L.J., took the view that, although the doctrine of estoppel per rem judicatam could apply to prevent the wife from repeating charges of cruelty, estoppel did not bind the court, and it was a question of discretion. HODSON, L.J., and to some extent MORRIS, L.J., took a different view. I read the reasons attributed to them in the headnote (15):

> "The allegation of cruelty put forward by the wife in the divorce proceedings should not be struck out on the ground that she had previously failed to establish the same charge in the maintenance proceedings, for the subject of litigation was not the same in the two sets of proceedings."

If that be a correct statement of the law, it seems to me that the husband in this case is in a difficulty. Let me illustrate it in this way. Suppose that, when the originating summons under s. 23 came before the learned judge, no point was taken on estoppel, and suppose that he, having investigated the facts fully, had come to the conclusion that the wife had stayed away without due cause, and had dismissed her originating summons. In that event it seems to me clear that in the second divorce proceedings no estoppel could arise by reason of the findings of fact on the summons, and the wife could (but for the first divorce proceedings) again allege all the facts which she had alleged in the maintenance proceedings as a defence to the petition based on desertion. I find it difficult to reach a different conclusion because the maintenance proceedings in fact took a different course, although they reached the same conclusion—that of dismissal. I am unable to attribute importance to the fact that the parties specifically asked the learned judge to hear and determine the issues which have been read by WILLMER, L.J., and which, therefore, I need not repeat. That was a convenient way of dealing with the maintenance proceedings. If the wife was estopped, that put an end to the maintenance proceedings and it would be unnecessary to go into the facts all over again. But those issues were framed for the purpose of determining the question in the maintenance proceedings, and, in my judgment, they were not framed for the purpose of deciding those issues between the parties for all purposes which might arise hereafter, and, indeed, have now arisen in divorce proceedings possibly then not contemplated at all. So, in my judgment, there is a real difficulty in holding that the judgment of SACHS, J., estops the wife in this case from repeating her allegations. However, I say no more about that, because, for the reasons which I gave earlier in this judgment, I agree that this appeal should be allowed.

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(14) [1957] 1 All E.R. 161; [1957] P. 19.

(15) [1957] P. at p. 20.

WILLMER, L.J.: It was agreed that the appeal from the order of Nov. 3, 1960, follows on this decision. Therefore, both appeals will be allowed.

Appeals allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Maxwell, Batley & Co.* (for the husband); *H. E. Thomas & Co.* (for the wife).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HAYWARD *v.* HAYWARD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Phillimore, J.), October 24, 28, 1960.]

Nullity—Estoppel—Bigamous marriage—Parties to bigamous marriage aware that earlier marriage still in existence—Duty of court to inquire into facts alleged—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 4 (1).

In 1937 the petitioner married a Miss T. in Canada. In 1945 the petitioner went through a ceremony of marriage with the respondent in England: at that time both parties were aware that the petitioner's first wife was probably still alive and that, therefore, their marriage in 1945 was probably bigamous. In 1957 the petitioner deserted the respondent who caused a summons to be issued against him in the magistrates' court on the ground of his desertion. The petitioner admitted desertion and accordingly a maintenance order was made in the respondent's favour. In 1959 the petitioner, having established that his first wife was alive in 1958, applied to the justices to revoke the maintenance order on the ground that his marriage with the respondent was bigamous and, therefore, void. The application was dismissed by the justices on the ground that the petitioner was estopped by his admission in 1957 of desertion. The petitioner now petitioned for a declaration that the marriage with the respondent was null and void. The respondent by her answer admitted that the marriage was bigamous but pleaded that by admitting desertion the petitioner was estopped from disputing the validity of the marriage, and herself cross-prayed for a decree of nullity.

Held: decrees of nullity would be granted to both parties, there being no estoppel for the following reasons—

(i) it had always been the practice of the ecclesiastical court to inquire into the facts concerning the validity or invalidity of marriage and, by

A reason of s. 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, that practice remained applicable in nullity suits (see p. 242, letter E, post); and a petitioner was not, therefore, precluded by an averment in previous proceedings that a marriage was valid from alleging in a subsequent nullity suit that it had been void ab initio (see p. 242, letter F, post).

B *Miles* v. *Chilton* (*falsely calling herself Miles*) ((1849), 1 Rob. Eccl. 684) and *Andrews* v. *Ross* ((1888), 14 P.D. 15) followed.

Woodland v. *Woodland* (*otherwise Belin or Barton*) ([1928] All E.R. Rep. 690) criticised.

Observations of LORD MERRIMAN, P., in *Bullock* v. *Bullock* ([1960] 2 All E.R. at pp. 310, 311) considered.

C (ii) moreover in the present case there could be no estoppel per rem judicatam since the decision from which it might arise was a decision of magistrates which was not binding on the court, and there could be no estoppel in pais because both the parties knew at the time of their marriage ceremony that the first wife was still living (see p. 243, letters C and D, post).

Dictum of LANGTON, J., in *Square* v. *Square* ([1935] All E.R. Rep. at pp. D 786, 787) applied.

Per CURIAM: in a case where, after a fair trial, a false decision has been reached, the court in subsequent proceedings when the truth is known should declare the truth and correct the error (see p. 242, letter A, post).

[**Editorial Note.** This case, in so far as it is concerned with the decision E in *Thompson* v. *Thompson* ([1957] 1 All E.R. 161), should be considered with *Holland* v. *Holland*, p. 226, ante.

As to estoppel in nullity suits, see 15 HALSBURY'S LAWS (3rd Edn.) 174, para. 341, note (l) and 12 HALSBURY'S LAWS (3rd Edn.) 231, para. 432, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 483, *4215*, *4216*.

For the Matrimonial Causes Act, 1950, s. 4 (1), see 29 HALSBURY'S STATUTES F (2nd Edn.) 394.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 32, see 5 HALSBURY'S STATUTES (2nd Edn.) 361.]

Cases referred to:

Andrews v. *Ross*, (1888), 14 P.D. 15; 58 L.J.P. 14; 59 L.T. 900; 27 Digest (Repl.) 563, *5155*.

G *Bullock* v. *Bullock*, [1960] 2 All E.R. 307; [1960] 1 W.L.R. 975.

De Reneville v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, *1075*.

Miles v. *Chilton* (*falsely calling herself Miles*), (1849), 1 Rob. Eccl. 684; 163 E.R. 1178; 27 Digest (Repl.) 448, *3798*.

H *Mordaunt* v. *Mordaunt*, (1870), L.R. 2 P. & D. 109, 382; *revsd.* sub nom. *Mordaunt* v. *Moncreiffe*, (1874), L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4; 27 Digest (Repl.) 457, *3928*.

Square v. *Square* (*otherwise Bewicke*), *Cowan* (*otherwise Youell*) v. *Cowan*, [1935] All E.R. Rep. 781; [1935] P. 120; 104 L.J.P. 46; 153 L.T. 79; Digest Supp.

I *Thompson* v. *Thompson*, [1957] 1 All E.R. 161; [1957] P. 19; [1957] 2 W.L.R. 138; 3rd Digest Supp.

Wilkins v. *Wilkins*, [1896] P. 108; 65 L.J.P. 55; 74 L.T. 62; 27 Digest (Repl.) 598, *5596*.

Woodland v. *Woodland* (*otherwise Belin or Barton*), [1928] All E.R. Rep. 690; [1928] P. 169; 97 L.J.P. 92; 139 L.T. 262; 27 Digest (Repl.) 553, *5038*.

Petition.

In this case the petitioner filed a petition dated Dec. 30, 1959, in which he alleged that on Dec. 15, 1945, a ceremony of marriage was celebrated between himself and the respondent in England and A

> " 3. That on Aug. 7, 1937, the petitioner was lawfully married to R.G.H., then R.G.T., spinster, at the United Baptist Parsonage, Woodstock in the province of New Brunswick, Canada, and that the said marriage has never been dissolved or annulled but is a valid and subsisting marriage. B
>
> " 4. That at the time when the petitioner went through the said ceremony of marriage with the respondent the said R.G.H. was alive."

The petitioner then alleged that the magistrates' court, sitting at Luton on Apr. 16, 1957, adjudged that the petitioner had deserted the respondent and ordered him to pay maintenance to the respondent; and that on May 26, 1959, the same court dismissed his application to revoke that order on the ground C that the marriage between himself and the respondent was bigamous. The petition concluded with a prayer that the marriage between the petitioner and the respondent be declared null and void. By her answer the respondent alleged that the order made on Apr. 16, 1957, " was made with the consent of the petitioner and the petitioner is thereby estopped from denying the validity of the . . . marriage". The respondent then repeated para. 3 and D para. 4 of the petition and, further, alleged that if the marriage between herself and the petitioner was valid and subsisting, the petitioner had committed adultery with one C.C., and had also deserted the respondent. And the respondent cross-prayed for a decree that the marriage be declared null and void, alternatively for a decree of divorce. On July 11, 1960, the suit came before PHILLIMORE, J., at Winchester Assizes, and on July 19, 1960, HIS E LORDSHIP gave a reserved judgment on the facts, in which he stated that the issues were: (i) was the marriage of the petitioner and the respondent celebrated on Dec. 15, 1945, bigamous? (ii) was the petitioner estopped from so alleging ? (iii) if the marriage was valid, had the petitioner been guilty of adultery or desertion? HIS LORDSHIP concluded, however, that the issue of estoppel raised a point of law of importance and, therefore, he adjourned the F suit for argument by the Queen's Proctor under the Matrimonial Causes Act, 1950, s. 10. On Oct. 24, 1960, having heard further argument HIS LORDSHIP granted decrees of nullity to both the petitioner and the respondent but reserved the reasons for his judgment.

F. R. N. H. Massey for the petitioner.
N. R. Blaker for the respondent. G
N. H. Curtis-Raleigh for the Queen's Proctor.

Cur. adv. vult.

Oct. 28. **PHILLIMORE, J.**, read the following judgment: The husband, who is the petitioner in the suit, married a Miss Tapley in Canada in 1937. On Dec. 15, 1945, he went through a ceremony of marriage with the respondent H at Rowley Regis in the county of Stafford in England. Both parties were aware that the petitioner's first wife was probably still alive and that their marriage was, therefore, probably bigamous. In 1957 the petitioner deserted the respondent, who by a summons issued in Luton petty sessions, charged him with desertion. At the hearing of this summons on Apr. 16, 1957, he admitted desertion and an order was made in the respondent's favour. The petitioner I failed to keep up the payments due under the order and, finding himself in financial difficulties, raised the question of the validity of the marriage. Inquiries were then made and it is common ground that these established that the first wife was still alive in July, 1958. The petitioner, accordingly, proceeded to ask the justices to revoke the order on the ground that it pre-supposed that his marriage to the respondent was valid whereas, in fact, it was bigamous and, accordingly, void ipso jure. On May 26, 1959, the justices dismissed the petitioner's summons on the ground that, having admitted desertion and so, A by implication, the validity of his marriage to the respondent, he was estopped from now alleging that it was in fact void.

The petitioner did not appeal but instead filed a petition in this court seeking a decree of nullity. The respondent by her answer admits that the marriage was bigamous, asserting that her husband having admitted desertion is estopped from saying so, and claims that since she herself is not so estopped B she should be granted a decree of nullity. Alternatively, if the marriage is held valid she claims a decree of dissolution on the grounds of her husband's adultery. He does not dispute that he has committed adultery. The question of law raised is, accordingly, whether I should refuse a decree of nullity to the husband in this case on the ground that although the marriage was admittedly bigamous and, therefore, void ab initio he is estopped from so alleging.

C There is a line of authority which suggests that the doctrine of estoppel may prevent a court from declaring a bigamous marriage null and void. The first of the three cases is *Wilkins* v. *Wilkins* (1). A wife who had married the respondent in 1865 petitioned the court in 1892 for a judicial separation on the ground of his adultery. He by his answer denied the adultery and alleged that the marriage was bigamous and so null and void on the ground that a D man whom the wife had married in 1854 was still living at the date of the marriage in 1865. The suit was heard by a jury, who found on the evidence that the respondent had committed adultery and that the petitioner's first husband had died before her marriage in 1865. She accordingly obtained a decree. Not long afterwards the first husband returned to England and the respondent thereupon filed a petition for a decree of nullity. The petitioner E set up the verdict of the jury as constituting an estoppel per rem judicatam. The case came before GORELL BARNES, J., who indicated that he felt a difficulty in granting a decree in face of the previous verdict of the jury, and without deciding the point adjourned the case for an application by the respondent to the Court of Appeal for a new trial of the original suit. The report covers only this application, which was granted on terms. The judgment of LOPES, L.J., deals solely F with the question whether it was right under the rules to grant a new trial and the terms to be imposed, but that of LINDLEY, L.J., refers (2) to the difficulty created by the verdict and decree in the first suit, whilst KAY, L.J., deals briefly with the point of estoppel. He said (3):

> "It is said that the applicant is estopped by the former verdict and G decree from proving this fact. But, as evidence is now forthcoming which could not by the exercise of reasonable diligence have been obtained at the first trial, there must be some mode of getting over an estoppel arising from a verdict which was obtained under a misapprehension of the real facts. In my opinion we have jurisdiction to enlarge the time for moving for a new trial of the first suit, and I am also clearly of opinion that the H case is one in which the jurisdiction ought to be exercised."

I do not think that in so stating KAY, L.J., was committing himself to the view that the plea of estoppel was good, any more than LINDLEY, L.J., in speaking of the difficulty and a new trial as the proper mode of getting over it. The report does not suggest that any authority on the question of estoppel was cited to the Court of Appeal and in the absence of any report of the hearing I before GORELL BARNES, J., I do not know whether any authority was cited to him. The Court of Appeal granted a new trial and by consent ordered that the verdict in the first suit and the decree of judicial separation be set aside. On a subsequent application GORELL BARNES, J., granted a decree of nullity (4). Whilst the course taken was eminently sensible and practical, this case in the absence of any decision on the point provides somewhat slender support for the contention that estoppel can prevent the court from granting a decree of nullity where a marriage is shown to be bigamous.

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(1) [1896] P. 108.

(2) [1896] P. at p. 113.

(3) [1896] P. at p. 114.

(4) [1896] P. at p. 115.

The second case, *Woodland* v. *Woodland* (*otherwise Belin or Barton*) (5) is in a different category. The husband and wife married in 1914 at a time when the wife's previous marriage had not been validly dissolved. In 1921 she brought a petition for restitution of conjugal rights which the husband did not defend with the result that she obtained a decree, the wording of which being in the usual form contained an express finding that the parties were husband and wife. In 1928, the husband having petitioned for a decree of nullity, the case came before Hill, J., who adjourned it for argument on the question whether the decree of restitution did not constitute an estoppel. After hearing the argument the learned judge dealt with the general principles of estoppel and concluded (6):

> " . . . I am unable to find that there is anything in the law peculiar to this Division which renders inapplicable the general law of estoppel."

He then proceeded to refer to the terms of the decree of restitution and to *Wilkins* v. *Wilkins* (7), describing (8) the observations of Kay, L.J. (9) as a clear recognition of the estoppel raised by the decree of judicial separation in that case. Hill, J., then proceeded to dismiss the petition. This is a clear decision in favour of estoppel per rem judicatam and the facts are close to those before me in the present case. I confess, however, that I find it impossible to concur in the conclusion of Hill, J. (6) that there is nothing "peculiar to this Division which renders inapplicable the general law of estoppel." I also think that in treating the observations of Kay, L.J., as a clear expression of recognition of the estoppel he was going beyond what the learned lord justice intended.

Finally, I turn to *Bullock* v. *Bullock* (10), a decision of Lord Merriman, P., and Collingwood, J., sitting in the Divisional Court. In that case the husband and wife married in 1944. The wife had previously married in 1921 but at the time of her re-marriage had not heard of her former husband for many years. At the time of this re-marriage she informed the husband of this and of her history. In 1959 the wife sought an order from the justices on the ground of her second husband's desertion, he contesting the matter on the ground that their marriage in 1944 was bigamous—a thoroughly unmeritorious defence in the light of his knowledge at the time of their marriage. The justices found on the facts that the first husband must be presumed to have died before 1944 and that the marriage was, accordingly, not bigamous and made an order in favour of the wife.

This order was upheld by the Divisional Court on the facts, but in the course of his judgment the learned President dealt at some length with the possibility of applying the doctrine of estoppel in the light of the husband's knowledge of the facts at the time when he entered into the marriage. The learned President made it clear that he was not expressing any final view on the position and expressly founded his decision, as did Collingwood, J., on the finding of fact made by the justices. However, his observations on the subject of estoppel were concurred in by Collingwood, J., and although not binding on me are entitled to the greatest respect, so much so that I thought it right to ask the Queen's Proctor for his assistance in the present case. In the course of his judgment, the learned President reviewed the cases of *Wilkins* v. *Wilkins* (11) and *Woodland* v. *Woodland* (5) and the decision of Dr. Lushington in *Miles* v. *Chilton* (*falsely calling herself Miles*) (12). He expressed the view (13) that the report in *Wilkins* v. *Wilkins* (11) makes it plain that

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(5) [1928] All E.R. Rep. 690; [1928] P. 169.

(6) [1928] All E.R. Rep. at p. 693; [1928] P. at p. 172.

(7) [1896] P. 108.

(8) [1928] All E.R. Rep. at p. 693; [1928] P. at p. 174.

(9) [1896] P. at p. 114.

(10) [1960] 2 All E.R. 307.

(11) [1896] P. 108.

(12) (1849), 1 Rob. Eccl. 684.

(13) [1960] 2 All E.R. at p. 310.

> "unless this new trial had been ordered, so that the verdict and judgment could be set aside, the husband would have been estopped from denying the validity of the marriage",

and concluded (14) that

> ". . . it is not universally true, as was assumed in *Miles* v. *Chilton* (15), that estoppel is prevented from operating merely because a bigamous marriage is involved."

He also indicated (16) that he was not convinced that an estoppel in pais as opposed to an estoppel per rem judicatam, which was the basis of *Wilkins* v. *Wilkins* (17), would not "operate" in such a case.

It is well established that a bigamous marriage is void ipso jure or void ab initio, whichever phrase is to be preferred. Inasmuch as it is void it is of its very nature incapable of being converted into a valid marriage, as can happen in the case of a marriage which is merely voidable as opposed to void. I am content to adopt the words of LORD GREENE, M.R., in *De Reneville* v. *De Reneville* (18):

> "A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it . . ."

I stress the word "every." It seems to me that it would be contrary to all principle if a ceremony which is by definition null and void could be converted into something valid and binding and capable of conferring status by the act or inaction of a party to it. It would surely be remarkable as a proposition of law if this court were to be prevented from declaring the truth, namely, that a marriage is bigamous, and so correcting the status of the parties to it and of their dependants merely because one or both of them has chosen to assert its validity or because one of them has failed to dispute or has concurred in the assertion of its validity by the other.

This court deals not merely with disputes between parties but with status. Marriage is not an ordinary contract—it is an institution which "confers a status on the parties to it, and upon the children that issue from it," as LORD PENZANCE pointed out in *Mordaunt* v. *Mordaunt* (19). It is an old maxim that estoppels are odious because they tend to shut out the truth (15 HALSBURY'S LAWS (3rd Edn.) 203, para. 382), and it is well settled that they cannot override the law of the land (PHIPSON ON EVIDENCE (9th Edn.), p. 705 and cases cited there). If the law declares a bigamous marriage void and criminal, is this court nevertheless to treat it as valid and refuse to declare the truth by reason of the conduct, however unmeritorious, of one or both of the parties to it?

The consequences to which this doctrine might lead are surely remarkable. If this court recognises the plea of estoppel it leaves one of the parties to it with two husbands regarded as such by law, or two wives as the case may be —a state of polygamy or polyandry, either of which is foreign to the law of England. Suppose that in such a case the bigamous spouse is prosecuted and convicted and the bigamy declared, he or she would nevertheless remain legally married in the eyes of the matrimonial court. Suppose that there has been a child of the bigamous union, is that child in the eyes of the law the offspring of a valid or of a bigamous marriage? Or suppose that such a child or any other party interested comes to this court for a declaration that the marriage is bigamous: in that case no estoppel would arise owing to the difference in finding and this court would declare the nullity which it had refused to declare

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(14) [1960] 2 All E.R. at p. 310.

(15) (1849), 1 Rob. Eccl. 684.

(16) [1960] 2 All E.R. at pp. 310, 311.

(17) [1896] P. 108.

(18) [1948] 1 All E.R. at p. 60; [1948] P. at p. 111.

(19) (1870), L.R. 2 P. & D. at p. 126.

A at the suit of a party to the illegal union. It may be asked what is the court to do in a case such as that of *Wilkins* v. *Wilkins* (20) when after a fair trial a false decision has been reached? I think that the short answer is that it must declare the truth, now that the truth is known, and then correct the error, just as it has to do if, for example, judgment is obtained against a party that does not exist.

B In *Thompson* v. *Thompson* (21) the Court of Appeal considered the whole question of estoppel in relation to proceedings for divorce and concluded that estoppel cannot bind the court so as to fetter its statutory duty under s. 4 (1) of the Matrimonial Causes Act, 1950, " to inquire . . . into the facts alleged." This duty in its present wording derives from the same section in the Matrimonial Causes Act, 1937, when the wording of s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925 (which in turn was derived from s. 25 C of the Matrimonial Causes Act, 1857) was altered. Prior to 1937 the court was required " to satisfy itself . . . as to the facts alleged." Counsel for the Queen's Proctor sought to argue that the change in wording in 1937 imposed a duty on the court which did not exist when *Woodland* v. *Woodland* (22) and *Wilkins* v. *Wilkins* (20) were decided. He also suggested that although s. 4 of the Act of 1950 refers only to a petition for divorce as opposed to nullity, the duty D arises in the present case since the form of the answer involves both nullity and divorce.

For myself I would prefer to rest on broader grounds. It was always the practice of the ecclesiastical court to inquire into the facts, and that practice in the absence of statutory definition or alteration remains applicable in cases of nullity by reason of the provisions of s. 32 of the Supreme Court of Judicature E (Consolidation) Act, 1925. *Miles* v. *Chilton* (23) affords, I think, compelling authority. In that case the husband sought a decree of nullity alleging bigamy on the part of his wife. She by her answer pleaded, inter alia, that he had known all the facts and knowing them had induced her to marry him, telling her that she had been lawfully divorced in proceedings which had been instituted by the first husband in collusion with the petitioner. DR. LUSHINGTON in his F judgment rejected the plea in the wife's answer. He referred to the general principles of estoppel and to the absence of authority for their application to marriage, which he said (24) is " more than a civil contract ". It is plain from his judgment that he had considered all available authority of the court and having done so had failed to find any suit when a previous averment that a marriage was valid had been held to preclude the petitioner, who had made G it, from subsequently asserting the contrary and obtaining a decree of nullity.

This case was followed in *Andrews* v. *Ross* (25). I think that the judgment of BUTT, J., puts it very well (26):

> " The facts of this case are very short. The petitioner was the sister of the first wife of the respondent, who died shortly after marriage. The H petitioner was present at the marriage of her sister to the respondent, and was, therefore, perfectly well aware of whatever impropriety or illegality there may have been in the marriage. She chose to go through the ceremony of marriage with a knowledge of all the circumstances. In that state of things, and in accordance with all the principles of law administered in other courts, she would not be allowed to sue for a I declaration of nullity of marriage. In other words she would not be allowed to get rid of any obligation that she had entered into with her eyes open. But the authorities cited, and especially the authority of *Miles* v. *Chilton* (23), show that the ecclesiastical courts have applied a different rule, and

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(20) [1896] P. 108.
(21) [1957] 1 All E.R. 161; [1957] P. 19.
(22) [1928] All E.R. Rep. 690; [1928] P. 169.
(23) (1849), 1 Rob. Eccl. 684.
(24) (1849), 1 Rob. Eccl. at p. 694.
(25) (1888), 14 P.D. 15.
(26) (1888), 14 P.D. at p. 16.

A that the principles prevailing in regard to contracts of marriage differ from those prevailing in all other contracts known to the law. It is not necessary that I should go into the cases, suffice it to say that the authorities show that the ecclesiastical courts would pronounce this marriage null and void under the circumstances to which I have referred. By s. 22 of the Matrimonial Causes Act of 1857 it is provided that in all suits and proceedings B other than proceedings to dissolve any marriage, the court shall proceed to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted. By them I am bound. Therefore I consider myself called upon to declare this marriage null and void, but I shall refuse the petitioner her costs."

C I agree with the submission of counsel for the Queen's Proctor that if I have to choose between the two lines of authority, that led by *Miles* v. *Chilton* (27) is to be preferred.

Apart, however, from these considerations I do not see how the doctrine of estoppel can apply in the present case. In so far as there is any question of estoppel per rem judicatam it can only arise from the decision of the justices, D which is not binding on this court. If it is put as an estoppel in pais I think that the short answer is that both the petitioner and the respondent knew the position. The respondent went before the justices and asserted by implication the validity of her marriage because she wanted maintenance. The petitioner submitted to an order, thus by implication conceding the validity of the marriage because he did not want to be prosecuted for bigamy. I am content to adopt E the words of LANGTON, J., in *Square* v. *Square* (*otherwise Bewicke*), *Cowan* (*otherwise Youell*) v. *Cowan* (28):

> "If two people with the same sources of information assert the same truth, or agree to assert the same falsehood, at the same time, I cannot see how either can be estopped as against the other from asserting differently at a later time."

F For these reasons I have thought it right to grant both parties a decree of nullity.

Order accordingly.

Solicitors: *F. W. P. Lupton* (for the petitioner); *John Q. Clayton & Co.*, Luton (for the respondent); *Queen's Proctor*.

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(27) (1849), 1 Rob. Eccl. 684.
(28) [1935] All E.R. Rep. at pp. 786, 787; [1935] P. at p. 126.

NOTE.

LAYZELL *v.* BRITISH PORTLAND CEMENT MANUFACTURERS, LTD.

[QUEEN'S BENCH DIVISION (Paull, J.), November 16, 17, 18, 1960.]

Costs—Infant—Next friend of infant successful as plaintiff in action for personal injuries to infant—Costs to be taxed on " common fund basis "—That basis the same as former solicitor and client costs—Plaintiff legally assisted during part of action—Supreme Court Costs Rules, 1959 (*Sch.* 2 *to S.I.* 1959 *No.* 1958), *r.* 28 (3), (4).

[As to the recovery of costs by the next friend of an infant, see 21 HALSBURY'S LAWS (3rd Edn.) 321, para. 675.

As to the basis of taxation where the plaintiff is legally aided, see 30 HALSBURY'S LAWS (3rd Edn.) 527, para. 997.

As to solicitor and client costs, see 30 HALSBURY'S LAWS (3rd Edn.) 427, para. 806; as to costs allowed on taxation as between solicitor and client, see ibid., 430, para. 809.]

Action.

In 1956 David Frederick Layzell, an infant suing by his next friend, his father Frederick William Layzell, brought an action for damages for injuries sustained by the infant through the alleged negligence of the defendants in the management and driving of a train. Pleadings were delivered in 1956 and 1957, the last particulars being delivered in May, 1958. In 1959, after change of solicitor, the plaintiff, suing by his next friend, became an assisted person* entitled in accordance with the Legal Aid and Advice Act, 1949, to legal aid in connexion with the action, his assessed contribution being nil. The civil aid certificate was dated Feb. 3, 1959, and was limited to close of pleadings and a further opinion. An amended civil aid certificate for further prosecuting the action was given to the plaintiff in December, 1959. At the trial, PAULL, J., gave judgment for the plaintiff and awarded damages. Counsel for the plaintiff then applied under r. 28 (3) of the Supreme Court Costs Rules, 1959 (contained in the Rules of the Supreme Court (No. 3), 1959, S.I. 1959 No. 1958, Sch. 2), for an order against the defendants for costs to be taxed on the common fund basis. As is apparent from the foregoing statement of facts, costs had been incurred on behalf of the plaintiff in the action before the time when a civil aid certificate was granted, and these costs were not the subject of legal aid.

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* Rule 29 (1) of the Supreme Court Costs Rules, 1959, provides—" On the taxation of a solicitor's bill to his own client (except a bill to be paid out of the legal aid fund under the Legal Aid and Advice Act, 1949, . . .) all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred."

Rule 30 provides: " (1) This rule applies to—(a) any proceedings in which money is claimed or recovered by or on behalf of, or adjudged or ordered or agreed to be paid to, or for the benefit of, a person who is an infant or of unsound mind or in which money paid into court is accepted by or on behalf of such a person . . .

" (2) No costs in any such proceedings as are referred to in sub-para. (a) . . . of the foregoing paragraph or incident to the claim therein or consequent thereon shall be payable by any plaintiff to his solicitor in respect of those proceedings, except such amount of costs as may be certified on the taxation under r. 29 of these rules of the solicitor's bill to that plaintiff."

" (3) On the taxation under the said r. 29 of a solicitor's bill to any plaintiff in any such proceedings as are referred to in the said sub-para. (a) . . . who is his own client, the taxing officer shall also tax any costs payable to that plaintiff in those proceedings and shall deduct the amount allowed on the taxation of those costs from the taxed amount of the solicitor's bill and certify the difference as the amount payable to the solicitor and, where necessary, shall also certify the proportion of that amount payable respectively by, or out of money belonging to, any party to the proceedings who is an infant or of unsound mind or the widow of the man whose death gave rise to the proceedings and any other party.

The Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1), provides so far as relevant—". . . costs shall be taxed for the purposes of this Schedule according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested."

Marven Everett, Q.C., and *Bernard Caulfield* for the plaintiff.

M. J. Morris, Q.C., and *L. B. Stephen* for the defendants.

PAULL, J.: In this case junior counsel on behalf of the plaintiff has made application asking me to exercise my discretion under r. 28 of the Supreme Court Costs Rules, 1959 (which are contained in the Rules of the Supreme Court (No. 3), 1959, S.I. 1959 No. 1958, Sch. 2). Rule 28 of those rules deals with costs payable to one party by another, or out of a fund (1). Paragraph (2) of r. 28 says this:

> " Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."

As I see it, para. (2) does not make any difference to the rule which was enforced before these Rules of 1959 came into force (2), namely, that ordinarily, taxation is party and party taxation, and the basis of the taxation under this rule on a party and party basis seems to me to be the same as it was before these rules came into effect.

Then, para. (3) of r. 28 says:

> " The court in awarding costs to which this rule applies may in any case in which it thinks fit to do so order or direct that the costs shall be taxed on the common fund basis."

To me, that is a new basis for taxation, and para. (4) of r. 28 defines that basis as follows:

> " On a taxation on the common fund basis, being a more generous basis than that provided for by para. (2) of this rule, there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and para. (2) of this rule shall not apply; and accordingly in all cases where costs are to be taxed on the common fund basis the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested shall be applied, whether or not the costs are in fact to be so paid."

A query which arises under para. (4) of r. 28 is whether that means that costs which are taxed on a common fund basis are taxed on what used to be known as solicitor and client basis, or on what used to be known as solicitor and own client basis. As far as I can see and understand the matter, it seems to me that that rule lays down that if costs are taxed on a common fund basis, they should be taxed on the same basis as costs were taxed before the rule came into force if the order made was that costs should be taxed on a solicitor and client basis. Although there is talk of common fund, and although submission has been made that it may be that the use of those words would entail taxation on a solicitor and own client basis, I do not so read the rules. I cannot govern the taxing master, but I think that I ought to indicate that in my judgment, under para. (4) of r. 28, taxation on the common fund basis is really the same as taxation on the old solicitor and client basis. If I am wrong about that, counsel for the plaintiff has given me an undertaking on behalf of his solicitor that in any event he will not try to enforce costs other than on solicitor and client basis, and on that undertaking I am going to make the order. I think that this case is the sort of case where I ought to exercise my discretion. It is a case of an infant who has been extremely seriously injured. In the case of an infant, it is necessary for him to get somebody to act as next friend, and in this case it is the infant's father who is acting as next friend. The infant's father did not meet with the injury, but he is responsible for the costs. He is responsible to the other side if the case is lost, and if it is won he is responsible for any difference between what can be recovered from the other side and what the solicitor is entitled to. I think, in those circumstances, it is right and proper that the father should not be put to the expense of having to pay all the difference between party and party and solicitor and own client costs. I think it is fair and reasonable that I should grant costs to be paid on the common fund basis on the understanding that this in fact amounts to no more than solicitor and client basis.

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(1) By para. (1) of r. 28, r. 28 applies to " costs which by or under these rules or any order or direction of the court are to be paid to a party to any proceedings either by another party to those proceedings or out of any fund (other than a fund which the party to whom the costs are to be paid holds as trustee or personal representative)."

(2) The Rules of the Supreme Court (No. 3), 1959, came into force on Jan. 1, 1960.

Order accordingly.

Solicitors: *Barlow, Lyde & Gilbert* (for the plaintiff); *Neil Maclean & Co.* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

R. *v.* CASLIN.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Streatfeild and Ashworth, JJ.), December 5, 6, 1960.]

Criminal Law—Appeal—Substitution of verdict—False pretences—Verdict of obtaining money by false pretences substituted for verdict of larceny by a trick —Criminal Appeal Act, 1907 (7 *Edw.* 7 *c.* 23), *s.* 5 (2)*—Larceny Act,* 1916 (6 *&* 7 *Geo.* 5 *c.* 50), *s.* 44 (3), (4).

The appellant, a club hostess, invited an American army sergeant into certain premises with the offer of "a good time" for the sum of £2 10s., which sum he thought was for her services as a prostitute. She took him to a locked door with a Yale lock and asked for 10s., which he took to be key money for a bedroom beyond; he gave her a £1 note and got no change. She then took him downstairs where the business of the club was carried on. The appellant ordered drinks and the £1 was put on the table and taken away by a barmaid. After the sergeant had paid for a series of drinks which the appellant consumed, she asked him for the £2 10s.; he gave her £3, because he had no change, and this was taken by the waitress. Still later, she asked him for £1 10s. for the use of the room; he put £1 10s. on the table which was taken by a barmaid. They then went up to the door with the Yale lock, but, on being told by another girl that the room was occupied, the appellant suggested the sergeant should go down the street to a place where she would meet him. He went there. She did not meet him. In fact there had not been a room beyond the door locked with the Yale lock to which the appellant had taken him. On appeal against the appellant's subsequent convictions of larceny by a trick of the £1, the £3 and the £1 10s., no reference having been made in the summing-up at the appellant's trial to the statutory power* to find the appellant guilty of obtaining money by false pretences, and the jury not having been addressed by counsel or directed as to that offence,

Held: on the facts the sergeant must have intended to part with the property in each sum, as each was an advance payment, and accordingly the offences were not of larceny but of obtaining money by false pretences, there being sufficient false representation of existing fact, viz., that a room

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* See s. 44 (3) of the Larceny Act, 1916, which is printed at p. 249, letter D, post.

A was available, if not also of willingness for prostitution; under the proviso to s. 5 (2)* of the Criminal Appeal Act, 1907, the court would, in the circumstances of this case, substitute verdicts of guilty of obtaining money by false pretences, as the jury must have been satisfied of facts proving the appellant guilty of such offences.

B [As to the powers of the Court of Criminal Appeal to amend sentence or alter verdict, see 10 HALSBURY'S LAWS (3rd Edn.) 539, para. 990; and for cases on the subject, see 14 DIGEST (Repl.) 677, 678, *6921*, *6923*.

As to the essentials of obtaining by false pretences, see 10 HALSBURY'S LAWS (3rd Edn.) 824-826, paras. 1592, 1593; and for cases on the subject, see 14 DIGEST (Repl.) 102, *654*; 15 DIGEST (Repl.) 1162, *11,741-11,743*.

C For the Criminal Appeal Act, 1907, s. 5 (2), see 5 HALSBURY'S STATUTES (2nd Edn.) 930.

For the Larceny Act, 1916, s. 44, see 5 HALSBURY'S STATUTES (2nd Edn.) 1039.]

Case referred to:

R. v. *Russell*, (1944), 29 Cr. App. Rep. 165; 14 Digest (Repl.) 670, *6786*.

D **Appeal.**

The appellant, Judy Caslin, was convicted on Aug. 17, 1960, at the County of London Sessions before the chairman and a jury on three counts of larceny. She was sentenced to six months' imprisonment on each count to run consecutively, making eighteen months' imprisonment in all. She appealed against conviction and sentence, and was granted bail by BUCKLEY, J., on Aug. 25, 1960, E which was renewed and extended by the Court of Criminal Appeal (LORD PARKER, C.J., STREATFEILD and NIELD, JJ.) on Nov. 22, 1960, when leave to appeal was granted.

The main grounds of appeal were (i) that the offence of larceny had not been established; (ii) that the chairman failed to direct the jury as to the difference between larceny and fraud; and (iii) that the sentence was harsh and excessive.

F The facts appear in the judgment of the court. The authorities and cases enumerated below were cited in argument in addition to those mentioned in the judgment†.

W. R. Rees-Davies for the appellant.

W. M. Howard for the Crown.

G **LORD PARKER, C.J.**, gave the following judgment of the court: This appellant was convicted at the County of London Sessions of three offences of larceny and was sentenced to six months' imprisonment on each count consecutive, that is to say, eighteen months in all. She has now appealed to this court against her conviction and against her sentence by leave of the court.

The short facts are these: On Aug. 3, 1960, a sergeant of the American army, H who was on leave in London, was walking along a passageway in Soho at about ten o'clock in the evening. The appellant was standing in a doorway of certain premises, and she spoke to him. According to his evidence, she asked if he was looking for a girl and offered to show him a good time. She invited him into the premises and, according to the sergeant, led him to understand that she was offering herself to him for prostitution for the sum of £2 10s. According to him, I she took him along a passage to a locked door and asked him for 10s., which he understood was key money for a bedroom. He had not got a 10s. note and he gave her a £1 note. She, however, then took him down to the basement where the business of a so-called club was carried on. There were other girls present and a bar, and the appellant ordered drinks. The £1 was put on the table and was taken away by the barmaid. A number of further drinks was ordered—soft drinks which the sergeant did not want—but the girl, getting a commission on them, ordered up to nine, I think, at a cost of between £1 and £1 10s. for two. Finally, she asked him for the £2 10s. He had not the change and he gave her £3, which was put on the table, and later taken by the waitress. Still later, and before they left the basement, the appellant asked him for £1 10s. for the room. Again he put £1 10s. on the table, and this also was taken by the barmaid. They then left the basement, went upstairs and came to a door with a Yale lock. Another girl who was there said that there was a regular customer in there. The appellant said: " That will take rather a long time ", and suggested that he should go round the corner down the street where she would later meet him. He went there, she did not turn up, and he spoke to the police. It is unnecessary to go on and deal with what happened after that, save this, that the police officers gave evidence that they went and examined the door with the Yale lock and there was no bedroom there at all.

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* Subsection (2) is printed at p. 249, letter H, post.

† I.e., ARCHBOLD, CRIMINAL PLEADING EVIDENCE AND PRACTICE (34th Edn.), paras. 912, 1939; RUSSELL ON CRIME (11th Edn.), Vol. 2, pp. 1049, 1059-1062, 1336, 1343 and 1346; *R.* v. *Bates & Pugh*, (1848), 3 Cox, C.C. 201; *R.* v. *Dent*, [1955] 2 All E.R. 806.

The appellant's evidence was that it was the sergeant who came up to her and said that he was looking for a nice girl, and that she suggested that he should go downstairs where there was a club and asked for 10s. as an entrance fee into the club. She said that down in the basement he never gave her £3 at all, but he only paid for the drinks, and that she never asked him for £1 10s. for a bedroom, and that that just did not occur.

The chairman in summing-up put the matter in this way:

> " The basis of the case for the Crown here is that as this woman never intended to prostitute her body—and, of course, that is a matter for you to decide upon the evidence—when that arrangement was made as between Mr. Pritzl and herself it was made dishonestly because she never intended to fulfil any obligation of any sort or description; it was because of that arrangement that the sergeant parted with his money, and had he known in fact what the truth was he would never have parted with it at all . . ."

Just before the jury retired he said:

> " Has the evidence satisfied you that this woman is a thief, and that in fact she was defrauding—because that is what it amounts to—this young man of his money, pretending that she was going to have intercourse with him, and inducing him in that way to part with those sums of money, knowing perfectly well she never had any intention of the sort in her mind at all ? If you think that is the truth of this matter you should convict her. If there is any reasonable doubt about it she is entitled to be acquitted."

The jury, after an absence of only twelve minutes, returned and found the appellant guilty on three counts pertaining to the three sums of money handed over to her, first the £1, then the £3 and finally the £1 10s. It is perfectly clear, therefore, that on the issues of fact the jury unhesitatingly accepted the evidence of the sergeant and rejected that of the appellant. Further, it is quite clear that they must have come to the conclusion that throughout the appellant was acting fraudulently.

The first question which arises is whether she was properly charged with larceny by a trick or whether this was a case of obtaining money by false pretences. The distinction between the two is a very fine one and, as we point out in a moment, the distinction is often largely academic. The authorities on the subject are numerous, and the result in each case must depend on the exact facts and the true inferences to be drawn therefrom. The guiding test in each case is whether the person whose money is obtained meant to part with the property in the money, in which case it would—if the representation was false and as to an existing fact—be false pretences, or whether he meant only to part with possession, in which case, whether the false representation was as to an existing fact or as to the future, it would be a case of larceny by a trick.

It is urged here that when each sum of money was handed over the sergeant only intended to part with possession of the money; that it was only handed over as the result of a promise to render services; and that the property was only to pass on the performance of that promise. We have come to the conclusion that on the facts of this case the sergeant must have intended to pass not merely the possession but also the property in each sum. They were advance payments of money, the property in which passed not conditionally on the services being rendered, but in the hope that they would be rendered. It is to be observed that in his deposition the sergeant had said in regard to the first payment, that is, the £1, that the appellant told him that he would get it back afterwards, and it may be, therefore, that that resulted in the indictment being framed charging larceny by a trick. At the trial, however, such evidence was not given, and the court has come to the conclusion that in regard to that payment as well as the subsequent ones, it was not a case of larceny by a trick.

That the distinction, however, between the two offences is often academic can be seen from s. 44 of the Larceny Act, 1916. Section 44 (3) provides:

> "If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly."

Section 44 (4) deals with the converse position. It provides:

> "If on the trial of any indictment for obtaining any chattel, money, or valuable security by false pretences it is proved that the defendant stole the property in question, he shall not by reason thereof be entitled to be acquitted of obtaining such property by false pretences."

No doubt the distinction between the two subsections is because false pretences is a misdemeanour and larceny by a trick is a felony. Accordingly, when charged with false pretences which turns out to be a case of felony, larceny, the conviction for false pretences, the misdemeanour can stand. Conversely, however, if the charge is one of the felony, larceny by a trick, and it turns out to be the misdemeanour of false pretences, conviction for the felony cannot stand, but the jury can find the prisoner guilty of the misdemeanour. No doubt if at the trial for larceny it appears to be a case of false pretences, the judge will give the jury a proper direction in regard to what constitutes false pretences and, indeed, should allow counsel for the defence to address the jury on that basis: see, in that connexion, *R.* v. *Russell* (1). That was not done in the present case, but the powers of this court depend on s. 5 (2) of the Criminal Appeal Act, 1907. That subsection provides:

> "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

In other words, the jurisdiction of this court does not depend on whether the judge did in fact sum up on the alternative basis, but on whether the jury must have been satisfied of facts which proved him guilty of that other offence. No doubt, therefore, this is a jurisdiction which must be exercised with great caution, and the fact that the jury never had a proper direction as to the alternative A offence, in this case false pretences, is a very relevant consideration.

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(1) (1944), 29 Cr. App. Rep. 165.

In the present case, however, the jury unhesitatingly accepted the sergeant's evidence of the facts. In the opinion of this court the only possible inference from those facts was that at the very entrance to those premises the appellant represented that she was a prostitute; that she was ready and willing there and then to prostitute her body; and that she had available the necessary facilities, B namely, a bedroom for that purpose. Those representations were clearly false and, as the jury have held by their verdict, were made fraudulently. Those representations, moreover, persisted at the time when each of the three payments was made and, indeed, induced the sergeant to make them.

It has been contended that those representations were only with regard to the future and could not, therefore, amount to false pretences. The court, however, C cannot accept that argument. No doubt in precise point of time the representation that she would prostitute her body was as to the future, in that the services promised would be performed after the payment, but it is impossible to divide the transaction up in that way. In any event, however, the representation in the present case that a room was available was a representation as to an existing fact. Counsel for the appellant, however, further urged that in regard to the D first count, the £1 was paid to the sergeant's knowledge and with his approval used to pay for the first round of drinks. It is by no means clear from the transcript to which we have been referred whether that is right or whether the first round and the subsequent rounds of drinks were all paid for separately. In any event it seems to this court that by then the offence charged in count 1 was complete (2). Counsel for the appellant further urged that no offences were E committed in that all the payments were placed on the table and were handed over to the barmaid. We cannot accede to that argument. The payments were intended by the sergeant for the appellant, and she obtained them. The fact that the barmaid eventually received them under some internal arrangement of the so-called club cannot affect the matter.

Accordingly, this court, while mindful of the caution with which the juris- F diction under s. 5 (2) of the Criminal Appeal Act, 1907, should be exercised, is of the opinion that verdicts of guilty of false pretences should be substituted. The court is clear that the jury must have been satisfied of the facts which proved her guilty of those offences of false pretences.

As regards the appeal against sentence, the court, as already announced, has decided to make the sentences of six months on each count concurrent and not G consecutive. In doing so it must not be thought that the consecutive sentences when passed were in any way wrong in principle. A severe sentence, intended to act as a deterrent for others, was clearly called for. The prisoner has, however, been on bail since Aug. 25, 1960. She has met and married another American soldier who knows all about these offences, who is standing by her and is making a home for her in this country. She must, of course, be punished, but the court H feels that in the light of these fresh circumstances it would be right to reduce the total sentence by making the sentences concurrent sentences.

Appeal dismissed. Sentence varied.

Solicitors: *Miles, Russell & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(2) Count 1 read: ". . . that on Aug. 3, 1960, you [Judy Caslin] stole the sum of £1, the property of Gerald Michael Pritzl."

JACKS *v.* WILKIE AND JACKS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Cairns, J.), December 14, 16, 1960.]

Divorce—Damages—Petition for damages only for adultery—Second petition filed before decree nisi for divorce was made absolute—Whether suit for damages only was a "matrimonial cause"—Whether second petition should be struck out as infringing Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (2)—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 49), *s.* 225.

On July 28, 1959, the husband was granted a decree nisi of divorce on the grounds of the wife's adultery with the co-respondent, who was ordered to pay the costs of the suit which was undefended. There was no prayer in the petition for damages. On Mar. 8, 1960, the day before the decree was made absolute, the husband filed a petition claiming damages against the co-respondent. On July 14, 1960, the registrar struck out this petition on the ground that it infringed r. 3 (2) of the Matrimonial Causes Rules, 1957*. On appeal,

Held: (i) a suit for damages for adultery was a cause within the meaning of s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, and a matrimonial cause within the Matrimonial Causes Act, 1950, and the Matrimonial Causes Rules, 1957, were applicable; and the fact that such a suit had been held (in *Kent* v. *Atkinson*, [1923] All E.R. Rep. 28) to be not merely ancillary to a claim for divorce did not prevent the suit for damages from being a matrimonial cause.

(ii) accordingly the petition had been rightly struck out under r. 3 (2), as at the date when it was filed the original petition had not been disposed of by final order.

[As to what is a matrimonial cause, see 12 HALSBURY'S LAWS (3rd Edn.) 213, para. 391, note (g); and as to the husband's right to claim damages, see ibid., 283, para. 548; and for cases on the subject, see 27 DIGEST (Repl.) 331, 332, *2744*, *2745*, *2756*.

As to the effect of filing a petition, see 12 HALSBURY'S LAWS (3rd Edn.) 314, para. 630 and SUPPLEMENT.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 225, see 5 HALSBURY'S STATUTES (2nd Edn.) 397.

For the Matrimonial Causes Act, 1950, s. 30, see 29 HALSBURY'S STATUTES (2nd Edn.) 416.

For the Matrimonial Causes Rules, 1957, r. 3, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 218.]

Cases referred to:

Demetriou v. *Demetriou*, [1950] 2 All E.R. 49; [1950] P. 261; 27 Digest (Repl.) 474, *4110*.

Har-Shefi v. *Har-Shefi*, [1953] 1 All E.R. 783; [1953] P. 161; [1953] 2 W.L.R. 690; 3rd Digest Supp.

Hopkins v. *Hopkins & Castle*, (1933), 103 L.J.P. 33; 150 L.T. 279; 27 Digest (Repl.) 332, *2760*.

Kent v. *Atkinson*, [1923] All E.R. Rep. 28; [1923] P. 142; 92 L.J.P. 54; 129 L.T. 473; 27 Digest (Repl.) 331, *2756*.

O'Neill v. *O'Neill & Piggott*, [1949] 2 All E.R. 649; 27 Digest (Repl.) 593, *5548*.

Summons adjourned into court.

This was an appeal by way of summons by the husband, William Henry Jacks, against an order of Mr. Registrar FORBES dated July 14, 1960, striking out his petition for damages only against the co-respondent, Harry Wilkie, on the ground of the latter's adultery with the wife, Kathleen Gladys Jacks.

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* Set out at p. 252, letter H, post.

By petition dated Oct. 11, 1958, the husband petitioned for the dissolution of his marriage with the wife solemnised on Dec. 16, 1948, on the ground of her adultery with the co-respondent. He also claimed the costs of the suit but not damages. This petition came before His Honour Judge Gage, sitting as a special commissioner, on July 28, 1959, and was undefended, the commissioner granting the husband a decree nisi having found that the wife had committed adultery with the co-respondent and also that the co-respondent had committed adultery with the wife. The husband was also awarded costs, to be paid by the co-respondent. On Mar. 8, 1960, the husband filed his present petition claiming damages only against the co-respondent, and, on the next day, Mar. 9, 1960, the decree nisi pronounced on July 28, 1959, was made absolute. On June 28, 1960, the co-respondent took out a summons to strike out the petition of Mar. 8, 1960. The matter came before Mr. Registrar Forbes on July 14, 1960, when he struck out this petition on the ground that it infringed r. 3 (2) of the Matrimonial Causes Rules, 1957*, in that there was, at the date when the petition for damages was filed, already on the court record a petition dated Oct. 11, 1958, brought by the same husband against the same wife and co-respondent on which said petition a decree nisi had been pronounced on July 28, 1959, and which petition had not been disposed of by final order. On July 19, 1960, the husband took out a summons against the co-respondent to have the order of Mr. Registrar Forbes rescinded. This summons came before Stevenson, J., in chambers, on July 26, 1960, when his Lordship adjourned it for argument in open court.

On Dec. 14, 1960, the summons came before Cairns, J., on which date His Lordship reserved judgment.

E. D. Smith for the husband.

W. R. K. Merrylees for the co-respondent.

Cur. adv. vult.

Dec. 16. **CAIRNS, J.**, read the following judgment: This is an appeal from an order of Mr. Registrar Forbes striking out a petition for damages only. Ths husband, William Henry Jacks, in an earlier suit petitioned for divorce on the ground of the adultery of his wife, Kathleen Gladys Jacks, with Harry Wilkie, the co-respondent. I shall refer to the parties as the husband, the wife and the co-respondent. In the earlier suit the husband claimed costs but not damages against the co-respondent. The suit was undefended and a decree nisi was pronounced on July 28, 1959, with costs against the co-respondent. On Mar. 8, 1960, the day before the decree was made absolute, the husband filed a petition claiming damages only against the co-respondent. On July 14, 1960, the registrar struck out that petition on the ground that it infringed r. 3 (2) of the Matrimonial Causes Rules, 1957, which provides that:

> " A petition shall not be filed if there is before the court another petition by the same petitioner which has not been dismissed or otherwise disposed of by a final order."

Counsel for the husband puts forward three contentions: (i) that, as is indicated by r. 3 (1) which reads " Every matrimonial cause shall be commenced by filing a petition addressed to the High Court ", r. 3 is dealing only with matrimonial causes, and a claim for damages only is not a matrimonial cause; (ii) that the word " petition " in r. 3 (2) must be given a limited meaning (since otherwise it would prevent a petitioner from having on the file at the same time a petition for divorce and, for example, a petition for declaration of legitimacy) and is to be read as meaning a petition for relief in respect of the petitioner's marriage; (iii) that the decree nisi is a final order disposing of the divorce petition.

I can deal shortly with this third point. Whether or not a decree nisi is in some sense a final order, it does not dispose of the petition; unless a petition is dismissed it is not disposed of until decree absolute.

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* Set out at letter H, supra.

The second point is also in my opinion free from difficulty if a suit for damages only can properly be regarded as a matrimonial cause. It may be right to say that some limitation must be imposed on the meaning of the word " petition " but I can see no good reason for construing it more narrowly than as " a petition in a matrimonial cause ".

The really difficult point is the first one. It does appear to me that r. 3 is dealing only with matrimonial causes, or perhaps I should say, having regard to sub-r. (5), with matrimonial causes and matters (1). Counsel for the husband has built up a formidable argument to the effect that a claim for damages is not a matrimonial cause or matter. That argument is in two parts, one based on statute and the other on the cases.

The Matrimonial Causes Rules were made under the Supreme Court of Judicature (Consolidation) Act, 1925 (hereinafter referred to as the Act of 1925), and s. 225 of that Act defines a " matrimonial cause " as " any action for divorce, nullity of marriage, judicial separation, jactitation of marriage or restitution of conjugal rights ". If it be said, as counsel for the co-respondent was inclined to say, that a suit for damages alone is a " matrimonial matter ", the answer is that the definitions of " cause ", " plaintiff " and " defendant " in the same section, read together, show plainly that such a suit is a " cause " and therefore it cannot be a " matter ", because " matter " is defined as " every proceeding in court not in a cause ". Therefore, says counsel for the husband, a suit for damages alone is a cause but not a matrimonial cause.

Counsel for the co-respondent points out, on the other hand, that Part 8 of the Act of 1925 is headed " Matrimonial Causes and Matters " and that s. 189, the section dealing with claims for damages whether on a petition for divorce or not, is in Part 8. He argues that the Matrimonial Causes Rules are made under s. 99 (1) (j) of the same Act (2) giving power to make rules with respect to matters which were then regulated by rules and regulations in force with respect to practice and procedure in matrimonial causes and matters, which must include everything in Part 8. A weakness of this argument is that Part 8 also includes legitimacy declarations (see s. 188) and yet it was thought necessary to refer to these specifically in s. 99 (1) (j).

If counsel for the husband is right there are no rules of court at all relating to claims for damages alone in respect of adultery. This is so improbable a situation that I should not accept it as the actual one unless driven to it, and in my opinion there are cogent reasons for saying that such a claim for damages is a matrimonial cause. The long title of the Matrimonial Causes Act, 1950, begins:

> "An Act to consolidate certain enactments relating to matrimonial causes in the High Court in England and to declarations of legitimacy and of validity of marriage and of British nationality . . ."

The remainder of the title is irrelevant. I note that in this title declarations as to legitimacy and validity of marriage are specifically mentioned but there are no words which would cover actions for damages unless they are within the expression " matrimonial causes ". Yet it is s. 30 of this Act, replacing s. 189 of the Act of 1925, which now gives the right to claim damages for adultery. Another reason why I consider that a claim for damages is a matrimonial cause is this: if the wife was alive she had (3), under s. 33 of the Matrimonial Causes Act, 1857, to be joined as a respondent and although this provision is not now contained in a statute (and it would be begging the question to say that it is

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(1) Rule 3 (5) reads: " Except where these rules otherwise provide, every other application in a matrimonial cause or matter—(a) shall be made to a registrar, and (b) shall be made by summons."

(2) See 18 HALSBURY'S STATUTES (2nd Edn.) 511, 512.

(3) Matrimonial Causes Act, 1857, s. 33, was repealed by Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 (1) and Sch. 6.

A contained in r. 9 of the Matrimonial Causes Rules, 1957) it cannot be supposed that if this kind of claim was a matrimonial cause from 1857 onwards it has since ceased to be. Again, any damages recovered may clearly be dealt with under s. 30 (3) of the Matrimonial Causes Act, 1950, and settled on the children of the marriage, if any, or as provision for the maintenance of the wife.

These various grounds tend, in my opinion, to support the view that a claim B for damages is a matrimonial cause. I acknowledge the difficulty of the restricted definition in the Act of 1925, but as against that can be set the provisions of the same Act on which counsel for the co-respondent relies. Moreover, as he pointed out, the definition in the Act is only conclusive when construing the Act itself—and, I may add, not even then if the context otherwise requires.

In my opinion, on the construction of the statutes and rules, a suit for damages C for adultery is a matrimonial cause. I must, however, examine the cases referred to by counsel for the husband and see whether this view is contrary to authority.

In *Kent* v. *Atkinson* (4), HILL, J., held that a petition for damages was independent of, and not ancillary to, a petition for divorce and could be brought notwithstanding the death of the wife. He suggested, obiter (5), that the action would lie after the decree absolute. This does not, in my opinion, prevent the suit D from being a matrimonial cause.

In *Hopkins* v. *Hopkins & Castle* (6), LANGTON, J., heard an action for damages which had been instituted after decree nisi. The case is reported on the question of the extent to which defences available in the divorce proceedings and not then raised can be set up in answer to a claim for damages. Counsel for the husband is entitled to point out that the fact that the petition was filed after decree nisi E was not held to be a bar to the proceedings, and although no rule corresponding to the present r. 3 (2) was then in force there was a long-established practice to the same effect (see *Demetriou* v. *Demetriou* (7)). However, as the point was not taken the case is, in my view, no real authority on the matter.

In *O'Neill* v. *O'Neill & Piggott* (8), it was held by the Court of Appeal that a co-respondent could appeal against an award of damages after decree absolute F notwithstanding his failure to appeal against the decree nisi (see the Act of 1925, s. 31 (1) (e)). This further emphasises, what had been held in *Kent* v. *Atkinson* (4), that the claim for damages is not merely ancillary to the claim for dissolution of marriage, but it does not prevent the former from being a matrimonial cause.

Finally, in *Har-Shefi* v. *Har-Shefi* (9), the Court of Appeal held that the Divorce Division had jurisdiction to entertain an action for a declaration that a G marriage was invalid. It was argued here that such a proceeding was not included in any definition of a matrimonial cause or matter and, therefore, could not be within the Matrimonial Causes Rules and that there was no reason why a claim to damages should not be in the same position. I can see no analogy between the two types of case. I express no opinion whether an action for such a declaration is a matrimonial cause or matter or is not, but if it is not it is because it is not H mentioned in the Matrimonial Causes Act, 1950, while an action for damages is.

I therefore conclude that the registrar was right to strike out this petition. This does not necessarily mean that after decree nisi the husband cannot set up a claim for damages. He may be able, by leave, to amend his petition under r. 15 in order to do so. On grounds of fairness it seems highly desirable that he should have to get leave to make such a claim at so late a stage, because the co-respondent I might have defended the original suit if a claim for damages had then been made. If HILL, J., was right in the view he expressed obiter in *Kent* v. *Atkinson* (5) the claim may still lie after decree absolute; but it may be that it is then too late because the petitioner is no longer a " husband ". The courts have not in modern times viewed with favour separate claims for damages for adultery (see per LANGTON, J., in *Hopkins* v. *Hopkins & Castle* (10)) and it need not be a matter for any regret if a husband who does not claim damages in his petition for divorce finds himself without a right to make such a claim thereafter.

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(4) [1923] All E.R. Rep. 28; [1923] P. 142.

(5) [1923] All E.R. Rep. at p. 30; [1923] P. at p. 148.

(6) (1933), 103 L.J.P. 33.

(7) [1950] 2 All E.R. 49; [1950] P. 261.

(8) [1949] 2 All E.R. 649.

(9) [1953] 1 All E.R. 783; [1953] P. 161.

In the present case I am of opinion that the registrar was right in striking out the petition and the appeal must, therefore, be dismissed.

Order accordingly.

Solicitors: *Johnson, Jecks & Landons*, agents for *Landons*, Brentwood (for the husband); *Clare & Clare* (for the co-respondent).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

ROSS SMITH (otherwise RADFORD) *v.* ROSS SMITH.

[COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), November 18, 21, 22, December 20, 1960.]

Nullity—Jurisdiction—Celebration of marriage in England—Wife, petitioner, domiciled and resident in England at time of marriage and resident in England when petition presented—Husband neither domiciled nor resident in England when petition presented—Whether English court had jurisdiction to entertain wife's petition on ground of husband's wilful refusal or incapacity to consummate the marriage.

The parties were married in England in 1955. The husband was of Scottish domicil and he was not resident in England when the wife presented a petition for a decree of nullity on the ground of his incapacity, or, alternatively, his wilful refusal to consummate the marriage.

Held: the marriage having been celebrated in England, the High Court had jurisdiction to pronounce on its validity and, for the purpose of doing so, to inquire into both the grounds on which its validity was impugned.

Ratio decidendi of LORD MACDERMOTT, C.J., in *Addison (otherwise McAllister)* v. *Addison* ([1955] N.I. 1) adopted.

Ramsay-Fairfax (otherwise Scott-Gibson) v. *Ramsay-Fairfax* ([1955] 3 All E.R. 695) followed.

Casey v. *Casey* ([1949] 2 All E.R. 110) not followed.

Hill (otherwise Petchey) v. *Hill* ([1959] 3 All E.R. 754) criticised.

Decision of KARMINSKI, J. ([1960] 3 All E.R. 70) reversed.

[As to the jurisdiction of English courts in cases of voidable marriages celebrated in England, see 7 HALSBURY'S LAWS (3rd Edn.) 109, para. 195, and SUPPLEMENT; and for cases on the subject, see 11 DIGEST (Repl.) 478-480, *1065-1070, 1076-1078.*]

Cases referred to:

Addison (otherwise McAllister) v. *Addison*, [1955] N.I. 1; 3rd Digest Supp.

Casey v. *Casey*, [1949] 2 All E.R. 110; [1949] P. 420; [1949] L.J.R. 1642; 11 Digest (Repl.) 479, *1076*.

Cooper v. *Crane*, [1891] P. 369; 61 L.J.P. 35; 27 Digest (Repl.) 36, *137*.

Dalrymple v. *Dalrymple*, (1811), 2 Hag. Con. 54; 161 E.R. 665; *on appeal*, (1814), 2 Hag. Con. 137, n.; 22 Digest (Repl.) 618, *7112*.

De Reneville v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, *1075*.

Easterbrook v. *Easterbrook (otherwise Jervis)*, [1944] 1 All E.R. 90; [1944] P. 10; 113 L.J.P. 17; 170 L.T. 26; 11 Digest (Repl.) 480, *1077*.

Galene v. *Galene (otherwise Galice)*, [1939] 2 All E.R. 148; [1939] P. 237; 108 L.J.P. 82; 11 Digest (Repl.) 485, *1104*.

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(10) (1933), 103 L.J.P. at p. 34.

Hill (*otherwise Petchey*) v. *Hill*, [1959] 3 All E.R. 754; [1960] P. 130; [1959] 3 W.L.R. 828; 3rd Digest Supp. A

Hussein (*otherwise Blitz*) v. *Hussein*, [1938] 2 All E.R. 344; [1938] P. 159; 107 L.J.P. 105; 27 Digest (Repl.) 38, *153*.

Hutter v. *Hutter* (*otherwise Perry*), [1944] 2 All E.R. 368; [1944] P. 95; 113 L.J.P. 78; 171 L.T. 241; 11 Digest (Repl.) 480, *1078*.

Inverclyde (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; 11 Digest (Repl.) 478, *1070*. B

Linke (*otherwise Van Aerde*) v. *Van Aerde*, (1894), 10 T.L.R. 426; 11 Digest (Repl.) 478, *1066*.

Ramsay-Fairfax (*otherwise Scott-Gibson*) v. *Ramsay-Fairfax*, [1955] 3 All E.R. 695; [1956] P. 126; [1955] 3 W.L.R. 849; 3rd Digest Supp. C

Salvesen (*or Von Lorang*) v. *Austrian Property Administrator*, [1927] All E.R. Rep. 78; [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; 11 Digest (Repl.) 478, *1069*.

Scrimshire v. *Scrimshire*, (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, *955*.

Simonin v. *Mallac*, (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 164 E.R. 917; 11 Digest (Repl.) 478, *1065*. D

Sottomayor v. *De Barros*, (1877), 2 P.D. 81; *on appeal*, C.A., (1877), 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 11 Digest (Repl.) 460, *945*.

Young v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; *affd.*, H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 30 Digest (Repl.) 225, *691*. E

Appeal.

The wife, who had presented a petition for a decree of nullity on the ground of the husband's incapacity or, alternatively, his wilful refusal to consummate the marriage celebrated in England in 1955, appealed against a judgment of KARMINSKI, J., dated June 24, 1960, and reported [1960] 3 All E.R. 70, on the trial of a preliminary issue to determine whether the court had jurisdiction to entertain the suit. F

The wife was domiciled and resident in England at the time of the marriage. At the time when the petition was presented the wife was living in England and the husband was in Kuwait. KARMINSKI, J., found that the husband's domicil was Scottish and held that the court had no jurisdiction to entertain the suit although the ceremony of marriage had taken place in England. G

John Latey, Q.C., and *S. K. D'A. de Ferrars* for the wife.
F. S. Laskey for the husband.

Cur. adv. vult.

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Dec. 20. **WILLMER, L.J.:** First, I should like to say how sorry we are that ORMEROD, L.J., is unable to be with us today, but the judgment which I am about to read in this case is the judgment of the court.

The appellant (who, for convenience, is referred to hereafter as the wife) seeks a decree of nullity against the respondent husband on the ground of his incapacity, or, alternatively, his wilful refusal to consummate the marriage. I The question which has arisen is whether the High Court has jurisdiction to entertain the suit, having regard to the fact that the husband is domiciled in Scotland and has not at any material time been resident in England. For the reasons given in *De Reneville* v. *De Reneville* (1) the domicil of the wife must be regarded as the same as that of the husband unless and until the marriage is annulled.

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(1) [1948] 1 All E.R. 56; [1948] P. 100.

In 1927 it was decided by the House of Lords in *Salvesen* (*or Von Lorang*) v. *Austrian Property Administrator* (2) that the court of the domicil has in all cases jurisdiction to pronounce a decree of nullity. But in that case Viscount Haldane observed (3):

> "Whether there cannot be jurisdiction which is not that of the domicil in restricted instances to entertain a suit of nullity is a question we have not before us for determination."

Commenting on this observation in *De Reneville* v. *De Reneville* (4), Lord Greene, M.R., said:

> "This doubtful question remains to be answered by the House of Lords, and there is no need for us to attempt to answer it for the purposes of this appeal."

Since then it has been decided by this court in *Ramsay-Fairfax* (*otherwise Scott-Gibson*) v. *Ramsay-Fairfax* (5) that jurisdiction to pronounce a decree of nullity exists where the parties are resident, although not domiciled, in England, and that for this purpose no distinction is to be drawn between marriages which are void ab initio and those which are merely voidable. The further question which is now raised by the present appeal is whether jurisdiction exists, in a case where the parties are not domiciled, and the respondent is not resident, in England, on the ground that the marriage was celebrated in England, the marriage in this case having taken place at Newcastle-on-Tyne on July 8, 1955.

The appeal is against the decision of Karminski, J., who held that he had no jurisdiction to entertain the suit. He reached this conclusion because he held himself bound by the decision of this court in *Casey* v. *Casey* (6), though it is to be remarked that in that case the petition was on the ground of wilful refusal only, and no question of incapacity arose. The learned judge considered, but declined to follow, the decision in *Hill* (*otherwise Petchey*) v. *Hill* (7), where Collingwood, J., distinguishing *Casey* v. *Casey* (6), held that he had jurisdiction to entertain a suit for nullity on the ground of incapacity where the marriage had been celebrated in England, notwithstanding that the parties were domiciled, and the respondent husband was resident, in Scotland. Karminski, J., also considered, but held that he was not free to follow, the decision in *Addison* (*otherwise McAllister*) v. *Addison* (8), where Lord MacDermott, C.J., in a case indistinguishable on its facts from the present case, after a full review of all the English authorities, including *Casey* v. *Casey* (6), decided that the Court of Northern Ireland did have jurisdiction to entertain the suit.

The decision in *Casey* v. *Casey* (6) has not by any means been received with universal favour and approval by text-book writers and commentators. But, being a decision of this court, it is clearly binding on us, unless it can be shown that its ratio decidendi is so inconsistent with other authority by which we are bound that we are free to consider the matter afresh and decide which of the conflicting decisions we ought to follow. In considering *Casey* v. *Casey* (6), however, we are met by the difficulty that the members of this court who heard that case did not speak with one voice. In that case, which arose out of a wife's petition for nullity on the ground of wilful refusal, the respondent husband was domiciled and ordinarily resident in one of the provinces of Canada, and the question was whether the fact of the marriage having been celebrated in England was sufficient to confer jurisdiction. All the members of the court agreed that it was not, but their reasons for this conclusion differed. Bucknill, L.J., with whose judgment Cohen, L.J., expressed his complete agreement, based his decision partly on the balance of hardship to the parties, but mainly on A the analogy of the rule that the court of the domicil of the husband was the sole court with jurisdiction to dissolve a valid marriage; and he thought it reasonable that a similar rule should be applied to a marriage which was merely voidable on the ground of wilful refusal to consummate it. The view of SOMERVELL, L.J., was that jurisdiction based on the place where the marriage was celebrated should be confined to cases where the validity of the ceremony B itself was attacked. He said (9):

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(2) [1927] All E.R. Rep. 78; [1927] A.C. 641.
(3) [1927] All E.R. Rep. at p. 82; [1927] A.C. at p. 654.
(4) [1948] 1 All E.R. at p. 58; [1948] P. at pp. 108, 109.
(5) [1955] 3 All E.R. 695; [1956] P. 126.
(6) [1949] 2 All E.R. 110; [1949] P. 420.
(7) [1959] 3 All E.R. 754; [1960] P. 130.
(8) [1955] N.I. 1.

> "The mere fact that the ceremony of marriage took place in a certain country does not seem to me a ground for founding jurisdiction in that country in cases where the matters alleged in the petition do not in any way dispute the validity of the ceremony as affecting a marriage." C

In expressing the view of the majority, BUCKNILL, L.J., was following and adopting the same reasoning as was followed by BATESON, J., in *Inverclyde (otherwise Tripp)* v. *Inverclyde* (10), namely, that, so far as jurisdiction is concerned, there is no distinction in principle between a petition to dissolve a valid marriage and a petition to annul a marriage which is merely voidable whether for incapacity or wilful refusal. The argument for the wife in the D present case is that this line of reasoning has now been expressly disapproved in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (11), where this court not only overruled *Inverclyde* v. *Inverclyde* (10), but held, approving the decision of PILCHER, J., in *Hutter* v. *Hutter (otherwise Perry)* (12), that, for the purposes of founding jurisdiction in nullity proceedings, no distinction is to be drawn between marriages which are void ab initio and those which are merely voidable. E It follows, so it is contended, that the main ground on which the majority in *Casey* v. *Casey* (13) based their decision is in conflict with the express decision of this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (11). As to the minority view expressed by SOMERVELL, L.J.—which is the view that KARMINSKI, J., was himself disposed to adopt in the present case—it is contended that this, being a minority view, is not binding on us. It is, moreover, attacked as being F unsupported by authority, unsound in principle, and impossible of application in practice. Counsel for the wife further relied, in support of his argument, on a dictum of DENNING, L.J., in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (14), where he said:

> "It may be that the courts of the domicil also have jurisdiction in these G nullity cases. So do the courts of the place where the marriage was celebrated."

The question which has arisen for decision in this case is one with a long history behind it. The jurisdiction of the High Court in relation to nullity proceedings is derived from that exercised by the ecclesiastical courts before the passing of the Matrimonial Causes Act, 1857. In this respect it differs from H the jurisdiction to dissolve marriages, which is wholly statutory. Section 22 of the Act of 1857 provided:

> "In all suits and proceedings, other than proceedings to dissolve any marriage, the said court [i.e., the new Court for Divorce and Matrimonial Causes] shall proceed and act and give relief on principles and rules which I in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief . . ."

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(9) [1949] 2 All E.R. at p. 117; [1949] P. at p. 433.

(10) [1931] P. 29.

(11) [1955] 3 All E.R. 695; [1956] P. 126.

(12) [1944] 2 All E.R. 368; [1944] P. 95.

(13) [1949] 2 All E.R. 110; [1949] P. 420.

(14) [1955] 3 All E.R. at p. 698; [1956] P. at p. 134, where the word "may" appears in place of "do".

A This section was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, but its substance was re-enacted by s. 32 of that Act, which provides:

> " . . . where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained." B

It is true that additional grounds, unknown to the ecclesiastical courts, are now available by statute for seeking a decree of nullity. But we do not think that this circumstance makes any difference from the point of view of jurisdiction; for, as was said by MORRIS, L.J., in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (15):

> " . . . those are merely additional grounds for the court to grant a decree of nullity if it is endowed with a jurisdiction to grant such a decree."

The ecclesiastical courts in practice assumed jurisdiction, in theory at least, only in cases where the party proceeded against was resident within the particular diocese, their powers in this respect being restricted by the Ecclesiastical Jurisdiction Act, 1531 (23 Hen. 8 c. 9), (16). No case has been cited to us in which any ecclesiastical court assumed jurisdiction on the mere ground that the marriage was celebrated within the jurisdiction of the diocese. On the other hand, there is authority for the proposition that they recognised that the court of the place of celebration provided a natural forum for adjudicating on the validity of a marriage. Thus in 1752, in *Scrimshire* v. *Scrimshire* (17), a restitution suit between parties who had contracted a marriage in France which was illegal by French law, SIR EDWARD SIMPSON said:

> " . . . I take it to be clear that both parties in the cause had obtained a forum in France, where the marriage contract was entered into; and by marrying there had subjected themselves to be punished by the laws of the country for a clandestine marriage; and had also subjected the validity of the contract to be tried by the laws of that country . . ."

F Again in 1811, in *Dalrymple* v. *Dalrymple* (18), another restitution suit, in which the husband was of Scottish origin and the marriage took place in Scotland, SIR WILLIAM SCOTT said:

> " I am not aware that the case so brought here is exposed to any serious disadvantage beyond that which it must unavoidably sustain in the inferior qualifications of the person, who has to decide upon it to the talents of the eminent men to whose judgment it would have been submitted in its more natural forum."

We think that it may be inferred that, had they not been restricted by the provisions of the Ecclesiastical Jurisdiction Act, 1531, and had facilities existed, such as are now available, for service out of the jurisdiction, the ecclesiastical courts would not have been slow to assume jurisdiction to pronounce on the validity of any marriage celebrated within the diocese.

What is of vital significance in relation to the question now under consideration is that the ecclesiastical courts drew no distinction, from the point of view of jurisdiction, between marriages void ab initio and those which were merely voidable. Jurisdiction was readily assumed in the case of voidable marriages, for instance, in cases of physical incapacity. Whatever the ground on which relief was claimed, the decree was always in the same form and pronounced the marriage esse et fuisse nullum. The decree of nullity as pronounced by the High Court today is substantially similar, and the same form is used whatever the ground for pronouncing the decree.

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(15) [1955] 3 All E.R. at p. 698; [1956] P. at p. 135.
(16) See 7 HALSBURY'S STATUTES (2nd Edn.) 185.
(17) (1752), 2 Hag. Con. at p. 411.
(18) (1811), 2 Hag. Con. at p. 59.

A Since the passing of the Matrimonial Causes Act, 1857, the court has assumed jurisdiction in nullity cases of various kinds, where no ground for asserting jurisdiction existed apart from the fact of the marriage having been celebrated in England. In *Simonin* v. *Mallac* (19), decided in 1860, the marriage was celebrated in England; the parties, who were domiciled and resident in France, came to this country to be married for the purpose of evading the requirements of French law with regard to parental consent. The question of the jurisdiction B of the English court was fully argued, and it was held by the full court that jurisdiction existed on the ground that the marriage had been celebrated in England. The marriage was regular in form and perfectly good by English law, but the court went on to consider whether it could be avoided having regard to the law of the domicil. As a matter of history, the decision was that English law was applicable, and not the law of the domicil, so that the marriage was C pronounced valid and the petition for nullity was dismissed. No doubt, the question, if it arose today, would be decided the other way, and to that extent the decision is of no weight. But, in so far as it was decided that the English court had jurisdiction, the decision has stood for a hundred years and, though frequently cited, has never been overruled or even questioned. It is not without significance that it was referred to without disapproval by the House of Lords D in *Salvesen's* case (20).

Sottomayor v. *De Barros* (21) was a case of a marriage in England between parties domiciled in Portugal. The parties were first cousins, and the marriage, though good by English law, was incestuous by the law of Portugal. Jurisdiction to hear the case was assumed without argument, and a decree of nullity was granted on the ground of the personal incapacity of the parties, which, it was E held, must be determined according to the law of the domicil. The fact that jurisdiction was assumed without argument becomes, we think, a matter of some significance when it is recorded that the case was tried at first instance (22) by SIR ROBERT PHILLIMORE, and subsequently went to the Court of Appeal (21), consisting of JAMES, BAGGALLAY and COTTON, L.JJ.

In *Cooper* v. *Crane* (23) the marriage was celebrated in England between a F woman and a man domiciled and resident in the United States of America. The marriage was regular in form, but the wife petitioned for a decree of nullity on the ground that her consent was obtained by duress. Jurisdiction was again assumed without argument, and in the event the petition was dismissed on the facts. The case is of significance in that jurisdiction was assumed without argument though the marriage was merely voidable. G

In *Linke* (*otherwise Van Aerde*) v. *Van Aerde* (24), where a marriage was celebrated in this country between parties domiciled in Belgium, the question of jurisdiction was argued, and *Simonin* v. *Mallac* (19) and *Sottomayor* v. *De Barros* (21) were cited. It transpired that the marriage was bigamous. It was held by GORELL BARNES, J. (24), that

> "The jurisdiction of this court to deal with the question of the validity of the marriage of the parties to the present suit was therefore clear . . ." H

He pronounced a decree of nullity accordingly.

Hussein (*otherwise Blitz*) v. *Hussein* (25) was another case in which a decree of nullity was sought by a wife on the ground that the marriage was induced by duress. In this case the husband's domicil was in Egypt, but the marriage was celebrated in England. HENN COLLINS, J., expressed himself as satisfied I that he had jurisdiction to entertain the suit. Lastly, in *Galene* v. *Galene* (*otherwise Galice*) (26), the parties were domiciled in France, but the marriage was celebrated in England. A decree of nullity had been obtained in France, on the ground that the marriage was defective in form, being clandestine and without parental consent as required by French law. When a petition was presented in this country, no question was raised, or doubt expressed, as to the jurisdiction of the court, and HENN COLLINS, J., pronounced a decree of nullity.

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(19) (1860), 2 Sw. & Tr. 67. (20) [1927] All E.R. Rep. 78; [1927] A.C. 641.
(21) (1877), 3 P.D. 1. (22) (1877), 2 P.D. 81.
(23) [1891] P. 369. The wife in this case was resident in England, to which country she had come from the United States of America. (24) (1894), 10 T.L.R. 426.
(25) [1938] 2 All E.R. 344; [1938] P. 159.
(26) [1939] 2 All E.R. 148; [1939] P. 237.

In none of these cases were the parties domiciled in this country, nor was the party proceeded against resident here. We have ventured to cite them as showing that over the last hundred years the courts of this country, including the Court of Appeal, have from time to time assumed jurisdiction in nullity cases on the sole ground of the marriage having been celebrated here, and have done so in cases both of void and voidable marriages.

In the meantime, in 1927, in *Salvesen's* case (27), the House of Lords made it clear that the court of the domicil always has jurisdiction to pronounce on the validity of a marriage, wherever celebrated. LORD PHILLIMORE went further and expressed the view (28) that the court of the domicil was the only competent court. This expression of view was not necessary for the decision of the case before the House, and, as we have already indicated, VISCOUNT HALDANE, who gave the leading speech, was careful to leave this question open. What is significant with regard to *Salvesen's* case (27) is that none of their Lordships sought to draw any distinction, from the point of view of jurisdiction in nullity, between marriages void ab initio and those which are merely voidable. This distinction was first drawn by BATESON, J., in 1931, in *Inverclyde* v. *Inverclyde* (29). In that case the petition was by a wife against a husband domiciled in Scotland, and was on the ground of incapacity. BATESON, J., held that, in the case of a voidable, as opposed to a void, marriage, only the court of the domicil had jurisdiction to annul the marriage, and he refused relief notwithstanding that the marriage had been celebrated in England. The distinction which BATESON, J., sought to draw between void and voidable marriages marked a wholly new departure. His decision was not followed by HODSON, J., in *Easterbrook* v. *Easterbrook* (*otherwise Jervis*) (30) nor by PILCHER, J., in *Hutter* v. *Hutter* (*otherwise Perry*) (31). In each of those cases the petition was by a husband domiciled abroad, though temporarily resident here, praying for a decree of nullity against an English wife on the ground of wilful refusal to consummate the marriage. In both cases the marriage had been celebrated in England. Both were undefended suits, but in *Hutter* v. *Hutter* (31) PILCHER, J., had the advantage of hearing the question of jurisdiction fully argued with the assistance of counsel for the King's Proctor. We think it is clear that in the latter case (31), the learned judge, rejecting the distinction drawn by BATESON, J., between void and voidable marriages, rested his decision in favour of granting relief partly on the ground of the residence of the respondent, and partly on the ground of the marriage having been celebrated in England. As we have already indicated, the decision of BATESON, J., in *Inverclyde* v. *Inverclyde* (29) was finally overruled by this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (32). At the same time *Easterbrook* v. *Easterbrook* (30) and *Hutter* v. *Hutter* (31) were expressly approved. It may be remarked that there is no inconsistency between the decision in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (32) and that in the earlier case of *De Reneville* v. *De Reneville* (33), where the distinction drawn between a void and a voidable marriage was relevant, but relevant only, for the purpose of determining the domicil of the petitioning wife.

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(27) [1927] All E.R. Rep. 78; [1927] A.C. 641.

(28) [1927] All E.R. Rep. at p. 90; [1927] A.C. at p. 671.

(29) [1931] P. 29.

(30) [1944] 1 All E.R. 90; [1944] P. 10.

(31) [1944] 2 All E.R. 368; [1944] P. 95.

(32) [1955] 3 All E.R. 695; [1956] P. 126.

(33) [1948] 1 All E.R. 56; [1948] P. 100.

A We have ventured to set out these decisions in their historical sequence with a view to examining the decision in *Casey* v. *Casey* (34) in its historical context. To this we will return presently. For the moment we content ourselves with the remark that, whether or not we hold ourselves bound by it, the decision is in striking conflict with the current of authority which—apart from *Inverclyde* v. *Inverclyde* (35), since held to have been wrongly decided—had been flowing steadily in the opposite direction for a period of many years. B

The decision of LORD MACDERMOTT, C.J., in *Addison* v. *Addison* (36), though not binding on this court, is clearly one that is worthy of our respectful consideration. The facts in that case were, mutatis mutandis, indistinguishable from those of the present case. The petition was by a wife resident in Northern Ireland praying for a decree of nullity against her husband on the ground of incapacity, or, alternatively, wilful refusal to consummate the marriage. The C husband was domiciled and resident in England, but the marriage had been celebrated in Northern Ireland, and it was on that ground that the jurisdiction of the Northern Irish court was invoked. LORD MACDERMOTT, in a very full judgment, reviewed all the authorities and, anticipating the conclusion reached later in the same year by this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (37), held that, for the purposes of establishing jurisdiction in nullity proceedings, no D distinction is to be drawn between void and voidable marriages. He came to the conclusion that, in the light of the authorities, it must be accepted that the court of the ceremony has, as such, a jurisdiction to annul, and decided that this jurisdiction must extend alike to the case of voidable marriages as it does to those which are void ab initio. He concluded by observing (38):

> E "There is much to be said for committing any plea that strikes at the creation of a valid marriage bond—be it one of bodily or mental or juristic incapacity or of a failure to observe the requisite formalities—to the court of the place where the bond was forged. It seems the natural forum to decide such issues and in practice it will often be that best versed in the law to be applied."

F He accordingly assumed jurisdiction and pronounced a decree.

It remains to refer once more to *Hill* v. *Hill* (39), where the petition was on the ground of incapacity only, and COLLINGWOOD, J., felt able to distinguish *Casey* v. *Casey* (34). As we understand his judgment, he reached this conclusion on two grounds, namely: (i) there is a fundamental difference between incapacity and wilful refusal, in that the former is something which must exist at the time G of the marriage, whereas the latter can arise only after the marriage, the existence of a valid marriage being a condition precedent to the cause of complaint; (ii) incapacity was a matter regularly dealt with by the ecclesiastical courts, who, however, knew nothing of wilful refusal as affording a ground for relief. We find ourselves quite unable to accept the distinctions which COLLINGWOOD, J., drew. It is well known that incapacity and wilful refusal are fre- H quently alleged as alternatives. This is because it is often impossible in practice to form any view, in a case where the marriage has not been consummated, whether this has been due to incapacity or to wilful refusal until all the evidence has been given. It would, we think, be the height of absurdity if the court had to hear the whole of a case before it could decide whether or not it had jurisdiction to entertain it. In the present case, for instance, it would be I quite anomalous to decide that there is jurisdiction to entertain the plea of incapacity but not that of wilful refusal, seeing that the same evidence must be adduced in order to establish either the one or the other.

It seems to us that there are three possible views: (i) that in no case does the court have jurisdiction to entertain proceedings for nullity where the sole ground for asserting jurisdiction is the fact of the marriage having been celebrated in England; (ii) that the fact of the marriage having been celebrated in England is enough of itself to confer jurisdiction in some cases but not in others; (iii) that, in every case where the marriage has been celebrated in England, that fact is of itself sufficient to confer jurisdiction, whatever the ground of complaint. The first of these alternatives has not been argued before us by counsel for the husband, who conceded that, in the light of the authorities, jurisdiction must be held to exist at least in cases where the formal validity of the ceremony or the juristic capacity of the parties is called in question. In any case it appears to us that, having regard to the cases to which we have referred, beginning with *Simonin* v. *Mallac* (40) and extending over the last century, it is now much too late to assert that in no case will the court assume jurisdiction on the sole ground of the marriage having been celebrated in England.

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(34) [1949] 2 All E.R. 110; [1949] P. 420. (35) [1931] P. 29. (36) [1955] N.I. 1.
(37) [1955] 3 All E.R. 695; [1956] P. 126. (38) [1955] N.I. at p. 32.
(39) [1959] 3 All E.R. 754; [1960] P. 130.

It is to the second alternative that the argument has been mainly directed. If it is to be held that the fact of celebration in England is enough of itself to confer jurisdiction in some classes of case but not in others, the difficulty immediately arises of determining at what point the dividing line is to be drawn. We have already referred to the difficulty of distinguishing, for the purposes of jurisdiction, between a plea of incapacity and a plea of wilful refusal. Apart from *Hill* v. *Hill* (41), there appears to be no authority for drawing the line at this point. The main ground on which the majority in *Casey* v. *Casey* (42) rested their decision, namely, the distinction between marriages void ab initio and those which are merely voidable, has been cut away since this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (43) overruled the decision of BATESON, J., in *Inverclyde* v. *Inverclyde* (44). The alternative ground, namely, that of balance of hardship to the parties, does not appear to be supported by authority, and does not in our view furnish a suitable, or indeed a practicable, test for determining a question of jurisdiction. The view expressed by SOMERVELL, L.J. (45), and adopted by KARMINSKI, J., in the present case, is equally unsupported by authority. On this view (46), jurisdiction would be excluded in cases of bigamy, or, indeed, in any case where the juristic capacity of the parties is called in question. If, on the other hand, it is to be held that jurisdiction exists where juristic capacity is in question, on what principle, it may be asked, is it to be excluded where the issue relates to physical capacity? Furthermore, on this view, jurisdiction would be excluded in cases where it is alleged that the consent of the petitioner was vitiated by fraud or duress. If the dividing line is to be drawn where SOMERVELL, L.J., suggested, it would seem that *Sottomayor* v. *De Barros* (47), *Cooper* v. *Crane* (48), *Linke* v. *Van Aerde* (49) and *Hussein* v. *Hussein* (50) would all have to be held to have been wrongly decided, and one of the grounds for the decision in *Hutter* v. *Hutter* (51), notwithstanding the approval of that decision by the court in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (43), would have to be held to have been misconceived.

The only remaining alternative is to say that jurisdiction exists to entertain a suit for nullity of any class whenever it is shown that the marriage was celebrated in England. We can only take this course if we are free to hold that *Casey* v. *Casey* (42) was wrongly decided; and this we can do only if satisfied that the present case is covered by one of the three exceptions to the rule binding this court to follow its own previous decisions which were mentioned by LORD GREENE, M.R., in *Young* v. *Bristol Aeroplane Co., Ltd.* (52). Of these A three exceptions only the first could possibly apply here. We do not think that we are bound to follow the minority view expressed by SOMERVELL, L.J., in *Casey* v. *Casey* (53). The question to be determined is whether the view of the majority, which must be regarded as the ratio decidendi of the case, is in conflict with any other decision of this court, so that we are free to choose which of the conflicting decisions we ought to follow. We have felt considerable difficulty B in reaching a conclusion on this point, but, after careful consideration, we have come to the conclusion that the decision of the majority in *Casey* v. *Casey* (53) cannot stand with the unanimous decision of this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (54). In the latter case, as we understand it, it was decided once and for all that no distinction is to be drawn, for jurisdictional purposes, between marriages which are void ab initio and those which are merely voidable. C If that is correct, the decision in that case was clearly in conflict with the ratio of the judgment of the majority in *Casey* v. *Casey* (53). This court must, therefore, decide which of these two conflicting decisions it will follow, and we entertain no doubt that the decision in *Ramsay-Fairfax* v. *Ramsay-Fairfax* (54) is to be preferred and should be followed. In reaching this conclusion we are encouraged to find that it is supported by the weighty authority of LORD MAC- D DERMOTT in *Addison* v. *Addison* (55). We would venture to adopt the reasoning which led him to his conclusion in that case.

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(40) (1860), 2 Sw. & Tr. 67. (41) [1959] 3 All E.R. 754; [1960] P. 130.
(42) [1949] 2 All E.R. 110; [1949] P. 420.
(43) [1955] 3 All E.R. 695; [1956] P. 126. (44) [1931] P. 29.
(45) [1949] 2 All E.R. at pp. 117, 118; [1949] P. at p. 433.
(46) Stated at p. 258, letter B, ante. (47) (1877), 3 P.D. 1. (48) [1891] P. 369.
(49) (1894), 10 T.L.R. 426. (50) [1938] 2 All E.R. 344; [1938] P. 159.
(51) [1944] 2 All E.R. 368; [1944] P. 95.

In our judgment, the marriage in the present case having been celebrated in England, the High Court has jurisdiction to pronounce on its validity and, for the purpose of doing so, to inquire into both the grounds on which its validity is impugned. The appeal must, therefore, be allowed. E

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Gibson & Weldon*, agents for *Frederick Gowen & Stevens*, Croydon (for the wife); *Kenneth Brown, Baker, Baker* (for the husband).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(52) [1944] 2 All E.R. at p. 300; [1944] K.B. at p. 729. The first exception is: "The court is entitled and bound to decide which of two conflicting decisions of its own it will follow."

(53) [1949] 2 All E.R. 110; [1949] P. 420.

(54) [1955] 3 All E.R. 695; [1956] P. 126.

(55) [1955] N.I. 1.

ATTORNEY-GENERAL (on the relation of THOMAS BROWNLEE PAISLEY) AND ANOTHER *v.* ST. IVES RURAL DISTRICT COUNCIL AND ANOTHER.

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), November 28, 29, 30, December 6, 1960.]

Highway—Highway authority—Drains—Non-repair of drains used for agricultural land drainage—Maintenance of drains awarded to surveyor for highways under Inclosure Act of 1800*—Whether county council under duty to maintain and repair drains in rural district for which rural district council formerly liable as successors of highway board—Local Government Act,* 1929 (19 *Geo.* 5 *c.* 17), *s.* 30 (1), *proviso.*

By an award made in 1803 commissioners, appointed under an Inclosure Act of 1800 relating to the parish of Holywell in the county of Huntingdon, ordered that certain drains in the parish should thereafter be maintained and kept in repair to specified breadths and depths by the surveyor of the parish highways, out of a rate levied by him on all occupiers of lands within the parish. Two of the drains passed through land which was occupied and farmed by P. The duties of the surveyor of parish highways were subsequently transferred by the Highway Act, 1862, s. 11, to the highway board for the district in which the drains lay, and the duties of the highway board were transferred by the Local Government Act, 1894, to the rural district council for the parish of Holywell. It was undisputed that between 1894 and the passing of the Local Government Act, 1929, the duty to maintain and repair the drains lay on the rural district council. No work had been done on the two drains since 1947 and they were choked, overgrown and silted; partly as a result of the non-repair of the drains, P.'s land was seriously flooded from time to time. In an action brought by the Attorney-General at the relation of P. and also by P. suing personally, both plaintiffs claimed a declaration that either the first defendants, the rural district council, or the second defendants, Huntingdon County Council, were bound in law to maintain and keep in repair the drains. P. also claimed damages. By the Local Government Act, 1929, s. 30 (1)*, the county council was made the highway authority for all rural districts in the county and as such had " all such functions under the Highway Acts, 1835 to 1885 " as were exercisable by rural district councils as successors to highway boards, and rural district councils ceased to be highway authorities. By the proviso to s. 30 (1) the responsibility for the repair of the drains would remain with the rural district council if the repair were not a function " with respect to highways." On appeal from a decision that the responsibility for repair lay on the rural district council,

Held: whether a function was one with respect to highways within the proviso to s. 30 (1) of the Local Government Act, 1929, was a question of fact, and depended on the degree to which the particular drain could truly be regarded as land drainage or road drainage; on the facts the decision that these drains were land drains rather than road drains should stand, with the consequence that the responsibility for repair lay on the rural district council.

Decision of SALMON, J. ([1959] 3 All E.R. 371] affirmed.

[**Editorial Note.** Section 30 (1) of the Local Government Act, 1929, has been repealed by the Highways Act, 1959, s. 312 and Sch. 25; s. 306 of the latter Act effects a saving comparable with the proviso to s. 30 (1) of the Act of 1929.

As to the transfer of authority relating to highways in rural districts by statute, see 19 HALSBURY'S LAWS (3rd Edn.) 8, para. 2; as to the duties of county councils as highway authority in rural districts, see ibid., 24, para. 27.

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* For the terms of s. 30 (1), see p. 267, letter H, post.

For the Local Government Act, 1929, s. 30 (1), see 14 Halsbury's Statutes (2nd Edn.) 270.]

Case referred to:

A.-G. v. *Tamworth Rural District Council*, (1901), 85 L.T. 190; 11 Digest (Repl.) 72, *944*.

Appeal.

The plaintiffs, the Attorney-General suing at the relation of Thomas Brownlee Paisley and the said Thomas Brownlee Paisley suing personally, claimed against St. Ives Rural District Council, the first defendants, and Huntingdon County Council, the second defendants, a declaration that under an Inclosure Act of 1800, relating to the parish of Holywell-with-Needingworth (referred to hereafter as " the parish of Holywell "), in the county of Huntingdon, and an award made under that Act, the first defendants, alternatively, the second defendants, were now the authority bound in law to maintain and keep in repair certain drains within the parish of Holywell; the second plaintiff, Mr. Paisley, also claimed damages for injury caused to his land by reason of one or other of the defendants' breach of duty in failing to maintain and keep in repair the drains. The second plaintiff was the owner and occupier of, and farmed land known as Manor Farm, Holywell, which was situated in the county of Huntingdon and within the rural district of St. Ives. Two drains, known as Parsons Drove and Heath Drain, ran adjacent to and passed through Manor Farm; the first drain ran from Stocks Bridge until it entered the River Ouse and the second drain ran southwards from Bath Hill Bridge until it joined the first drain. These drains were originally natural watercourses and were small tributaries of the Great Ouse; they left the Great Ouse outside the parish of Holywell, joined together inside the parish and then flowed onward to the River Ouse. They were natural drains for the land on each side of them, and while only two or three feet wide and quite shallow at their source, they gradually broadened as they reached the parish of Holywell. By an Inclosure Act of 1800, relating to the parish of Holywell, the commissioners therein designated were required to appoint a surveyor of the highways within the parish, and among other things, the commissioners were empowered to scour out and widen the ancient brooks, ditches and watercourses in the parish of Holywell and to set out new ditches, drains and watercourses in and through the lands and grounds thereby intended to be inclosed, of such breadth and depth and in such direction as the commissioners thought fit; and the commissioners were empowered, and the duty was imposed on them, to order and award by whom, at whose expense and at what time and in what manner the said brooks, ditches, drains and watercourses should thereafter be repaired, cleaned, scoured and maintained. By an award made in 1803 under the Inclosure Act of 1800, the commissioners ordered that Parsons Drove and Heath Drain, among other drains in the parish of Holywell, should be for ever thereafter maintained and kept in repair, to the respective breadths and depths specified in the award, by and at the expense of the surveyor of highways for the time being out of a rate to be levied by him on all occupiers of lands and grounds within the parish of Holywell. By the Highway Act, 1862, s. 11, these duties were transferred from the surveyor of highways to the highway board for the district in which the drains lay. The duties transferred to the highway board were in turn transferred to the first defendants, as the rural district council, under the Local Government Act, 1894, s. 25. No work had been done on the drains since 1947, and for years they had been seriously choked, overgrown and silted and were generally in a very bad condition. From time to time the second plaintiff's land had been seriously flooded, partly as a result of the non-repair of the drains; this flooding had interfered with his farming and had caused him damage.

It was common ground that the duty to maintain and repair the drains lay on one or other of the defendants, but the second defendants, the county council, A contended that by virtue of the Local Government Act, 1929, s. 30 (1) and the proviso thereto, these duties lay on the first defendants, the rural district council, and had not been transferred to the second defendants since they were not functions under the Highway Acts, 1835 to 1885, within sub-s. (1) of s. 30, nor were they functions with respect to highways within the meaning of the proviso.

SALMON, J., heard the action on July 13, 14, 15, 1959, and on July 24, 1959, B in a reserved written judgment (reported [1959] 3 All E.R. 371), held that the rural district council were liable to maintain and repair the drains, made a declaration accordingly, and gave judgment for the plaintiff landowner against the rural district council for damages to be assessed by an official referee. The rural district council now appealed, contending that the duty to repair had been transferred from them to the county council by the Local Government Act, C 1929, s. 30 (1).

C. E. Scholefield, Q.C., and *G. J. Ponsonby* for the rural district council.
A. L. Figgis for the plaintiff landowner.
J. P. Widgery, Q.C., and *Alan Fletcher* for the county council.

Cur. adv. vult.

D Dec. 6. **PEARCE, L.J.**, read the judgment of the court at the request of SELLERS, L.J.: St. Ives Rural District Council appeal against a declaration (1) that they are now the authority bound in law to maintain and keep in repair two drains, Parsons Drove and Heath Drain, in the parish of Holywell in Huntingdon. They contend that the liability lies not on them but on their co-defendants, Huntingdon County Council, by virtue of the Local Government Act, 1929, s. 30 (1).

E An award of the commissioners under the Inclosure Act, 1800, ordered that these drains:

> " shall be for ever hereafter maintained and kept in repair . . . by and at the expense of the surveyor of the highways for the time being out of a rate to be from time to time laid by him on all occupiers of lands and grounds within the parish of Holywell-with-Needingworth according to the annual F value set by us on such lands and grounds."

By the Highway Act, 1862, s. 11, the duties of surveyors of highways were transferred to highway boards. By the Local Government Act, 1894, s. 25, highway boards were abolished and their duties were transferred to rural district councils, who became the successors of the rural sanitary authority and highway G authority.

It is agreed that thus St. Ives Rural District Council inherited the duty to repair and maintain these drains. The point in dispute is whether that duty still lies on them or was transferred from them to Huntingdon County Council by the Local Government Act, 1929, s. 30 (1). That subsection says:

> " As from the appointed day, every county council shall be the highway H authority as respects such part of the county as is for the time being comprised in any rural district and as respects the highways therein, and as such shall have all such functions under the Highway Acts, 1835 to 1885, as were exercisable by rural district councils who by virtue of the Local Government Act, 1894, became successors of highway boards, and rural district councils shall cease to be highway authorities: Provided that nothing in this I section shall affect the functions of rural district councils under the Local Government Act, 1894, as respects rights of way and encroachments on roadside wastes, or any functions not being functions with respect to highways exercisable at the appointed day by rural district councils as successors to surveyors of highways or highway boards."

The learned judge held (1) that the subsection apart from the proviso would clearly transfer the liability in respect of these drains to Huntingdon County

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(1) Reported [1959] 3 All E.R. 371.

A Council. For the maintenance of these drains was one of such functions under the Highway Acts, 1835 to 1885, as were exercisable by the rural district council who by virtue of the Act of 1894 became the successor of the highway board. It is agreed that the learned judge was right in so holding. The judge then went on to hold that the proviso prevented the transfer to the county council of the duty to maintain these particular drains, since it retained to the rural district council "any functions not being functions with respect to highways" and on the particular facts these drains were not functions with respect to highways. B In our judgment, on the true construction of s. 30 (1) with its proviso the rural district council retains functions inherited from the surveyor of highways unless they are "functions with respect to highways." The difficulty lies in deciding whether the maintenance of these or any other particular drains are "functions with respect to highways", and that point has, we are told, given rise to doubts and problems in many cases. C

Counsel for the rural district council traced the history of roads from early days and his careful argument may be summarised thus. From the days of Philip and Mary (2 & 3 c. 8), when statutory labour was introduced and local elected surveyors of highways were made responsible, there was constant difficulty in maintaining highways. D Later a rate became leviable to help the surveyor to achieve maintenance for which statutory labour was inadequate, and always, especially when the condition of the roads was elementary, water was an enemy to maintenance. It was the privilege as well as the duty of the surveyor to deal with drainage so as to enable him to prevent flooding and accumulations of water which would disintegrate the roads (see per BYRNE, J, in *A.-G.* v. *Tamworth Rural District Council* (2)). E The commissioners under the Inclosure Act, 1800, must have had that in mind, so counsel for the rural district council argued, when they laid the rate in respect of these drains, not on the riparian owners, but on all the inhabitants of the parish since all were concerned in the maintenance of the highways. It is to their award, therefore, that the court should look in deciding whether the maintenance of these particular drains is a "function with respect to highways." F

We cannot accede to that argument. There is no sufficient evidence that the levying of a universal rate was due to the commissioners' belief that it was by virtue of its effect on a highway that maintenance of a particular drain was a matter of concern to all. Nor do we think that the Local Government Act, 1929, when it allocated functions on the appointed day, had any intention of taking century-old awards (or opinions) as the test. G The question whether a function was a "function with respect to highways" must, in our judgment, have been intended to be answered as a matter of fact by a contemporary consideration of the land itself. It would be a question for the surveyor, not the historian. The learned judge propounded the test which he applied to the particular facts in this case as follows (3):

H

> "There are, of course, road drains and gulleys whose main, if not whose only, function is to drain the highway. The repair of such drains and gulleys is, in my judgment, clearly a function with respect to highways. There are other drains and ditches whose function is solely to drain agricultural land and which cannot in any way affect highways. The repair of such drains and ditches is equally clearly not a function with respect to highways. I Then there are drains and ditches that affect both agricultural land and highways. Whether or not the function of maintaining and repairing these drains and ditches can properly be described as a function with respect to highways depends, in my view, on the degree to which the drains can be truly regarded as land drainage or road drainage."

It is not disputed that the decision of fact is right, if the test which the judge

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(2) (1901), 85 L.T. 190.

(3) [1959] 3 All E.R. at p. 375.

A applied is correct. In our judgment it is correct and clear, and we do not seek to improve on it.

Applying that test it should be possible for surveyors of the bodies concerned to agree without serious difficulty what are the boundaries of their respective spheres of duty.

Appeal dismissed.

B Solicitors: *John J. McIntyre* (for the rural district council); *Fisher, Dowson & Wasbrough*, agents for *Francis & Co.*, Cambridge (for the plaintiff landowner); *Sharpe, Pritchard & Co.*, agents for *A. Case Aylward*, Huntingdon (for the county council.)

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

C

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* DODD AND OTHERS.

D [QUEEN'S BENCH DIVISION (Lloyd-Jacob, J., sitting as a judge of the Division), December 6, 7, 8, 9, 12, 1960.]

Gaming—Pool betting—" Bet "—Football supporters' association—Membership on payment of 1s.—Issue of membership cards bearing code numbers—Weekly sale of tickets to members for 1s.—Football teams arbitrarily allocated by code numbers—Monetary prize awarded by association if teams so allocated to E *member scored most goals or fewest in next Saturday's matches—Whether pool betting duty recoverable—Finance (No. 2) Act,* 1947 (11 *&* 12 *Geo.* 6 *c.* 9), *s.* 6 (1), (2), (5), (6)—*Finance Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 49), *s.* 14 (2)—*Finance Act,* 1950 (14 *Geo.* 6 *c.* 15), *s.* 17 (1)—*Finance Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 33), *s.* 4 (1), (5).

A sub-committee of a football club supporters' association conducted a F scheme, the purpose of which was to raise funds which would be available to assist the football club. Membership under the scheme was open to local residents and was renewable annually, the entrance fee being 1s. A member was allotted a code number by the committee. Members could participate for 1s. weekly in what was called a weekly lottery. This was conducted by the issue of tickets offered weekly on Mondays by " agents ", who in fact G acted voluntarily, to members only at a price of 1s. for a ticket. The member's code number was communicated to the office after the sale of the ticket, and served to identify three football teams participating in matches to be played on the following Saturday. The selection of the teams allocated to the member's code number depended on an arbitrary allocation made by the printer and was wholly independent of the sub-committee. The H total goals scored by both sides in the three matches were computed. Money prizes were awarded for the highest, second highest and the lowest aggregate scores of both sides in the three matches. It was possible for members to change their codes weekly, but requests for code numbers allocated to particular teams were refused. Such changes of code numbers at the request of members as were made were for the purposes of choosing I numbers that happened to be attractive to members rather than of selecting teams. Out of a total of gross stakes exceeding £70,000 not more than £1 in value was attributable to such changes. In an action for the recovery of pool betting duty on the stake money, claimed under s. 6 of the Finance (No. 2) Act, 1947, s. 14 (2) of the Finance Act, 1948, s. 17 (1) of the Finance Act, 1950, and s. 4 (1), (5) of the Finance Act, 1952*,

Held: where there was a bet, for the purpose of pool betting, the event

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* For these sections, so far as relevant, see pp. 274, 275, post.

on which success or failure depended was the entrant's forecast (see p. 275, A
letter G, post), but in the present case a member's chance of qualifying for a prize was at the mercy of the printer's choice in allocating at random teams to code numbers (see p. 275, letter H, post), and, though it might be that the choice of code numbers by a member would render the transaction of purchasing a ticket a bet, yet the existence of the possibility of the member's selecting code numbers could, on the facts, be dismissed as de B
minimis; accordingly pool betting duty was not recoverable, because the purchase by a member of a ticket did not constitute a bet.

[**Editorial Note.** The question whether the weekly lotteries were exempt private lotteries was not determined; see, on this aspect of the case, p. 276, letters C to G, post.

As to pool betting duty, see 18 HALSBURY'S LAWS (3rd Edn.) 235-238, C
paras. 455-459; and for cases on the subject, see DIGEST Supplements.

For the Betting and Lotteries Act, 1934, s. 24 (1), the Finance (No. 2) Act, 1947, s. 6, and the Finance Act, 1948, s. 14, see 10 HALSBURY'S STATUTES (2nd Edn.) 804, 813 and 817.

For the Finance Act, 1950, s. 17, see 29 HALSBURY'S STATUTES (2nd Edn.) 297.

For the Finance Act, 1952, s. 4, see 32 HALSBURY'S STATUTES (2nd Edn.) 148, D
149.]

Action.

This was an action by writ, dated Nov. 26, 1957, by the Commissioners of Customs and Excise against Harry Dodd, Edmund Tarmey and William James Holland, sued on behalf of themselves and all other members of the committee E
of Stockport County Football Club Supporters' Association and on behalf of all members of the association for recovery of pool betting duty which the plaintiffs alleged was payable by the committee or by the association, as the promoters of certain weekly competitions for prizes, in the period Mar. 6, 1954, to Jan. 14, 1956. The facts appear in the judgment.

The question whether the lottery by the sale of tickets to members was an F
exempt private lottery within the meaning of the Betting and Lotteries Act, 1934, s. 24, was not determined by the court (see p. 276, letter G, post). Each ticket under a head "Conditions of Sale" stated "this Private Lottery is conducted as an exempt Private Lottery within the meaning of the Betting and Lotteries Act, 1934." By their reply the plaintiffs denied that the transactions which were the subject of the action were exempt or private lotteries within the meaning and effect of s. 23 to s. 25 of the Betting and Lotteries Act, 1934, or of s. 6 (6) G
of the Finance (No. 2) Act, 1947*. If the weekly lottery were an exempt private lottery, that would, accordingly, be an alternative ground on which the purchase of tickets would not constitute a bet.

J. R. Cumming-Bruce for the plaintiffs.

R. G. Clover, Q.C., and *C. J. Cunliffe* for the defendants. H

LLOYD-JACOB, J.: By this action the Commissioners of Customs and Excise sue Harry Dodd, Edmund Tarmey and William James Holland as representatives of an unincorporated association which is known as the Stockport County Football Club Supporters' Association. It would appear that the fortunes of this old-established association football club had declined over the years, particularly as reflected in the attendance of paying visitors to their I
home matches, and certain gentlemen who were interested in encouraging local support for this team appear to have met at the private residence of one of them —so far as the documents produced in evidence show—in March, 1953, and they

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* Finance (No. 2) Act, 1947, s. 6 (6) provides, so far as is relevant—" In this section . . . the following expressions have the meanings hereby respectively assigned to them, that is to say— . . . ' bet ' does not include the taking of a ticket or chance in any lottery which by virtue of s. 23, s. 24 or s. 25 of the Betting and Lotteries Act, 1934, is to be deemed not to be an unlawful lottery; . . ."

decided to form a committee which they hoped would promote money-making activities, the proceeds of which would be available initially for the presentation of testimonials to certain members of the football club. That intention developed over the months until, in October, 1953, a venture was constituted as a supporters' club with the object of providing funds which would be available for general ground improvements or otherwise so as to assist the operation of the football club itself. Rules were made, membership cards were prepared and members were recruited and certain social activities were promoted and developed.

It soon occurred to the committee that a convenient method of raising funds in addition to things like whist drives, dances and sale of badges would be to run sweepstakes, and one of their number was authorised by the then committee to approach the assistant chief constable of the district to inquire into that possibility. I have no evidence what the outcome of this discussion was, if it ever took place, but what has been produced in evidence is this, namely, early in the next year, in February, 1954, the first defendant, Mr. Harry Dodd, appears to have received a certain amount of local publicity in relation to a suggestion that he had made for the raising of, I think, political funds, and he was invited to meet this committee and inform them of the proposals that he had in mind. That on the evidence is established as the origin of the particular scheme which falls to be considered in the present case.

The method which Mr. Dodd suggested was, in fact, adopted; the association formed a special sub-committee to operate it under the title of " The Stockport County Supporters' Association (Auxiliary Branch) " and a particular banking account, referred to as the No. 2 banking account, was opened for the purpose of dealing with such funds as were secured. Premises were rented, a paid secretary was appointed and the scheme as proposed by Mr. Dodd was put into operation.

At first, as I understand Mr. Dodd's testimony, the arrangements made were made in contemplation that the participation of members would not exceed a figure of some 19,600, but the popularity achieved by this scheme was such that a modification was introduced which permitted something in excess of 27,000 regular entrants to the scheme and permitted them each to be given a separate code number or rather separate code numbers which consisted of three groups of two digits. According to the rules the membership of the association was open to local residents—that expression meaning persons living within some five to seven miles of the playing ground of the football club. In addition, in special cases, persons who could establish an interest in the followings of the club, other than this geographical one, were permitted to join, all of them paying an annual subscription of 1s. Membership was evidenced by the issue initially of a white membership card, and a member could renew his membership annually, and if he so desired, he could do this through the auxiliary branch. Applications so made would secure the allocation to him of his code numbers, those code numbers being allocated by the committee of the auxiliary branch and were intended thereafter to identify any entry he might make in what was termed a " weekly lottery ". A member only secured his code numbers by completing the form and its completion involved him giving undertakings as follows:

> " 1. To pay a yearly subscription of 1s. each year. 2. To abide by the rules and regulations of the branch as prescribed from time to time by the committee. 3. To support Stockport County Football Club in all ways to the best of my ability and in particular by attending all matches of the club, and to endeavour to persuade others to do likewise. 4. To assist by all means available to me, all social and other activities of the branch by attendance thereat or otherwise. 5. I note that the code numbers alongside, for my benefit, will be used in the weekly lottery to be run by the association, if I desire to participate therein by payment of 1s. weekly."

Participation in this weekly lottery was arranged in the following way. The committee would procure the printing each week of an appropriate number of leaflets. The entry on these leaflets, which is significant for my present explanation, consisted of the names of fifty association football teams identified in each case by the presence of two digit numbers which ran from 01 to 09, 10 to 20 and so on, up to 50. The appropriation of a particular team to a particular member was the result of a random selection by the printer and followed no rule or direction whatsoever given by the committee. Each of the teams so printed on the form would, save for any unforeseen eventualities, have a First Eleven football match on the Saturday following the issue of the tickets, from the result of which a result in the form of both goals scored and goals conceded was to be expected. These leaflets were then entrusted, on the Monday of each week, to what were called " agents," for distribution, and it was required of those agents that they should offer the same to such of the members as were allocated to them, or such as they could recruit for a payment of 1s. for each leaflet, but it was clearly understood (and there is no suggestion that this was ever departed from) that no leaflet could be sold to anyone who did not qualify for membership by payment of the proper entry fee of 1s. If a member agreed to participate in the scheme in the weekly lottery, his code numbers would be recorded by the agent and transmitted, together with the 1s. fee, to the office which had been rented for the purpose. As the code numbers comprised three groups of two digits, they served to identify, in relation to the numbered teams on the leaflet (1), three matches which would take place on the next following Saturday, whereby a total of the goals scored by all the six opposing sides in the three matches could be arrived at. Money prizes were awarded for the highest, the second and the third highest combined scores, but this latter was later changed for the lowest combined score. There were a few occasions, I have been told, where in addition a prize for fourth highest combined score was also offered.

Over the period of some ninety-eight weeks during which this scheme operated, approximately £64,000 was contributed by way of tickets purchased and of that approximately £45,000 was distributed in prizes and some £15,000 transmitted to the football club, according to the evidence, to be utilised to finance improvements in the ground accommodation for visitors and also for the provision of lighting facilities at the ground. The balance went in expenses. These latter, so far as they concerned the office and secretarial charges, being certified weekly by an accountant and the figures printed on the leaflet for the next ensuing week.

During the investigation by the plaintiffs' officers, which preceded the issue of the writ, it appears to have been explained to them that the receipts for ticket purchases, in total, did not correspond to the precise amount calculated at 1s. per entrant who took part in the lottery, but a figure of the order of ten per cent. was eventually agreed, of the total. For the purposes of this action an uplift of ten per cent. of the actual cash receipts was used in the calculation of the pool betting duty which is claimed in these proceedings, an amount which, in the schedule of stake moneys delivered with the statement of claim is expressed as " agents' commission ". That expression is plainly inaccurate. The agents who were some three hundred in all, including thirty women, were giving their services gratuitously, that being a way of betokening their support for the association and for the football club to which it related. Those persons were permitted to recover any expenses to which they had been put in completing the distribution of the tickets that had been allotted to them —which expenses, on the occasions when they desired to be reimbursed (which according to the evidence was not the invariable practice) were deducted by them from the total of the subscription moneys which they had secured, before they paid them into the office. Experience seems to have shown that no such expenses account ever exceeded ten per cent. of the total of the subscription moneys procured by the agent, and, indeed, in some cases it was a little less. The figure of ten per cent. was, in fact, volunteered by the defendants for the purposes of the action to save the expense of going through, or working out, the precise total. It is important that the significance of that figure should be properly understood.

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(1) Rule 1 of the " Rules for Football " printed on the back of a leaflet or ticket below the numerical list of teams for a particular Saturday provided: " Football Teams represented by a number constitute the Pool. Each member has a code or codes, according to subscriptions. Each code represents three football teams on the weekly ticket competing for any of the declared dividends."

During this same period, this ninety-eight weeks, the membership of the defendants' association, which it must be understood was obtained from an area of population numbering 150,000 or so, increased steadily from some 3,500 to a figure of 22,000, whilst at the same time the then highest attendance at the club ground for a match was slightly under 11,400, and the average attendance was of the order of only 7,500. Those are material figures, or may be material figures, to have in mind.

In addition to the particulars of the football teams whose results would determine the combined scores which constituted qualification for a prize award, the weekly leaflets—which I can more conveniently refer to as "tickets" —contained other information, the form of some of which, at any rate, varied from time to time. Some of that information, and for example the expression "fixed odds", had begun to appear in September, 1955, and was plainly inaccurate, as was a similar assertion which was sent out in a letter dated Dec. 20, 1955, which the then committee of this auxiliary branch sent to the plaintiffs in the course of the inquiries which were instituted prior to these proceedings being brought.

But there is one very material provision, to which I must refer in some detail, and that is found in condition of sale No. 5, which initially read:

> "Members may, if they so desire, change their codes weekly by sending their membership card with amended code attached by registered post to reach the office by Friday before matches are played",

to which was added for the summer season (when the cited matches were of teams playing in Australia) the following:

> "but on account of the abnormally high scoring feats among a certain few clubs in Australian football, the committee have decided that anyone selecting their own code and sending in by registered post the amount of prize money will be limited to the following amounts",

and then followed the figures of £20, £10 and £5, which were approximately some ten per cent. of the prizes which were offered in the competition proper.

In the course of the hearing I had the advantage of listening to the testimony of Mr. Dodd, the first of these three named defendants, who was the president of the Supporters' Association and was, as I have already indicated, closely concerned with the initiation and also with the development of the operation of this particular scheme. In my judgment he was a truthful and an accurate witness whose recollection could be relied on as evidencing the facts to which he was testifying. His evidence on the operation of this condition shows that requests were sometimes received for code-number changes because the member either disliked his numbers as numbers or preferred to have numbers which had a personal association such as a birthday or some other anniversary. Requests for new code numbers appropriate to any three particularly selected teams from the list were, he says, always refused by the exercise of the committee's discretion during the period of the year when the matches were played in England. So far as concerns the Australian period, he says that any request for change of code numbers was acceded to only if the code numbers requested had not already been bespoken to by an existing contributing member, and were, in consequence, available for allotment in the ordinary way to a subscriber.

There is nothing in the evidence which would enable me to hold that the restricted money competition ever attracted any entrants and it cannot be taken that any of the stake moneys to which the schedule to the statement of claim relates ever in fact related to that competition within a competition.

Still dealing with Mr. Dodd's testimony, it was most unfortunate for my purposes that this gentleman's recollection of a meeting which he had had in September, 1958, differed from that of Mr. R. Neilson, who also gave evidence before me and with whom Mr. Dodd was then speaking. It appears that a meeting had been deliberately arranged at which Mr. R. Neilson could attend at the offices of the defendants' association and when the avowed purpose of the meeting had been disposed of and the defendants' solicitor (who was in attendance) had taken his leave, these two gentlemen remained together awaiting the time when it was convenient for Mr. R. Neilson to catch a train to return to London, and they talked together. No record was kept of that discussion by either party, and in one particular at least, namely, the alleged reference to an anglers' club, I am quite satisfied that Mr. R. Neilson's memory has betrayed him. There is, of course, in addition, the strong possibility that such discussion as there was may, so far as Mr. Dodd was concerned, have been understood by him to relate to the then current scheme—which I am now considering, and certainly not to the subject of this particular litigation. In all the circumstances, whilst desirous of expressing an obligation to Mr. R. Neilson for the assistance he sought to give me, it would, I think, be quite ungenerous for me to treat Mr. R. Neilson's evidence as establishing the unreality of the sworn testimony which I heard from Mr. Dodd. It is against that background of fact that the liability of the defendants' association for pool betting duty falls to be determined.

By a series of successive enactments between the years 1947 and 1952, the incidence of pool betting duty during the period covered by these matters has been laid down. The material enactments are as follows. The matter commenced by the Finance (No. 2) Act, 1947, s. 6 (1) and (2), which, so far as they are relevant, read as follows:

> " (1) There shall be charged on all bets made by way of pool betting . . . a duty of excise, to be known as the pool betting duty, equal to ten per cent. of the amount of the stake money paid.
>
> " (2) The pool betting duty shall be paid . . . in the case of other bets [that is to say, not made by totalisator] by the promoter."

Subsection (5) and sub-s. (6) say:

> " (5) Bets shall be deemed for the purposes of this section . . . to be made by way of pool betting whenever a number of persons make bets on terms that the winnings of such of those persons as are winners shall be, or be a share of, or be determined by reference to, the stake money paid or agreed to be paid by those persons . . .
>
> " (6) . . . ' promoter ' means, in relation to any pool betting, the person to whom the persons making the bets look for the payment of their winnings, if any."

It is perfectly clear, if, in fact, there is any liability, that these proceedings are properly constituted by being taken against the association who acted as promoter. The next enactment is the Finance Act, 1948, s. 14 (2), of which the material portion reads:

> " . . . bets shall be deemed for the purposes of . . . s. 6 [viz., of the Finance (No. 2) Act, 1947] . . . to be made by way of pool betting whenever a number of persons make bets on terms that the winnings of such of those persons as are winners shall be, or shall include, an amount (not determined by reference to the stake-money paid or agreed to be paid by those persons) which is divisible in any proportions among such of those persons as are winners."

The third Act is the Finance Act, 1950, s. 17 (1), which provides:

> " . . . bets shall be deemed for the purposes of . . . s. 6 [viz., of the Finance (No. 2) Act, 1947] . . . to be made by way of pool betting whenever a number of persons make bets on the basis that the winners or their winnings shall, to any extent, be at the discretion of the promoter or some other person . . ."

Then the Finance Act, 1952, s. 4 (1), reads:

> " For the purposes of s. 6 [of the Act of 1947] . . . any bet shall be deemed to be made by way of pool betting unless it is a bet at fixed odds."

Subsection (5) reads:

> " For the purposes of the pool betting duty any payment which entitles a person to make a bet by way of pool betting shall, if he makes the bet, be treated as stake money on the bet, and this subsection shall apply to any payment entitling a person to take part in a transaction which is, on his part, only not a bet made by way of pool betting by reason of his not in fact making any stake, as if the transaction were such a bet, and the transaction shall accordingly be treated as a bet for the purposes of the pool betting duty."

It will be noted throughout those various sections and subsections that liability to duty attaches only to transactions which are bets or which are deemed to be bets under s. 4 (5) of the Finance Act, 1952. This does not call for special consideration in the present case, so I will turn to the main question which was debated before me, that is to say: Was there in this scheme any provision which would justify the conclusion that the purchase of a ticket for 1s., by one who had qualified for membership of the club, constituted a bet?

Let me clear the ground first of all. The mere fact that the distribution of prizes depended in part on the outcome of certain specified football matches does not of itself import any element of forecasting. In the known form of football pool betting wherein an entrant indicates his own forecast of the outcome of specified matches, it is accurate to state that he stakes his entry money on the chance of his forecast being more accurate than those of other entrants, thus backing himself against the field, and that transaction constitutes a bet, notwithstanding the fact that the second party to the entrant's wagering contract is to be regarded as a group of other entrants, for whom the promoter acts, or may act, as agent. The results of the specified matches will determine the accuracy or otherwise of the forecast which the entrant has made, but the event on the issue of which, success or failure of the bet falls to be determined, is the entrant's forecast, and not the match results themselves.

In the defendants' scheme—if for the moment I disregard the potentiality of alteration of code numbers—each entrant, by reason of the allotted code numbers, which identified his entry, was required to accept the three corresponding teams arbitrarily selected by the printer as his particular entry, on which his chance of securing a prize must depend; that necessarily means to my mind that any entrant's chance of qualifying for a prize was not dependent on any option or action of his own, but was wholly at the mercy of circumstance. The provisions of condition of sale No. 5 undoubtedly introduced the possibility of an action on the part of the entrant which may affect his chance of qualifying for a prize, although, of course, it must be borne in mind that this would be effective only for the week in which the change was made and not thereafter, unless some further application for a change was acceded to. The existence of that mere possibility, according to the condition of sale, cannot of itself, in my judgment, turn into a betting transaction, the purchase of a ticket by a member, who did not avail himself of the opportunity to change from the random allocation of teams into a deliberate selection. In the few instances in which this change of code numbers was promoted, it might well be that the notional introduction of a choice, even though the entrant was concerned only to secure attractive numbers rather than attractive corresponding teams, could constitute the transaction a bet, because the intention which a person has in mind in deciding the materials on which he proposes to wager is not, in my judgment, an essential factor in determining whether or not a wagering contract has been entered into. A

In the present case out of gross stakes estimated in total to exceed some £70,000, a series of transactions which on the evidence, did not amount to more than £1 in value in all, can, I think, fairly be dismissed on the ground of de minimis. B I find myself constrained to hold that the system operated, as explained by Mr. Dodd in his evidence, did not include, as part of each ticket purchased, the making of a bet, and having arrived at that conclusion it follows from my construction of the sections that there being no bets, pool betting duty was not consequently attracted. If I am right about that, it is, of course, unnecessary for me to deal with the alternative ground which was based on the provisions of s. 24 C of the Betting and Lotteries Act, 1934, sub-s. (1) of which reads—the Act excluding from objection so-called private lotteries—

> " . . . the expression 'private lottery' means a lottery in Great Britain which is promoted for, and in which the sale of tickets or chances by the promoters is confined to . . . (a) members of one society established and conducted for purposes not connected with gaming, wagering or lotteries . . ." D

On the evidence, there is no question that the lottery was promoted for, and the sale of tickets for chance by the promoters was confined to, members of a particular society, i.e., the Supporters' Association, who are the defendants, and on behalf of whom the three named defendants are sued in the present proceedings. But the question which has to be determined is whether that is a E society established and conducted for purposes not connected with gaming, wagering or lottery. Although, as I have indicated, it is not material for determination of this action for me to deal with it, it is clear that that question requires for its solution considerations of fact, and as I have listened to the evidence and arrived at certain conclusions on fact, it is, I think, proper for me to include in my judgment three views at which I have arrived. The first view is that this F association was established without any intention that its future activities would, or might, include the conduct of any lottery. The second is that throughout its existence the purposes for which the association has been conducted include the periodical gathering of its members together for discussion, for dancing, for card games, and the like social activities. The third view is that paid-up membership of the Supporters' Club is a genuine indication of an active G and practical interest in the Stockport County Football Club and in particular in the provision of improvement amenities for watching the games which are played at the ground of that club.

Having expressed my findings on fact, I think it right to deny myself the opportunity of indicating my construction of this section.

Judgment for defendants.

Solicitors: *Solicitor of Customs and Excise* (for the plaintiffs); *Gibson & Weldon*, agents for *A. E. M. West & Co.*, Manchester (for the defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

WINDSOR REFRIGERATOR CO., LTD. AND ANOTHER *v.* BRANCH NOMINEES, LTD. AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), November 22, 23, 24, December 7, 1960.]

Company—Debenture—Receiver—Appointment to be made "by writing"—Appointment purporting to be made by deed—Seal of company affixed in presence of directors who attested it—Deed ineffective—Whether appointment effective as writing.

B.N. Ltd., a bank's wholly owned subsidiary, held a debenture as security for a company's overdraft with the bank, the principal being repayable on demand. The debenture conferred power, when the principal moneys had become payable, to appoint "by writing" a receiver. B.N. Ltd. affixed its common seal to an undated deed appointing a receiver. The sealing of the deed was witnessed by two directors of B.N. Ltd. The document, undated, was sent to a branch of the bank and, a few days later, the bank's branch manager inserted therein the then date and delivered to the company a formal demand for payment and, on payment not being made, produced the document, handed it to the receiver and indicated that the receiver was appointed.

Held: assuming that the document of appointment was invalid as a deed on the ground that it could not be delivered by B.N. Ltd. as an escrow subject to an overriding power to recall it, the document could nevertheless be valid as an appointment by writing, since an appointment by writing might be made out before it was intended to take effect and could take effect on a subsequent date when, e.g., demand for the money had been made and the appointment had been communicated to the receiver.

Decision of CROSS, J. ([1960] 2 All E.R. 568) reversed on this point.

Cases referred to:

Beesly v. *Hallwood Estates, Ltd.*, ante, p. 90.

Foundling Hospital (Governors & Guardians) v. *Crane*, [1911] 2 K.B. 367; 80 L.J.K.B. 853; 105 L.T. 187; 17 Digest (Repl.) 217, *170*.

Appeal.

This was an appeal by the defendants from an order of CROSS, J., on May 19, 1960, reported [1960] 2 All E.R. 568, on a matter which was ordered on May 27, 1959, to be argued as a preliminary point of law. CROSS, J., held that the procedure adopted by the defendants was invalid to effect the appointment of a receiver of the plaintiffs' property under the debentures held by the first defendants, Branch Nominees, Ltd., because the document of appointment was ineffective as a deed, and could not be regarded as an appointment under hand validly made on behalf of the debenture holders.

J. L. Arnold, Q.C., and *L. J. Morris Smith* for the defendants.

Muir Hunter and *David Graham* for the plaintiffs.

LORD EVERSHED, M.R.: This action is of a somewhat unusual character; and though the writ in it was issued in June, 1958, it has now come before this court on appeal from the decision of CROSS, J., on a submission made pursuant to an order of May 27, 1959. The form of that order, so far as relevant, is as follows:

> "And it is ordered that the preliminary point of law raised by para. 8 of the defence and para. 4 of the said draft reply be set down to be argued before this court as a preliminary point of law before the trial of this action, that is to say whether the procedure described in para. 5 and para. 8 of the defence read with the further and better particulars thereof delivered on Feb. 24, 1959, was invalid to effect the appointment by the defendants,

> Branch Nominees, Ltd., of the defendant Philip Clarkson Greenwood on A
> Feb. 28, 1958, to be the receiver under their debentures by reason of all or
> any of the following facts that is to say . . ."

There then follow five further paragraphs of facts or assumed facts. From what I have said it will be apparent that the nature of the action is to challenge the validity of the appointment of the defendant Greenwood as receiver of the B property of the first plaintiffs, Windsor Refrigerator Co., Ltd., the appointment purporting to have been made under the powers in certain debentures which were issued by the Windsor company in favour of Branch Nominees, Ltd., by way of security for moneys which the Windsor company owed to their bankers.

The plaintiffs challenge the validity of the appointment, and sue accordingly for damages against the defendants including the receiver. As I have said it C is a very unusual form of action, but I dare say none the worse for that. On the other hand, I venture to echo and emphasise what CROSS, J., said in his judgment (1):

> " The fact that there was this dispute [as to facts] between the parties shows how unsuitable this form of procedure is for the determination of a question of this sort." D

It is no doubt easy to be wise after the event; and I do not want to be thought offensive in any sense at all to those who drafted the order if I say that its language is a little startling " whether the *procedure* described . . . was invalid to effect the appointment . . ."

I shall not take up time in reading all the facts which are referred to expressly E or by inference, but one of the particulars under para. 5 and para. 8 of the defence was as follows:

> " The requests for the preparation of the formal demand and the sealing of the instrument of appointment were made by the bank (through its advance department) with the intention thereafter of procuring the said demand to be served on the company and the said instrument of appoint- F ment to be dated and delivered to Mr. Greenwood so as to effect his appointment as receiver. The debenture holders complied with such requests (as they were bound to under cl. 2 of each of the said agreements [i.e., contemporary agreements made when the debentures were issued]) in the knowledge that such was the intention of the bank and in order to enable such intention to be carried into effect and the bank had the express or alternatively implied G authority from the debenture holders on their behalf to serve or procure the serving on the company of the said demand and to date and deliver to Mr. Greenwood the said instrument or procure the same to be so dated and delivered. It was not the intention either of the debenture holders or the bank that the said instrument of appointment should have any effect until so dated and delivered." H

Suffice it to say that for the purpose of determining the so-called preliminary issue, what I have read was to be assumed, and it has become quite manifest that those circumstances which I have narrated are by no means conceded. Very briefly it is said by the defendants that the following course of events took place. On Feb. 25, 1958, Branch Nominees, Ltd. (who were the debenture holders, I but who are a company wholly owned by the Windsor company's bankers, the National Provincial Bank, Ltd.), proceeded to affix the seal of the company to an instrument in the following terms:

> " We, Branch Nominees Ltd., being the registered holders of the debentures referred to in the schedule hereunder written and under and in accordance with the provisions of the conditions indorsed upon the said debentures

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(1) [1960] 2 All E.R. at p. 574.

> and all other powers us enabling hereby appoint Mr. Philip Clarkson Greenwood, A.C.A., to be receiver of the undertaking and all of the property and assets of Windsor Refrigerator Co., Ltd., comprised in and charged by the said debentures upon the terms and with and subject to the powers and provisions contained in the said debentures [and then there was a reference to remuneration] as witness our common seal this (blank) day of (blank) 1958."

The affixing of the common seal was on the face of the document witnessed by two gentlemen of the names of Brooks and Wheeler, who are said to be directors of Branch Nominees, Ltd. That was on Feb. 25, 1958. According to the defendants' story, after correspondence passing between Branch Nominees, Ltd., the bank, and also to some extent the Windsor company, a Mr. Inkin, who was the manager of the local branch of the bank which kept the Windsor company's account, at about 10.20 a.m. on Feb. 28, filled in the figure " 28 " and the word " February " where the blanks occur at the end of the document of appointment. He then proceeded, in the company of Mr. Greenwood, to the office of the Windsor company; Mr. Greenwood remained decorously outside for a short period. When Mr. Inkin saw Mr. Wood, the managing director of the Windsor company, Mr. Inkin (according to the defendants' story) after expressing suitable condolence demanded payment of what was due to the bank, or alternatively under the debentures. He having made that demand, which not surprisingly was not then and there met, there entered Mr. Greenwood. Thereupon Mr. Inkin handed to Mr. Greenwood the document which I have read, and thereby (again according to the defendants' story) indicated that he (Greenwood) was appointed receiver by virtue of the powers in the debenture; and Mr. Greenwood thereupon proceeded or began to proceed so to act. In the 2½ years that have elapsed since that event, it seems that one result has been that the existing overdraft of the company had been somewhat more than doubled; and in order to protect what there is to protect, Mr. Greenwood has since been appointed receiver by the court.

The debentures are in a form common enough, and contain in condition 12 the following:

> " (1) At any time after the principal moneys hereby secured shall have become payable the registered holder of this debenture may at any time appoint by writing any person or persons to be a receiver or receivers of the property charged by this debenture and may from time to time by writing remove any receiver so appointed and appoint another in his stead."

Sub-condition (2) states what the receiver's powers are, and to those I shall return briefly hereafter. There cannot, I should have thought, be any doubt that the document to which I have referred as the appointment was intended to be a deed. That view is supported not only by the fact that the common seal of the company is affixed in the presence of two directors, but also by the fact that it was stamped as a deed with a 10s. stamp, and is referred to as a deed of appointment in various letters, which are before the court but which I need not read.

The first challenge which the plaintiffs have made (and which has been agitated on this issue) is that the deed was for the purposes intended wholly ineffective. That argument, which found favour with CROSS, J., was based on certain considerations; and before I state them it is right that I should say at once that on this part of the case we did not hear counsel for the defendants fully in argument, and we have not heard counsel for the plaintiffs at all. The basis of the attack rested on this: that this appointment must have been in the circumstances one of three possible things, or have one of three possible results. In the first place it operated (and was intended to operate) without qualification as a deed executed and delivered on Feb. 25, 1958. If that were the result, then it is conceded that it must have been ineffective to appoint Mr. Greenwood because at that date no demand for payment under the debentures had been made. Another view is that it was executed and delivered not as a deed, but as an escrow, i.e., that its operation would be suspended pending the fulfilment of whatever was or were the condition or conditions implicit in the execution as an escrow. To that possible view I will return in a moment. The third view (and it was on this ground that Cross, J., based his decision) is that the deed, though executed, was executed subject to the suggested condition that pending the delivery of a demand, and its not being satisfied, Branch Nominees, Ltd. could at any moment recall it. If that were the effect, then it was not a deed, it was nothing; and for that view Cross, J., cited *Foundling Hospital* (*Governors & Guardians*) v. *Crane* (2), which was also cited in a recent judgment of this court (3). If either of the first and third effects was achieved by this document, then as I understand, the results are not in doubt, and those results would be fatal to the defendants.

There remains the possibility of the escrow, and that raises the problem what were the conditions on which the deed was so executed. In view of the fact that we have not heard fully this part of the argument, and (consequently) since I shall not myself express any concluded view on it, I do not propose to go into it at length. In his judgment Cross, J., indicated (4) that there were, or might have been, four conditions, fulfilment of which was necessary before the deed took effect as such, viz., first, Mr. Greenwood's agreement to act on acceptable terms; second, that demand for payment made by Mr. Inkin be not complied with; third, the dating of the document by Mr. Inkin; and fourth, that he hand the deed to Mr. Greenwood after the demand was made and not complied with. In addition to other difficulties in the defendants' way on this part of the case, there is this further point which I mention, but on which again I express no view, that if this instrument were executed as an escrow subject to some or all of the conditions made or other conditions, then on the fulfilment of the condition or conditions prima facie, so it is argued, it would become retrospectively operative from its date or the date when it was actually executed, viz., Feb. 25. Counsel for the defendants indicated, but did not pursue the point, that that general principle would not apply in a case of this kind. If it did, then, of course, again the result would be fatal to the defendants, for on Feb. 25, 1958, beyond a peradventure, the power to appoint a receiver had not arisen, there having been no demand.

As I have indicated, however, Cross, J., based himself on the third possible result of the instrument in the circumstances. He said (5):

> "I prefer, therefore, to rest my decision on this part of the case on the ground that a deed cannot be delivered as an escrow at all subject to an overriding power in the grantor to recall the deed altogether, rather than on the fact that on Feb. 25 the debenture holders had no power to make an unconditional appointment."

I propose to say no more on this aspect of the case, save only this. Though this point of law has been tried as a preliminary issue on various elaborate hypotheses, few of them appeared to be matters of undisputed fact. I assume that it will be a point to be decided at the trial what exactly happened in the board room or other office of Branch Nominees, Ltd., when the common seal of the company was affixed to this instrument in the presence of Mr. Brooks and Mr. Wheeler, and some conclusions may be drawn from the evidence of what then occurred, or was said or recorded. For the purpose of the rest of my judgment, however, I shall assume that on the grounds stated by the learned judge, or for some other good reason, this instrument was ineffective at any relevant date as a deed for the purpose of making any appointment of Mr. Greenwood or otherwise.

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(2) [1911] 2 K.B. 367.

(3) *Beesly* v. *Hallwood Estates, Ltd.*, ante, p. 90.

(4) [1960] 2 All E.R. at p. 574.

(5) [1960] 2 All E.R. at p. 576.

A On that basis counsel for the defendants then developed his alternative argument, which was that although the instrument might not be a deed, still it was an instrument in writing; and since what the debenture required was appointment " by writing ", it would suffice to satisfy the condition albeit that it was ineffective (for its survival) for any purpose as a deed. I emphasise at once the two words " by writing " because, according to the judgment of CROSS, B J., this alternative appears to have been put somewhat differently before him. What was argued and decided was not whether this instrument operated as a writing sufficient to satisfy the condition, but whether it could be treated as a document under hand, which I conceive is not the same thing, or at least not necessarily so. CROSS, J., rejected that argument. He was content to assume first that the condition might not require appointment by deed; second, that C by virtue of the Law of Property Act, 1925, the directors of Branch Nominees, Ltd. could have appointed an agent to execute on their behalf a document under hand; third, that such an appointment under hand by an agent could have been made with the intention that it should not bind unless certain events happened, including the prior making of the demand, etc. In other words, it did not have the disability in this respect that a deed executed as an escrow might have. D CROSS, J., stated the alternative submission of the defendants as follows (6):

> ". . . (iv) If this appointment cannot take effect as an escrow, I ought to treat it as being equivalent to an appointment under hand made by the directors who signed it as agents for the debenture holders."

The learned judge decided the point adversely to the defendants. He said (7):

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> ". . . I am prepared to accept proposition (iii), but I am quite unable to see how the facts which I must assume to be correct justify proposition (iv). The debenture holders were asked by the bank to prepare and seal a deed. I have not seen any resolution of the board of the debenture holders, but I assume that it accorded with this request. I have, therefore, no reason F to think that the two directors who put their names on the appointment were authorised to do anything else than to witness the affixing of the seal. I cannot assume that they had any authority to bind the company by a document under hand or were purporting to do so."

It seems to me that the point as it has now developed is not the same point as was in the mind of the learned judge, and which was decided by him. G The question is not whether these two gentlemen, when they put their names on this document, were purporting to execute a document under their hands as agents for the company, or had any authority so to do. The question, as I conceive it to be, is: Can this document, albeit purporting to operate as a deed, but failing so to do—can it none the less be the instrument of the company in writing? I have come to the conclusion that that question ought to be H answered in the affirmative. So to decide is far from deciding that Mr. Greenwood's appointment was valid. There remain matters of fact plainly in issue, and all that we can say, as it seems to me, is that assuming those facts are found eventually in a sense favourable to the defendants' case, then this document could operate as an instrument in writing within the contemplation of condition 12 of the debenture so that it could be said by the defendants that Branch I Nominees, Ltd. had by writing appointed Mr. Greenwood.

In order to make clear the limitations of what I am saying, I must also make plain what would have to be the necessary basis of fact before such a conclusion could be reached. I will repeat that the question what did happen on Feb. 25 might have some reflection on later events. In addition it will be plainly necessary first to establish as a fact that before anything was done which could be called an appointment on Feb. 28, there had been a demand. I gather from counsel for the plaintiffs that that fact is by no means conceded, and that someone will have to prove it. If a demand were made, it was made, as I assume, by Mr. Inkin, the branch manager; but Mr. Inkin was the officer of the National Provincial Bank, Ltd., and not of Branch Nominees, Ltd. So there is the second question: Had he authority to make the demand not as manager of the National Provincial Bank (Reading Branch) but as agent for the debenture holders, Branch Nominees, Ltd.? That is a further question for investigation. Then assuming that he did make demand, and had authority to make it for Branch Nominees, Ltd., what then happened? The suggested events, according to the defendants—which I have perhaps already sufficiently indicated—are that after the entry of Mr. Greenwood into the room, the document was handed to Mr. Greenwood, and some words were used which were understood to mean (so they say) that thereupon Mr. Greenwood was appointed, and the instrument was a writing, and evidence to that effect. Once more, that will have to be gone into at the trial.

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(6) [1960] 2 All E.R. at p. 576.

(7) [1960] 2 All E.R. at p. 577.

If all those facts are established in a sense which supports the defendants' case, then as I have indicated it appears to me not fatal to the defendants' case that this appointment started by being (or by being intended to be) a deed, but was ineffective as such. I conceive that if an individual sets out to execute a deed, and for some reason the instrument is not effectively a deed (say, because of the absence of a seal, or the absence of attestation) it cannot be said that therefore it is not, and cannot be, an instrument in writing and his instrument in writing. Counsel for the plaintiffs has argued that in considering matters of this kind, one must apply a strict construction adverse to the debenture holders on the language of condition 12 of the debenture. I am not quite sure what the precise effect of that submission is. The words are quite simple words: "appoint by writing"; and in construing them it is fair to note that the condition also empowers the debenture holders by writing to remove. For myself I should have thought that those words would be satisfied if something was done—if the person acting for the debenture holders so conducted himself that one could say that he was appointing someone to be a receiver, and if he accompanied that by handing a writing which was the company's writing to the receiver. That would satisfy the condition. I am not by any means saying that that would be the only way to do it, but that is the relevant alleged course of events here. Counsel for the plaintiffs says: No, this writing came into existence when it was made on Feb. 25, and when the two directors, Mr. Brooks and Mr. Wheeler, then appended their signatures to the affixing of the seal, and thereby for present purposes identified it as the company's writing. He says that the subsequent putting in of the figure "28" and of the word "February" again before the demand, does not affect that proposition, and that even if it did, it would mean that the writing was complete and (if at all) effective as such at that point of time.

The point is a short one, but in my judgment those propositions are not well founded. I agree with CROSS, J., when he accepted, as I understand that he did, that in the case of a writing it is perfectly competent that it should be made out, that it should come into existence, on a day before it is intended to take effect, and does take effect. The contrary view would seem to have startling results, because, assuming a power to appoint in writing, a man might make a document, lock it up in his desk with the idea that he was not wanting to use it at the moment, but there it was available if he did want to use it, and years might pass. According to counsel for the plaintiffs, when it was produced, it would have been effective from the date when he had made it and put it in his desk. That appears to me an absurd and unreal result of the argument which I do not think is the law.

Counsel for the plaintiffs took a final point which he submitted this morning, viz., that notwithstanding the words which I have read in condition 12, the true construction of the condition is that "by writing" should be read "by deed".

That argument, as I follow it, is based on the view that, as appears from what follows in sub-condition (2), powers are given to the receiver so appointed which would involve the vesting in him of some estate; and if that is right, then a deed is necessary, and one should construe the words " by writing " as therefore meaning, in the light of what follows, " by deed ". I am afraid I am quite unable to accept that argument. I do not accept the view that there was any vesting of an estate contemplated as the result of the appointment. But even if some such matter arose, that would be a question to be decided after the appointment, for example, whether the receiver, not having been appointed by deed, had in law the authority to do something which he thereafter purported to do. We are not at this stage concerned with that at all.

For the reasons that I have stated, I conclude that the answer to this case is that on the assumptions of fact which I have indicated—which can be determined only in the action—this instrument would be capable of being a writing as contemplated by the appointment taking effect on the date (Feb. 28) when it was in fact, according to the defendants, passed over to Mr. Greenwood after a demand had been made by Mr. Inkin with the authority of the debenture holder.

I would, therefore, order accordingly, and set aside the judgment of CROSS, J., though, as I say, I do not express any view on the matter with which he expressly dealt, viz., whether the document took effect in the circumstances (or was capable of taking effect) as a deed. I repeat what I said at the beginning, that the course which this matter has taken emphasises as clearly as any case in my experience the extreme unwisdom—save in very exceptional cases—of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the short cut so attempted inevitably turns out to be the longest way round.

HARMAN, L.J.: I concur, and find myself doing so with particular heartiness, with reference to the last observations my Lord has made. The number of conditions which he has found it necessary to use to fence in the expression of this court's opinion shows at once the undesirability of this kind of procedure. It is highly undesirable that the court should be constrained to tie itself in so many knots, and in the end merely say: " Well, if this was thus, then that was so ". In particular here one has no notion what authority (if any) Mr. Inkin, the servant of the bank, had so far as he was (if at all) the agent of the debenture holders. Had he authority to demand the mortgage money? Had he authority to make the appointment? One has no idea at all, and those are only two of the questions which are left unresolved by the case as it now stands. As my Lord has observed, the point about the delivery of this instrument as an escrow has not been fully argued. The judgment appears to show the learned judge to have held that the document could only be effective as an escrow, if when delivered it was not retractable at the will of the grantor pending the fulfilment of the conditions attached to it. That statement of the law seems to be consonant with a decision of this court in *Beesly* v. *Hallwood Estates, Ltd.* (8) in which judgment was delivered recently. I assume, therefore, that on this point the learned judge was right.

The other point, viz., whether the document was operative in law as an appointment in writing, was not argued before the learned judge as it has been argued before us. He came to the conclusion that these two directors had authority only to execute, or to witness the execution of a deed by the company, and that as that did not authorise them to execute or sign a document under hand, that was an end of the matter. But with all respect, the appointment need not be under hand. There was no need for any signature here. The two directors were authorised to do that which they did, and having done it, whether that instrument so brought into being operates as a writing is for the court, and is not a matter of their authority at all; and my Lord has expressed the view, in A which I concur, that this document on the face of it could operate as an appointment in writing. Whether it did so depends on a number of facts to which we do not know the answer. All we can say, therefore, is that it could so operate.

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(8) Ante, p. 90.

Counsel for the plaintiffs' assumption that one must write it all out after the demand is made, and one is not entitled to carry a piece of paper in one's pocket with the words written on it, and produce that piece of paper if and when one B needs it, seems to be an absolute novelty, and not convenient in practice, or right in law. I can see no reason why one should not write down words on a piece of paper and keep them in one's bosom or one's pocket book, and produce them at the right moment. Nor do I see why, if one so produces them, they should not have effect at the moment when one produces them to the proper person, here to the receiver. Regarded as a document in writing, the document is not a C conditional appointment at all. When the words were written on Feb. 25, they were written without any intent that they should have any present effect and merely in preparation for a day which might or might not arrive. When it did arrive, the production of the document and the handing of it to Mr. Greenwood with an intimation that this was his appointment as receiver, would constitute a good appointment by writing (if Mr. Inkin had the necessary authority). D To that extent, therefore, we differ from the learned judge, although over ground which he never really traversed. Nevertheless, to that extent the appeal must, in my judgment, be allowed, and some kind of declaration made that in various events which might have happened, this instrument could be effective according to its tenor.

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DONOVAN, L.J.: In the way in which this case has come before the court, and has been argued here, it seems to me that two questions arise: First, whether the document purporting to appoint the receiver is such a " writing " as satisfies condition 12 of the debenture; and secondly, whether, if so, the appointment was invalid as being premature.

As to the first question, I can see no answer to the defendants' contention that F if the document cannot properly operate as a deed, it certainly can do so as a writing; and I need say no more on this point than my brothers have said already, with which I agree.

As to the second question, the argument is that the receiver was appointed the moment the document was signed, and so before the debt became payable. I agree that in a context where precision is not required, one might speak of the G document loosely as appointing a receiver. But in this context precision is required. What the debenture holder wants to do is to levy equitable execution, and for that purpose to have some person in being clothed with the necessary authority to take possession of the company's property, to carry on its business, to act in its name, and pay the debt; and the company has to submit to the H exercise of these powers by the person having such authority. This state of affairs is not achieved simply by the debenture holder signing a document in privacy, and keeping the contents to himself for as long as he wishes. Clearly the contents of that document must be communicated at least to the receiver before his appointment can be said to be effective. One may illustrate this by the converse case of removal, which may also be done under condition 12 by I writing. The plaintiffs here are driven to argue that the receiver might also be removed by a writing of which he need know nothing. So he would go on managing the company's business, acting in the company's name and receiving the company's property perhaps for weeks before he became aware of the fact that he had ceased to be receiver, and had been removed. This seems to me clearly to expose the fallacy of the argument.

On the assumptions that we are asked to make, i.e., that the receiver was notified of his appointment on Feb. 28, after demand for payment had been properly made, I think that the appointment was not premature, and I agree that the appeal should be allowed.

Dec. 7. The case was mentioned: **LORD EVERSHED, M.R.**, stated that the order below would be set aside, but no declaration should be made because this was a hypothetical case.

Appeal allowed.

Solicitors: *Wilde, Sapte & Co.* (for the defendants); *Matthew Trackman, Lifton & Cunnington* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

FARMERS' MACHINERY SYNDICATE (11th HAMPSHIRE) *v.* SHAW (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), October 27, 28, December 16, 19, 1960.]

Rates—Agricultural building—" Occupied together with agricultural land "—Used " solely in connexion with agricultural operations thereon "—Grain drying plant—Provision by farmers' syndicate—Used to dry their grain—Controlled by management committee—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5 *c.* 44), *s.* 2 (2).

Rates—Rateable occupation—Occupier—Property of syndicate—Control by committee of syndicate.

Thirteen farmers occupying different farms, and a fourteenth, who was the managing director or governor of a limited company owning and occupying a farm, formed a co-operative syndicate to obtain and work a grain drying plant, which would be used for drying their grain. The machine was purchased and installed on land conveyed to four trustees, three of whom were members of the syndicate. The plant was managed by a management committee in accordance with written rules. The committee consisted of a chairman and a secretary, who was not a farmer, and two other members. The committee had the control of the grain drying plant, and the key of the plant was in the possession of the chairman of the committee during the period of the year when the plant was not in use. On the question whether the plant was exempt from rates as being an agricultural building " occupied together with agricultural land . . . and . . . used solely in connexion with agricultural operations thereon " within s. 2 (2)* of the Rating and Valuation (Apportionment) Act, 1928,

Held: the grain drying plant was not exempt from rates as an agricultural building within s. 2 (2) because—

(i) the occupiers of the grain drying plant for the purpose of rates were the management committee; accordingly the plant was neither occupied " together with agricultural land " nor used solely " in connexion with agricultural operations thereon ", i.e., on the farms, as the committee did not conduct any agricultural operations on the farms and the farms were not in their occupation.

(ii) even if (contrary to (i) above) the plant were occupied by the farmers, the building was not occupied " together with agricultural land " nor used " solely in connexion with agricultural operations thereon ", for " the land " meant each farmer's land and occupation would not be " solely " in connexion with any one farmer's separate farm, but would be joint occupation in connexion with all the other farms as well.

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* The relevant terms of s. 2 (2) of the Act of 1928 are stated at p. 286, letter I, post, and the exempting provision, s. 67 (1) of the Local Government Act, 1929, is set out at p. 287, letter A, post.

Appeal allowed.

[As to agricultural buildings exempt from rates, see 32 HALSBURY'S LAWS (3rd Edn.) 47, para. 64; and for cases on the subject, see 38 DIGEST (Repl.) 530, 531, *319*, *321-324*.

For the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 174.]

Cases referred to:

National Pig Progeny Testing Board v. *Greenall*, [1960] 3 All E.R. 556; 124 J.P. 508; [1960] 1 W.L.R. 1265.

Clayton v. *Kingston-upon-Hull Corpn.*, [1960] 3 All E.R. 840.

Case Stated.

The ratepayers were the owners of a hereditament comprising a grain drying depot, Annett's Farm, Farringdon, Hampshire, assessed at £163 net annual value, £41 rateable value in Part II of the valuation list for Alton Rural District under a decision of a local valuation court of Hampshire Local Valuation Panel arising out of a proposal for the alteration of the valuation list made by the valuation officer on Sept. 29, 1958. On Jan. 11, 1960, the Lands Tribunal (ERSKINE SIMES, Esq., Q.C.) allowed the ratepayers' appeal against the decision ((1960), 6 R.R.C. 278) and directed that the assessment should be deleted from the valuation list. The valuation officer appealed by way of Case Stated to the Court of Appeal. He contended that the tribunal was wrong in law in deciding that the hereditament was an agricultural hereditament as defined in s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, that the buildings forming part of the hereditament were not occupied together with agricultural land and that, even if they were so occupied, they were not used solely in connexion with agricultural operations on such land.

P. R. E. Browne, Q.C., and *J. R. Phillips* for the valuation officer.

C. E. Scholefield, Q.C., and *G. J. Ponsonby* for the ratepayers.

HARMAN, L.J. (delivering the first judgment at the request of LORD EVERSHED, M.R.): This is an appeal against a decision of the Lands Tribunal, given on Jan. 11, 1960; the decision of Mr. ERSKINE SIMES, Q.C., is really contained in these words (1):—

> "I am satisfied that this hereditament is occupied together with agricultural land and is used solely in connexion with agricultural operations thereon and is therefore an 'agricultural hereditament' within s. 2 of the Act of 1928."

The Act to which he referred was the Rating and Valuation (Apportionment) Act, 1928, passed to put things straight before the reliefs which are contained in the Local Government Act, 1929, and, therefore, one looks at the definition in the earlier Act and finds the substantive provisions in the later one. In the Act of 1928 s. 2 provides:

> "(1) In this Act the expression 'agricultural hereditament' means any hereditament being agricultural land or agricultural buildings.
>
> "(2) In this Act the following expressions have the meanings hereby respectively assigned to them:—'Agricultural land' means any land used as arable meadow or pasture ground only . . . 'Agricultural buildings' means buildings (other than dwelling-houses) occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connexion with agricultural operations thereon."

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(1) (1960), 6 R.R.C. at p. 282.

Section 67 (1) of the Act of 1929 provides:

> "No person shall, in respect of any period beginning on or after the appointed day, be liable to pay rates in respect of any agricultural land or agricultural buildings . . ."

For the definition of those terms one is referred back to the Act of 1928.

The facts in this case communicated to the Lands Tribunal were of a very jejune character and when the matter came before us we felt bound to remit the case or to adjourn it in order to see whether there could be an agreement about the facts. The parties very sensibly came to an agreed statement of facts which is now before us. From that it appears—and this is a welcome thing in agriculture—that fourteen farmers in the Selborne district of Hampshire decided to enter into a co-operative venture. In these days grain is harvested largely by combine harvesters which bag it in a very wet state, and it is necessary to dry the grain artificially after it has been bagged. A grain dryer is an expensive machine and these fourteen farmers decided to have one on a co-operative basis; with the aid of a loan they bought the machine which, of course, needed land on which to stand. A piece of land was chosen which was part of the farm of one of the protagonists in the venture and was conveyed to four of the persons who were in the venture, they being, I think, the youngest of the farmers who were supposed to be concerned in the matter. In fact one of them did not become a member of the syndicate, which I shall mention in a moment, but that does not really matter. It was conveyed to them in fee simple. It was further declared, though it was not necessary, that they should hold it on trusts for themselves as joint tenants. The contributors to the scheme were fourteen persons and they produced the money in unequal shares, or such of it as was not borrowed from the mortgagee. I say fourteen persons. That is true in this sense, that they were the moving spirits in the fourteen farms under their control, but in fact one of these farms belonged not to Mr. Wright, who is the chairman of the syndicate and the leading member of it, but to A. B. Wright (Farmers), Ltd., of which he was either the managing or the governing director, and that has an importance in the case which will appear later.

The scheme was that, when this machine was installed on this piece of land, which was quite a small piece of land, it should be managed by a committee, who in fact during the operating part of the year between August and October employed two men night and day to look after the machinery which was going throughout the twenty-four hours. During the rest of the year for the most part the grain dryer was not in use and the keys were kept by Mr. Wright at his farm because, for one thing, he was the chairman of the syndicate and, for another, the dryer was on what had been his land and was, no doubt, most convenient to his farm. Generally speaking each member of the syndicate had what is called a quota, i.e., so many tons of grain which he might send by right to the dryer to be dried. If he wanted grain over his quota sent, he had to ask for it; he had no right but the management committee could allow him, if there was a vacancy, to have more than his quota dried. If he did not send any grain to the dryer, he must nevertheless pay his subscription for the year on a theoretical basis.

The scheme, so far as I know, was quite a successful one and it has been sought to rate the grain dryer. The objection is raised, which has found favour with the Lands Tribunal, that this comes within the Act of 1928. The appellant valuation officer says that the tribunal was not entitled either on the facts that it knew, still less on the facts we now know, to come to the conclusion which it reached. Mr. Simes reached his conclusion on broad grounds, viz., that this was the kind of land or buildings which the legislature was meaning to relieve when it gave relief to agricultural land and agricultural buildings. Speaking in general terms, I think one may agree with him, but it remains to be seen whether the scheme which Parliament has laid down does fit this particular A co-operative effort, which it might well not have thought of in 1929.

This kind of machinery is a novelty in this country, as, indeed, as I understand it, is this kind of co-operative effort, and I cannot see my way to fit the facts into the form of the legislation. It must first be found that these are agricultural buildings. That they are agricultural and that they are on agricultural land I do not doubt at all. That they are occupied together with agricultural land in B one sense, of course, is true, but, apart from the fact that one of the farmers in question, who is a member of the syndicate, is not the owner of his farm, which belongs to a limited company, can the building be said to be occupied together with agricultural land? Each farmer owns his own farm; each has a right to send his grain or a quota of it to this place to be dried. I cannot see that the farmers have any further right than that. C

Counsel for the ratepayers says that in fact each farmer owns severally his own farm but each farmer owns jointly and severally his equitable proportion of the grain dryer and the land on which it stands. He says that therefore it can be said that the building is occupied together with agricultural land. I am quite unable to accept that. The occupation of the land in each case is the several occupation by the farmer of his land. Even if they did jointly and D severally own the grain dryer, as in a sense they do, it does not seem to me that that is an occupation "together with the land". It would be necessary to substitute the words "together with the several parcels of land".

Even that is not the end of it, because the section goes on with these words: "and . . . used solely in connexion with agricultural operations thereon". That these are agricultural operations no one can doubt. "Thereon" means on E the land, as was held by this court the other day in *National Pig Progeny Testing Board* v. *Greenall* (2) following other cases by which we thought that we were bound. So it must be found that the building, i.e., the grain dryer, is used solely in connexion with agricultural operations on the land. What land? Each farmer's several land. If, however, each farmer's several land is involved, then the word "solely" cannot be satisfied because the building is used together F with thirteen other parcels of land as well as the one which is being considered.

Therefore, it seems to me that the matter breaks down even if, as so far I have assumed, it were true to say that the ownership of the grain dryer is that of the several farmers who are the members of the syndicate. In the first place that will not do for the technical reason that Mr. A. B. Wright is not the owner of the land which he farms; that belongs to a limited company and that alone G would be fatal because, the limited company not being a member of the syndicate, an outsider comes in and the section cannot be satisfied. Apart from that, in my judgment these fourteen members, so to call them, are not the occupiers of this grain dryer. The occupiers, I think, are the management committee, who under the rules and regulations control the operations. The regulations provide:

> "1. Committee of management. The day-to-day running of the plant H shall (subject to the regulations hereinafter contained) be under the control of a committee of management which shall consist of the chairman and secretary of the syndicate and two other members elected by the members."

Now the secretary does not farm any of these lands at all. It is obvious (and I think that I need not go through the other regulations) that the whole control I of this machine and the land on which it stands is in this committee of management. They are actively in control; they have two men during the season employed working there. The chairman of the committee himself visits it daily during the active season of the year and during the time when it is not in use the machine is in his possession because he has the key. It seems to me that the committee satisfy every qualification needed for rateable occupation. It is said that the committee are mere trustees having no beneficial interest and paramount to them are the members who, I suppose, by electing another committee can depose them. That does not seem to me to be anything to the point in a matter of this sort; they are much more clearly the controllers of this machine than were the trustees in *Clayton* v. *Kingston-upon-Hull Corpn.* (3) which was decided in November last, and in my judgment they are the rateable occupiers of this machine. That, of course, quite apart from any of the other objections, is fatal to the ratepayers' claim in this case.

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(2) [1960] 3 All E.R. 556.

It is not necessary for me to consider whether the trustees may be the occupiers; they are merely four persons in whom, as a matter of convenience, the legal estate was vested and I do not think that they themselves as such exercise any control. I need not, however, say anything about that because I am of opinion that the committee of management, not the members, are the occupiers for rating purposes and that is quite a sufficient ground, apart from the point about what counsel for the valuation officer has called multiple occupation and apart also from the point that one of the members of the syndicate is not an occupier of land at all, on all of which three grounds this case might be decided adversely to the decision of the tribunal. I prefer to put my main emphasis on the fact that the rateable occupiers are the committee, and if that be so it cannot be said that the building which they occupy is occupied in connexion with agricultural operations on the several farms—none of which is in the occupation of the committee. I would, therefore, allow the appeal.

DONOVAN, L.J.: I agree and I add only a few words on what was the real bone of contention before the Lands Tribunal. Even if these fourteen farmers occupied the building jointly and severally, so that the building was occupied together with each separate farm, nevertheless the building was not occupied solely in connexion with agricultural operations on a separate farm of any one of them; it was occupied in connexion with agricultural operations on all the other farms as well; so that on this point, even if it stood alone, the building would not satisfy the statutory definition. In my opinion it is going to be very difficult for any combination of farmers working separate farms to obtain exemption from rating in circumstances like the present, in respect of a common grain drying machine, short of an alteration of the law, and particularly in respect of the definition of an " agricultural building ".

LORD EVERSHED, M.R.: I also agree and, although we are differing from the view of the Lands Tribunal, I do not think that I can usefully add anything to what has fallen from my Lords. It may well be that, in a desire to encourage co-operative enterprise in the farming industry, Parliament may think fit to revise the present language of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928; but until it is done, for the reasons which my Lords have given, I do not think that the so-called syndicate can say that they are the occupiers, even if that were to get over all the difficulties in the case. As HARMAN, L.J., has pointed out and for the reasons that he has given, I think that the truth here is that the committee are the rateable occupiers, of whom one member, the secretary, let it be noted, is not himself a farmer at all.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Ellis & Fairbairn* (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(3) [1960] 3 All E.R. 840.

NOTE.

A

R. *v.* DAINES. R. *v.* WILLIAMS.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Streatfeild and Ashworth, JJ.), December 12, 1960.]

Criminal Law—Appeal—House of Lords—Leave—Application to Court of Criminal Appeal—Practice as regards legal aid and leave to be present when no point of law of general public importance seems to be involved—Administration of Justice Act, 1960 (8 *&* 9 *Eliz.* 2 *c.* 65), *s.* 1. B

Applications.

On June 13, 1960, the appellants, Colin Raymond Daines and William Edward Williams were convicted at Nottingham Quarter Sessions before the chairman C and a jury on three counts of shop-breaking and larceny, house-breaking and larceny and office-breaking and larceny. Daines was sentenced to seven years' imprisonment and Williams to five years' imprisonment. They appealed against their convictions on the ground that the chairman had misdirected the jury as to corroboration, and the appeals came before the Court of Criminal Appeal (LORD PARKER, C.J., SLADE and ELWES, JJ.) on Nov. 14, 1960, when the D court dismissed their appeals applying the proviso to s. 4 of the Criminal Appeal Act, 1907.

On Dec. 12, 1960, they applied to the Court of Criminal Appeal (LORD PARKER, C.J., STREATFEILD and ASHWORTH, JJ.) under s. 1 of the Administration of Justice Act, 1960*, for leave to appeal to the House of Lords, for free legal aid and for leave to be present when their applications were heard by the Court of E Criminal Appeal.

J. J. Deave for the appellants.
I. S. Hill for the Crown.

LORD PARKER, C.J., giving the judgment of the court, said: These are two applications for leave to appeal to the House of Lords against the decision F of this court given on Nov. 14, 1960, dismissing the two appeals against conviction. The court has carefully considered the applications, has heard counsel on behalf of the prisoners, and has come to the clear conclusion that there is no point of law of general public importance involved in the decision. Accordingly, leave to appeal to the House of Lords is refused.

The court would only add this, that on reading the papers this seemed a G perfectly plain case and that no point of law of general public importance arose; but, having regard to the fact that these were the first two applications under the Administration of Justice Act, 1960, they thought it right to grant legal aid and have the matter argued by counsel and for the prisoners to be present. The court desires to say that in the future in a case where there does not seem to be any point of law of general public importance the court will deal with the matter H on the papers without granting legal aid or leave to be present.

Applications refused.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Kimbers*, agents for *F. C. Crawley*, Worksop (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*] I

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* Section 1, so far as material, reads: " (1) Subject to the provisions of this section, an appeal shall lie to the House of Lords, at the instance of the defendant or the prosecutor . . . (b) from any decision of the Court of Criminal Appeal on an appeal to that court.

" (2) No appeal shall lie under this section except with the leave of the court below or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House."

GELBERG *v.* MILLER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild, Slade, Ashworth and Elwes, JJ.), December 16, 1960.]

Road Traffic—Obstruction—London—Motor car left in thoroughfare—Persistent refusal by owner to remove car after repeated requests by police officer—Power of police officer to arrest owner without warrant—Metropolitan Police Act, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54, *para.* 6*—Prevention of Crimes Amendment Act,* 1885 (48 *&* 49 *Vict. c.* 75), *s.* 2.

Arrest—Arrest without warrant—Conduct of arrest—Information necessary to be given to arrested person—Acts constituting more than one offence—One offence justifying arrest without warrant—Arrest lawful although charge ultimately brought for other offence.

On Dec. 9, 1959, the appellant left his motor car in a street in London, outside a restaurant, while he went in the restaurant to have luncheon. The street was a "restricted street" within the meaning of the London (Waiting and Loading) (Restriction) Regulations, 1958, and, under reg. 3*, it was an offence to permit the car to wait in the street during prescribed hours (which included the time during which the car was parked in the street). The appellant was requested three times by officers of the Metropolitan Police Force to remove the car, but on each occasion he refused to do so, and, when the police officers said that they would move it, he took out the rotor arm from the distributor mechanism to prevent the car being moved. He also refused to give his name and address. The respondent, one of the police officers, then arrested the appellant, after telling him that he was going to arrest him for obstructing him in the execution of his duty by refusing to move the car and refusing his name and address. The arrest was effected by the respondent taking hold of the appellant's left wrist and arm. The appellant did not attempt to resist arrest. The appellant was charged with and pleaded guilty to an offence against reg. 3 of the Regulations of 1958. He was also charged with and convicted of wilfully obstructing a police officer when in the execution of his duty, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885. On an information by the appellant against the respondent charging him with assaulting the appellant on Dec. 9, 1959, the appellant's submission was that, as there was no breach or apprehended breach of the peace on his part, the respondent had no power to arrest him without a warrant. The information was dismissed. On appeal by way of Case Stated against the conviction of obstructing the police and against dismissal of the appellant's information, the court, having dismissed the appeal against conviction, and having been informed by the Attorney. General that he could not contend that a constable had power to arrest without warrant for obstruction of a constable in the execution of his duty (a misdemeanour under s. 2 of the Act of 1885),

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* Regulation 3, which is in Part 3 of the regulations, reads: "Subject to the provisions of reg. 11 and reg. 12 of these regulations, no person (other than a person licensed to sell goods from a stationary pitch) shall cause or permit any vehicle to wait in any restricted street specified in Sch. 1 to Sch. 7 inclusive during the prescribed hours except for so long as may be necessary for the purpose of delivering or collecting goods or merchandise or loading or unloading the vehicle at premises situate within the street . . ."

By reg. 15: "Any person who acts in contravention of any of the provisions of the regulations contained in Parts 2, 3, 4 and 5 of these regulations shall be liable on summary conviction to a fine not exceeding £5."

Jermyn Street is specified as a restricted street in Sch. 2 to the regulations, "the prescribed hours" being between 8.30 a.m. and 6.30 p.m. on Mondays to Fridays inclusive and between 8.30 a.m. and 1.30 p.m. on Saturdays.

The provisions of reg. 11 and reg. 12 did not apply in the circumstances of the present case.

The regulations have been amended, but the amendments do not affect the material provisions of reg. 3

Held: in the present case the constable had power to arrest the appellant A
without warrant under s. 54 of the Metropolitan Police Act, 1839, and had lawfully arrested him accordingly, for the following reasons—

(a) on the facts there had been wilful obstruction by the appellant in the highway contrary to s. 54, para. 6* of the Metropolitan Police Act, 1839 (as applied to motor cars by s. 31 of the Road Traffic Act, 1930†) and the respondent, being a constable of the Metropolitan Police Force, was entitled B
under s. 54 to take the appellant into custody without a warrant.

(b) what the appellant already knew and what the respondent said to him before making the arrest was sufficient to satisfy the legal requirement for an arrest without warrant, namely, that the arrested person was entitled to know what was the act for which he was arrested; the known act or acts in the present case were such as would make the appellant guilty of an offence C
against s. 54 of the Act of 1839, and, that being so, it was immaterial that the charge ultimately brought against him was not a charge under s. 54.

Dicta of Lord Simonds in *Christie* v. *Leachinsky* ([1947] 1 All E.R. at pp. 575, 576) applied.

Appeal dismissed.

[As to the powers of a police officer to arrest without a warrant, see 10 Halsbury's D
Laws (3rd Edn.) 344, 345, paras. 636, 637, and 346-351, paras. 639-642; and for cases on the subject, see 14 Digest (Repl.) 194, *1590-1596*, 202-204, *1676-1691*.

For the Prevention of Crimes Amendment Act, 1885, s. 2, see 5 Halsbury's Statutes (2nd Edn.) 915.

For the Metropolitan Police Act, 1839, s. 54, see 24 Halsbury's Statutes E
(2nd Edn.) 817; and for the Road Traffic Act, 1930, s. 31, see ibid., p. 601.

For the London (Waiting and Loading) (Restriction) Regulations, 1958, reg. 3, reg. 15, see 10 Halsbury's Statutory Instruments (1st Re-issue) 111, 117.]

Cases referred to:

Christie v. *Leachinsky*, [1947] 1 All E.R. 567; [1947] A.C. 573; [1947] L.J.R. F
757; 176 L.T. 443; 111 J.P. 224; 14 Digest (Repl.) 204, *1691*.

R. v. *Howarth*, (1828), 1 Mood. C.C. 207; 14 Digest (Repl.) 190, *1551*.

Case Stated.

This was a Case Stated by Graham Rogers, Esq., a metropolitan magistrate, in respect of his adjudication as a magistrates' court sitting at Bow Street on G
Jan. 11 and 14, 1960.

On Dec. 9, 1959, two charges were preferred by the respondent, a constable of the Metropolitan Police Force, against the appellant: (i) that the appellant wilfully obstructed the respondent when in the execution of his duty on Dec. 9, 1959, at Jermyn Street, S.W.1, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885; and (ii) that the appellant unlawfully caused a vehicle H
to wait in a restricted street during prescribed hours at Jermyn Street, contrary to reg. 3 and reg. 15 of the London (Waiting and Loading) (Restriction) Regulations, 1958. On Jan. 7, 1960, an information was laid by the appellant against the respondent that he unlawfully assaulted and beat the appellant at Jermyn Street on Dec. 9, 1959. At the request of counsel for the appellant, the charges and information were heard together. The appellant pleaded guilty to the I
charge under the Regulations of 1958, and not guilty to the charge under s. 2 of the Act of 1885. With regard to the information against the respondent, the appellant contended that, as there was no breach of the peace or apprehended breach of the peace on his part, the respondent had no power to arrest him, and that, if the respondent had such power, he used unnecessary and excessive force

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* The relevant provisions of s. 54 are printed at p. 295, letters C to F, post.

† The effect of s. 31 is stated at p. 295, letter H, post; s. 31 is repealed by s. 267 of, and Sch. 18, Pt. 1 to, the Road Traffic Act, 1960; see now s. 256 of the latter Act.

in exercising it so as to cause injury to the appellant and was, therefore, guilty of assaulting and beating the appellant. The respondent contended that he had power to arrest the appellant in spite of there being no breach of the peace or apprehended breach of the peace on the part of the appellant; that the amount of force was necessary and reasonable in the circumstances; and that, therefore, he was not guilty of assaulting and beating the appellant.

The magistrate found that the offence of wilfully obstructing the respondent in the execution of his duty, contrary to s. 2 of the Act of 1885, was proved against the appellant and imposed a fine on him. With regard to the information against the respondent, the magistrate held that the respondent had power to arrest the appellant notwithstanding the absence of any breach or apprehended breach of the peace on the appellant's part and that the force used was necessary and relevant in the circumstances.

The material facts found by the magistrate appear in the judgment of LORD PARKER, C.J.

S. E. Brodie and *J. Prophet* for the appellant.

Paul Wrightson for the respondent.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), and *J. R. Cumming-Bruce* appeared as amici curiae.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by GRAHAM ROGERS, ESQ., one of the magistrates of the Magistrates' Courts of the Metropolis, sitting at Bow Street, before whom the appellant was charged, first, with wilfully obstructing the respondent, a police officer, when in the execution of his duty on Dec. 9, 1959, at Jermyn Street, S.W.1, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885; secondly, that the appellant on that day unlawfully caused a vehicle to wait in a restricted street during prescribed hours, again at Jermyn Street, contrary to reg. 3 and reg. 15 of the London (Waiting and Loading) (Restriction) Regulations, 1958. As regards the second charge, the appellant pleaded guilty and was fined. As to the first charge of wilfully obstructing the police, he was convicted and fined, and against that conviction he now appeals by way of this Case Stated. At the same time there was before the learned magistrate an information laid by the appellant himself against the respondent, the police officer, that the respondent did unlawfully assault and beat the appellant at Jermyn Street on the same day. The case in regard to that was that the respondent wrongfully and illegally arrested the appellant and, in arresting him, used unnecessary and unreasonable force. In regard to that information, the magistrate held that there was a power of lawful arrest and that the respondent had not used unnecessary and unreasonable force. As regards the latter, that is a pure question of fact and does not enter into this appeal.

As will appear in a moment, the matter really depends on the exact facts and, accordingly, in this case I propose to read the main facts as set out in para. 2 of the Case:

> " (a) On Dec. 9, 1959, at approximately 2 o'clock in the afternoon the appellant's Riley motor car, registered number XLR 650, was parked on the north side of Jermyn Street, S.W.1, outside the Mokaris Restaurant. The appellant had left his said motor car in that position in order to have luncheon in the said restaurant.
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> " (b) While the appellant was in the course of his luncheon, three police officers, namely the respondent [who, I think, was a police sergeant] and police constables Ross and Waddell, observed the appellant's motor car parked as aforesaid as they were travelling up St. James' Street in a police patrol car. The respondent gave certain instructions to the said police constables, in respect of the said motor car.
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> " (c) The said police constables approached the said motor car and were

> in the course of inspecting it when the appellant emerged from the said restaurant. The appellant was requested by one or both of the police constables to remove the motor car, which was parked in a restricted street contrary to reg. 3 and reg. 15 of the London (Waiting and Loading) (Restriction) Regulations, 1958. A
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> " (d) The appellant refused to remove his said motor car, saying that he would be only three minutes as he had to finish off his luncheon and pay his bill at the said restaurant. The appellant was requested again to remove his said motor car and on his again refusing so to do he was informed by one or both of the police constables that if he did not remove his said motor car one of the police constables would do so. The said motor car was thereupon unlocked by the appellant; he opened the bonnet of the said motor car and removed the rotor arm from the distributor mechanism, and told the police officers and the respondent, who had by that time joined them, that he was going to have a cup of coffee and would not be three minutes. B C
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> " (e) The appellant returned to the said restaurant and after about three minutes came back to the said motor car.
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> " (f) The appellant then began to replace the rotor arm, and while doing so was spoken to by the respondent. The respondent asked the appellant to produce his driving licence and certificate of insurance and to supply the respondent with his name and address. The appellant did not comply with the respondent's requests, but told the respondent to wait. D
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> " (g) After waiting a short while and after a further request to move the car and to supply his name and address, which the appellant refused, the respondent arrested the appellant for obstructing him in the execution of his duty. The arrest was effected by the respondent taking hold of the appellant's left wrist with his left hand and his upper left arm with his right hand. E
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> " (h) Prior to the respondent taking hold of the appellant as aforesaid, he told him he was going to arrest him for obstructing him in the execution of his duty by refusing to move his car and refusing his name and address. The respondent had no reason to believe that the appellant would not have accompanied him to the police station without his taking hold of him as aforesaid; nor did the appellant give any indication that he was likely to resist arrest; nor in fact did he in any way resist arrest." F

G

The first question which falls to be dealt with is the appellant's appeal against his conviction for obstructing the respondent in the execution of his duty. For my part, having listened to counsel for the appellant, who, I think, has said everything on behalf of the appellant, I am quite clear that there was abundant evidence here on which the learned magistrate could convict. It was the duty of the police so far as possible to prevent any obstruction of the highway. It H was their duty to get the car removed either by the driver himself taking it away or, if necessary, by towing it away, and the actions of the appellant were directly obstructing that duty. He refused on three occasions to remove it and, when the police said that they would remove it, he took out the rotor arm and prevented that being done. It seems to me that, so far as that matter is concerned, the appellant fails. I

As regards the information brought by the appellant for unlawful arrest, the matter is not so easy. It came before the court on an earlier occasion (1), and on that occasion the point taken by counsel for the respondent was that at common law, in all the circumstances of this case, there was a power of arrest without warrant. It seemed to this court that that raised a matter of grave constitutional importance, it being heretofore thought by many that that power of arrest at common law without a warrant for a misdemeanour could only be exercised when a breach of the peace was observed or apprehended and, accordingly, the court, as then constituted, adjourned the matter in order to have a court of five judges, and the Attorney-General was asked to appear and assist the court as amicus curiae. The Attorney-General, to whom the court is grateful for his assistance, has appeared and has told the court that he feels unable to contend that a constable is entitled to arrest somebody for obstructing him in the course of his duty—which, of course, is a misdemeanour under s. 2 of the Prevention of Crimes Amendment Act, 1885—unless the circumstances show that a breach of the peace or an apprehended breach of the peace is involved, meaning by that some affray or violence or possibly disturbance. He has contended, however, that on the facts of this case there was a power of arrest under s. 54 of the Metropolitan Police Act, 1839. Section 54 of that Act, so far as it is material, provides:

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(1) On Nov. 9, 1960, before LORD PARKER, C.J., ASHWORTH and ELWES, JJ.

> " . . . Every person shall be liable to a penalty not more than 40s., who, within the limits of the metropolitan police district, shall in any thoroughfare or public place, commit any of the following offences . . . 6. Every person who shall cause any cart, public carriage, sledge, truck, or barrow, with or without horses, to stand longer than may be necessary for loading or unloading or for taking up or setting down passengers, except hackney carriages standing for hire in any place not forbidden by law, or [and these are the relevant words for the purposes of this case] who, by means of any cart, carriage, sledge, truck, or barrow, or any horse or other animal, shall wilfully interrupt any public crossing, or wilfully cause any obstruction in any thoroughfare . . ."

The section, at the end, goes on to say:

> " And it shall be lawful for any constable belonging to the metropolitan police force to take into custody, without warrant, any person who shall commit any such offence within view of any such constable."

It is perhaps right to say that by s. 63 of the same Act it is provided:

> " It shall be lawful for any constable belonging to the metropolitan police district, and for all persons whom he shall call to his assistance, to take into custody, without a warrant, any person who within view of any such constable shall offend in any manner against this Act, and whose name and residence shall be unknown to such constable, and cannot be ascertained by such constable."

I only mention that section because it shows that under this Act there appear to be two distinct powers of arrest without warrant. In both cases the offence must be one committed within view of the constable, but I think that it is reasonably plain that s. 63 is, in effect, dealing with other offences than those which are covered by s. 54. Further, under s. 31 of the Road Traffic Act, 1930, it is provided that a motor car shall be a carriage for the purposes of any statute and, accordingly, the leaving of a motor car in a public highway in the metropolitan police district and thereby wilfully causing any obstruction to the highway is an offence under the Act of 1839 in respect of which a power of arrest is given without warrant if the offence is committed within the view of a constable.

Counsel for the appellant has contended that on the facts of this case no wilful obstruction of the highway has been proved. He says, what I think is true, that it is not every offence against parking regulations which will amount to an unlawful obstruction of the highway. There may be cases where the circumstances giving rise to the absolute offence of parking a car contrary to the regulations do not of themselves show a wilful obstruction of the highway; in particular, there may be no wilful act or any unreasonable user. But, for my part, I think that this is a plain and almost unarguable case. It seems to me that for anyone to leave his motor car in Jermyn Street at 2 p.m., in order that he may have lunch in a nearby restaurant, speaks for itself. It can only be a wilful obstruction of the highway. The matter, however, does not end there, because, as the Case reveals, the wilfulness of the appellant's conduct is shown by the fact that no less than three times he refused to move the car, knowing that the police were maintaining that it ought not to be there, and, indeed, prevented the police from moving it by removing the rotor arm. Accordingly, prima facie, there was a power to arrest under s. 54 in this case.

The matter, however, does not rest there, because it has always been the law of this country that a person, on his arrest, is entitled to know what I may loosely call " the reason why ". As Lord Simonds said in *Christie* v. *Leachinsky* (2):

> " . . . the law requires that, where arrest proceeds on a warrant, the warrant should state the charge on which the arrest is made. I can see no valid reason why this safeguard for the subject should not equally be his when the arrest is made without a warrant."

Lord Simonds, in his speech, then goes on to show that there are well-known exceptions to that general rule. In particular, he points out that, where a man is, in effect, caught red-handed, no explanation is necessary as a prelude to his arrest, because he knows the facts. That was decided as long ago as 1828 in *R.* v. *Howarth* (3). Another exception would be where it was necessary to arrest a possibly violent criminal and there would be no opportunity for explaining to him the reason why he was being arrested. Lord Simonds pointed out that, while the liberty of the subject was a very important matter and nothing should be decided to impinge on his rights, yet, on the other hand, nothing should be laid down which would make it more difficult for the police or for a subject of Her Majesty to preserve the Queen's peace. Accordingly, he went on to deal with what exactly should be told on such an occasion as a prelude to arrest. Must it be the specific section or subsection of the Act of Parliament which, it is said, the offender has offended against, or is it to be just a broad statement of the nature of the offence? Or is it to be a statement of the facts, facts which may give rise to a number of offences, it being left to those responsible hereafter to say exactly what the charge should be? Lord Simonds said this (4):

> " These and similar considerations lead me to the view that it is not an essential condition of lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment, but this, and this only, is the qualification which I would impose on the general proposition. It leaves untouched the principle, which lies at the heart of the matter, that the arrested man is entitled to be told what is the act for which he is arrested. The ' charge ' ultimately made will depend on the view taken by the law of his act."

A little later in his speech Lord Simonds said (5):

> " This is, I think, the fundamental principle, that a man is entitled to know what, in the apt words of Lawrence, L.J. [who sat in the Court of Appeal in that case], are ' the facts alleged to constitute crime on his part '."

Accordingly, it is clear from that that the mere fact that in the present case the charge ultimately brought was not a charge under s. 54 of the Metropolitan Police Act, 1839, is neither here nor there. The question is: Did the appellant know or was he told the alleged facts which would make him guilty of that offence? In this case, it is true, the respondent said to him that he, the respondent, was arresting the appellant for obstructing him in the execution of his duty, and there was no power of arrest, as I have already said, under the Prevention of Crimes Amendment Act, 1885, in respect of the misdemeanour of obstructing a police officer in the execution of his duty. However, the exact words which appear in para. 2 (h) of the Case are these:

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(2) [1947] 1 All E.R. at p. 575; [1947] A.C. at p. 592.
(3) (1828), 1 Mood. C.C. 207.
(4) [1947] 1 All E.R. at p. 575; [1947] A.C. at p. 593.
(5) [1947] 1 All E.R. at p. 576; [1947] A.C. at p. 593.

> " . . . he told him he was going to arrest him for obstructing him in the execution of his duty by refusing to move his car and refusing his name and address."

To my mind, it is clear that the respondent, by saying that he was arresting the appellant for refusing to move his motor car, was informing the appellant of a fact which, in all the circumstances, amounted to a wilful obstruction of the highway by leaving his car in that position. It seems to me to matter not that the respondent also coupled with that the refusal to give the name and address or the allegation of obstructing him in the execution of his duty. May I test it in this way: Supposing that the respondent had said nothing but had just arrested the appellant, could it really be said that the appellant did not know all the facts constituting an alleged wilful obstruction of the highway without having that particular charge made against him at the time? In my judgment, what the appellant knew and what he was told was ample to fulfil the obligation as to what should be done at the time of an arrest without warrant.

I should add two things. (i) This very simple and in many ways straightforward case has given rise to these grave issues only because of the finding, with which the court is not quarrelling, that this was a case where no breach of the peace had occurred or could reasonably be anticipated. (ii) Whatever the true result of this case, if ever it was a case of a man in effect asking for it, the appellant did. Having come to that conclusion, I find it unnecessary and, indeed, I think inadvisable to deal with a number of important points which counsel for the respondent has taken to the effect that, quite apart from the Metropolitan Police Act, 1839, there was, on the facts of this case, power at common law in the police to arrest. On the last occasion when the matter was before the court and, indeed, on this occasion, I have felt that there were great difficulties in these submissions. That view is reinforced by the fact that the Attorney-General himself has felt it impossible to support any wide proposition. For my part, therefore, I think that it would be very inadvisable for this court to embark on this occasion on a consideration of those matters.

I would dismiss this appeal.

STREATFEILD, J.: I find it unnecessary to add anything to my Lord's judgment, except to say that I wholly agree with it.

SLADE, J.: I agree.

ASHWORTH, J.: I also agree.

ELWES, J.: I also agree.

[Counsel for the appellant asked for leave to appeal to the House of Lords.]

LORD PARKER, C.J.: The court is unable to certify under s. 1 (2) of the Administration of Justice Act, 1960, that a point of law of general public importance is involved. Accordingly, no question of an application for leave to appeal to the House of Lords arises.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Humphrey Razzall & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent); *Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re ST. NICHOLAS, PLUMSTEAD (RECTOR AND CHURCHWARDENS).

[SOUTHWARK CONSISTORY COURT (Chancellor E. Garth Moore), November 23, 30, 1960.]

Ecclesiastical Law—Ornaments—Pyx—Lawful ornament if use subsidiary to lawful services of church.

Ecclesiastical Law—Baldachino—Architectural feature, not ornament.

The rector and churchwardens of St. Nicholas, Plumstead, petitioned for a faculty to reserve the Blessed Sacrament in a hanging pyx to be suspended from a baldachino situated in the north aisle of the church. At the time of the petition the Sacrament was being and for a number of years had been reserved in an aumbry in the north wall of the chapel. The parish comprised fourteen thousand souls who were under the care of one incumbent. In the preceding year there had been two hundred and thirty-three acts of communion from the reserved Sacrament. The petition, which had the support of the parochial church council, was unopposed and was presented on the grounds that one of the radiators which had been installed in the church was so close to the aumbry as to cause the wall to become disfigured and flowers placed nearby to wither. The bishop had given his consent to the intended transfer.

Held: the faculty would be granted as sought since

(i) in this parish reservation of the Sacrament was a necessity (*Bishopwearmouth* (*Rector & Churchwardens*) v. *Adey*, [1958] 3 All E.R. 441, applied) and

(ii) reservation could be authorised in a pyx hanging from a baldachino since (a) a baldachino was not an ornament but an architectural feature (*White* v. *Bowron* (1873), L.R. 4 A. & E. 207 and *Grosvenor Chapel, South Audley Street* (1913), 29 T.L.R. 286, not followed); and (b) a pyx, though an ornament, was not unlawful if its use was subsidiary to the lawful services of the Church (observations of SIR PHILIP WILBRAHAM BAKER-WILBRAHAM in *Re Lapford*, [1954] 3 All E.R. at p. 490, and of Chancellor ASHWORTH in *Re St. Mary the Virgin, Swanley* (unreported) not followed).

[As to the legality of baldachinos, see 13 HALSBURY'S LAWS (3rd Edn.) 337, para. 768, note (t); and for cases on the subject, see 19 DIGEST 442, 443, *2851*, *2852*.

As to reservation in a pyx, see 13 HALSBURY'S LAWS (3rd Edn.) 345, para. 786, note (r); and for cases on the subject, see 3rd DIGEST Supp.]

Cases referred to:

Bishopwearmouth (*Rector & Churchwardens*) v. *Adey*, [1958] 3 All E.R. 441; 3rd Digest Supp.

Grosvenor Chapel, South Audley Street, (1913), 29 T.L.R. 286; *subsequent proceedings*, 29 T.L.R. 411; 19 Digest 443, *2852*.

Lapford, Re, [1954] 3 All E.R. 484; [1955] P. 205; [1954] 3 W.L.R. 748; 3rd Digest Supp.

St. Mary the Virgin, Swanley, Re, (Dec. 19, 1946), unreported.

White v. *Bowron*, (1873), L.R. 4 A. & E. 207; 43 L.J. Eccl. 7; 37 J.P. 820; 19 Digest 442, *2851*.

Petition.

This was a petition by the vicar and churchwardens of St. Nicholas, Plumstead, for a faculty to introduce into the church a hanging pyx, to be suspended from a baldachino which was already around and over an altar in a side-chapel, for the reservation therein of the Blessed Sacrament. The petition was unopposed. The facts appear in the judgment.

W. S. Wigglesworth for the petitioners.

Cur. adv. vult.

A Nov. 30. **THE CHANCELLOR** read the following judgment: The Blessed Sacrament is at present reserved, with the approval of the bishop, in an aumbry which, with the authority of a faculty from this court, is in the north wall of the chapel. The baldachino was erected some years ago in pursuance of a faculty granted by me, though at the time I entertained a slight doubt concerning the legality of baldachinos. The petition has the support of the parochial church B council and is unopposed. I directed that it should be heard in open court because of the difficult points of law which it appeared to raise and I am very much indebted to counsel for the petitioners for the researches which he has made and the arguments and authorities which he has presented.

There has been reservation in the aumbry in this chapel for a number of years. This is not surprising for there are about fourteen thousand souls in the parish, C including those in hospital, and only one priest at present for them all. Last year there were two hundred and thirty-three acts of communion from the reserved Sacrament. The reason why it is desired to move the Blessed Sacrament is because radiators have been installed and there is now one uncomfortably close to the aumbry, making the area too hot, tending to disfigure the wall near the aumbry, as heat so often does, and causing flowers placed near the aumbry to D wither and die. There does not appear to be any other seemly spot in the whole church where an aumbry could be put and where no radiator is. The bishop has signified his consent to the proposed change from the aumbry to a hanging pyx. In the circumstances I have no hesitation in concluding that I ought to grant the faculty prayed, provided that it is open in law for me to do so.

Three points, however, arise for consideration on the legal aspect of the case, E namely, reservation, the baldachino and the hanging pyx. About reservation I need say very little. So far as it is applicable to the present case I adopt, without repeating, what I said about this in *Bishopwearmouth* (*Rector & Churchwardens*) v. *Adey* (1). In my view, and in accordance with the judgment of many chancellors, reservation with the permission of the bishop is lawful and, in a proper case, should be assisted by faculty. If it be necessary to go further, F and I do not think that it is, I should unhesitatingly say that this is a case in which the doctrine of necessity can be invoked, for it would be impossible for a single priest adequately to administer the Sacrament in this parish without reservation. This, however, does not dispose of the matter, for there is still to be determined whether the particular method proposed is lawful, namely, reservation in a pyx suspended from a baldachino.

G Baldachinos have for long been suspect. When one goes into the matter, however, one finds that the suspicion stems from one isolated source, namely, a decision of Chancellor TRISTRAM in *White* v. *Bowron* (2). In that case the Consistory Court of London was petitioned for a faculty for a baldachino and the learned chancellor refused it on the ground that a baldachino is an illegal ornament. That decision was followed in the same court by Chancellor KEMPE in H *Grosvenor Chapel, South Audley Street* (3). Chancellor KEMPE, however, made it clear that he did not agree with his predecessor's reasoning, but, in the same court, deemed himself bound by the decision. I, too, find it impossible to follow Chancellor TRISTRAM's reasoning and, in this court, I am not bound by this decision. In my view, a baldachino is not an ornament, any more than an apse or a recess is an ornament. They are all architectural features. I differ from I Chancellor TRISTRAM only with great hesitation. The fact that I do so at all is an indication of the strength with which I hold the contrary view, fortified as I am by the opinion of Chancellor KEMPE and also by the fact that baldachinos are to be found in a number of churches and college chapels and in at least two cathedrals, one of them being the cathedral church of Chancellor TRISTRAM's own diocese of London. It is, however, only right to add that Chancellor KEMPE clearly would not have allowed a baldachino for the purpose for which it is A proposed to use it here, namely, as a setting for the reserved Sacrament. That, however, is because for Chancellor KEMPE reservation would have been suspect. Much water has flowed between Southwark and London since 1913 when he made his observations and, had he been alive today, he might well have been of a different view, convinced by the body of judgments in other courts in favour of reservation. On the issue which was before him I respectfully agree that a B baldachino is in itself lawful. Such doubts as I entertained when I granted a faculty for this one are now dispelled.

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(1) [1958] 3 All E.R. 441.

(2) (1873), L.R. 4 A. & E. 207.

(3) (1913), 29 T.L.R. 286.

There still remains the question whether I can lawfully permit this baldachino to be used for housing a hanging pyx containing the Sacrament or whether a hanging pyx is in itself an illegal ornament. It is, I think, an ornament. It is clearly not a decoration. Where the distinction is to be drawn between furnishings C and ornaments is one of the great mysteries of Anglicanism. But, on the assumption that a pyx is an ornament, it is caught by the ornaments rubric and is unlawful unless pyxes were in use by the authority of Parliament in the second year of the reign of Edward 6. This is a mixed question of fact and law. Were they then in use? If so, was it by the authority of Parliament?

Historical research has established that they were in general use throughout D England during the middle ages, not by the authority of Parliament but in defiance of the Pope, which raises an interesting question whether their use then was lawful or unlawful. Be that as it may, the authority of the Pope undoubtedly ceased in the reign of Henry 8, while pyxes undoubtedly continued in general use. It seems clear that they continued to be used well after the second year of the reign of Edward 6. Whether or not they then dropped out of use is not E clear. If they did drop out of use, they must have been revived under Queen Mary, for by Statute 1 Mar. Sess. 2 c. 3, that reputedly papistical monarch, with the authority of Parliament (4) rather surprisingly provided statutory protection for these very articles which the Pope had so often forbidden. One would have thought that that was a clear indication of their legality in England whatever Rome might say. At some time thereafter pyxes certainly dropped out of use F again, but that part of the Marian statute which expressly protects them still remains in force, though the statute as a whole has been reviewed and other parts have been repealed. Today there cannot be many hanging pyxes in England, though in at least two cathedrals (neither of which has a baldachino) there are hanging pyxes.

From this relation of fact what conclusion follows? It would seem that Parliament G does not actively object to the hanging pyx. Is that to say that Parliament tacitly authorises them, and that they were in use in the second year of the reign of Edward 6 by Parliament's tacit authority? There are two observations to the contrary in the decided cases. In *Re Lapford* (5) the then Dean of the Arches (6) thought that they were unlawful, as earlier had also Chancellor ASHWORTH in *Re St. Mary the Virgin, Swanley* (7). But the observations of both H these learned judges were entirely obiter. The point was never argued and was never before them and so I am forced to make my own decision unbound and almost unguided by authority. Some assistance is, however, to be derived from decided cases dealing with other articles. There is a wealth of authority upholding the legality of organs, credence tables, pews and hassocks. Though pews and hassocks may be furnishings, I cannot differentiate between organs and I credence tables on the one hand and pyxes on the other. Either they are all ornaments, as I think is probably the case, or else they are all furnishings. Organs were certainly not in general use in the reign of Edward 6. If organs and credence tables are ornaments and are yet allowed, it must be because they are subsidiary to the lawful services of the Church and are thus deemed by the courts to be within the tacit authorisation of Parliament. A pyx, used for reservation lawfully authorised by the exercise of the bishop's jus liturgium, can be in no worse position and, by virtue both of its former use and of the Marian statute, might be said to be in a better position. If, however, organs and credence tables are not ornaments (though I think that they are) then I see no reason why a pyx should be regarded as an ornament, in which case it is unaffected by the ornaments rubric. Its legality seems to me to depend on the legality of reservation. Indeed, when an ornament of the church (as distinct from an ornament of the minister), has been disallowed by the courts as falling foul of the ornaments rubric, it will, I think, usually and perhaps always be found that, with one exception, it has been an ornament which subserves a practice which the court is condemning either as an unauthorised ceremony or as superstitious (whatever that may mean). Ornaments which subserve lawful practices have been allowed. Indeed the rubric, while allowing certain ornaments, does not actually condemn others. The exception is a tabernacle which has been refused even when reservation has been permitted; but I refrain from digressing into the stormy and often astonishing reasons which from time to time have led to this. They form a not very edifying chapter of their own. Suffice it to say that, as a matter of historical fact, tabernacles, unlike pyxes, were never in general use in England. Since, as I have said, reservation is in my view necessary in this church and also otherwise lawful, it follows that it may be authorised in a pyx. I, therefore, hold that it is open to me to grant this petition. The point, however, is by no means easy and I have been much exercised to understand the law. I have also felt some exasperation that the answer should not be crystal clear. It is a strong argument for hastening the process of canon law revision. A point like this should not be obscure.

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(4) For the statute cited, which was given the short title, the Brawling Act, 1553, by S.L.R. Act, 1948, see 7 HALSBURY'S STATUTES (2nd Edn.) 1186.

(5) [1954] 3 All E.R. 484; [1955] P. 205.

(6) Sir PHILIP WILBRAHAM BAKER-WILBRAHAM.

(7) (Dec. 19, 1946), unreported.

I am, therefore, prepared in principle to grant this petition. There is, however, one point on which I am not wholly satisfied and that is with regard to the design of the proposed pyx. I am sufficiently in agreement with Rome to doubt whether the proposed pyx is sufficiently secure. For reasons of security one requires something in the nature of a ciborium within a locked cage, the case being so constructed that it cannot be unhooked. While, therefore, I indicate my intention to grant this petition, that is subject to the submission of a satisfactory new design which I expect can be done through the registry without a further hearing in open court. The only order which I make today is, therefore, that the matter stand generally adjourned with liberty to amend and to apply. On the submission of a satisfactory design, however, I intend to decree that a faculty pass the seal as prayed. I trust that this decision, so contrary to the law and practice of Rome, will not be taken to have any doctrinal significance at this time of dramatic though tentative rapprochement.

Order accordingly.

Solicitors: *Trollope & Winckworth* (for the petitioners).

[*Reported by* C. G. LEONARD, ESQ., *Barrister-at-Law.*]

Re P. & J. MACRAE, LTD. A

[COURT OF APPEAL (Ormerod, Willmer and Upjohn, L.JJ.), November 11, 14, December 15, 1960.]

County Court—Appeal—Company winding-up order—Appeal on error of law only—County Courts Act, 1959 (7 *&* 8 *Eliz.* 2 *c.* 22), *s.* 108.

Company—Winding-up—Compulsory winding-up—Petition by judgment creditor—Majority of creditors opposing—Discretion of court—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 346 (1). B

An appeal to the Court of Appeal against a compulsory winding-up order made in a county court is governed by the County Courts Act, 1959, s. 108, and in order to succeed the appellant must show that the county court judge has erred in point of law (see p. 304, letter A, and p. 311, letter C, post). C

A company was incorporated in January, 1959, and had a capital of £1,000 divided into one thousand shares of £1 each, all of which were issued and paid up. A petition was brought in the county court for compulsory liquidation of the company. The petitioning creditor's debt was for £685 19s. 1d. and the opposing creditors' debts were for £19,101; the debts of supporting creditors amounting to £2,136, and the company had total debts of about £30,000. No evidence was given by the opposing creditors as to their reason for opposing the petition, and neither was there evidence of the extent of the assets of the company. Similarly there was no evidence of special circumstances concerning the opposing creditors such, for example, as that they had any reasons other than ordinary business reasons for their opposition. The company's business was in the hands of a receiver. On appeal against an order for compulsory winding-up, D E

Held: on a petition for compulsory winding-up of a company by a creditor prima facie entitled to such an order the court has a discretion, under s. 346 (1) of the Companies Act, 1948, whether to grant or to withhold the order, and the bare fact that the opposing creditors are a majority is not sufficient of itself to entitle them to have the order refused, though, when the majority of creditors opposes for good reason, their opposition should prevail in the absence of proof by the petitioner of special circumstances rendering the winding-up desirable (see p. 307, letter H, post; cf., p. 311, letter B, post); in the present case the opposing creditors had not thought fit to explain their reasons, and (UPJOHN, L.J., dissenting) it not being shown that the county court judge had taken into consideration matters that he should not consider or had failed to consider matters that he should have considered, his order for compulsory winding-up should stand (see p. 308, letter G, post; cf., p. 312, letter I, post). F G

Re Uruguay Central & Hygueritas Ry. Co. of Monte Video ((1879), 11 Ch.D. 372) and *Re Chapel House Colliery Co.* ((1883), 24 Ch.D. 259) applied.

Re Crigglestone Coal Co., Ltd. ([1906] 2 Ch. 327) and *Re Vuma, Ltd.* ([1960] 3 All E.R. 629) considered. H

Appeal dismissed.

[**Editorial Note.** UPJOHN, L.J., dissented from the decision of the Court of Appeal. Yet both he and the other members of the court agreed that the approach of the county court judge to the exercise of his discretion had been correct. That approach was expressed as follows: "it is for the court to weigh up all the relevant matters and decide whether the prima facie right of the petitioning creditor to an order should give way to the wishes of a majority of creditors expressed by the bare fact of opposition coupled with the nature of their debts" (see p. 308, letter C, and p. 311, letter I, post). It seems, therefore, that the true divergence between the judgments is on the factors which the county court judge was considered to have taken into account. Accordingly, it is not altogether clear whether, as a consequence of this decision, opposing creditors should in all cases I file evidence giving the reasons for their opposition, though it seems probable that it is expedient for them to do so. There is in this connexion a statement in the majority judgment that " before a majority of creditors can claim to override the wishes of the minority, they must at least show some good reason for their attitude " (see p. 307, letter G, post; c.f., Re *A.B.C. Coupler & Engineering Co., Ltd.*, p. 354, post).

As to the wishes of creditors on the hearing of a winding-up petition, see 6 HALSBURY'S LAWS (3rd Edn.) 552, para. 1064; and for cases on the subject, see 10 DIGEST (Repl.) 877-879, *5801-5819*.

For the Companies Act, 1948, s. 346 (1), see 3 HALSBURY'S STATUTES (2nd Edn.) 723.

For the County Courts Act, 1959, s. 108, see 39 HALSBURY'S STATUTES (2nd Edn.) 183.]

Cases referred to:

Chapel House Colliery Co., Re, (1883), 24 Ch.D. 259; 52 L.J.Ch. 934; 49 L.T. 575; 10 Digest (Repl.) 878, *5809*.

Clandown Colliery Co., Re, [1915] 1 Ch. 369; 84 L.J.Ch. 420; 112 L.T. 1060; 10 Digest (Repl.) 882, *5851*.

Cригglestone Coal Co., Ltd., Re, [1906] 2 Ch. 327; 75 L.J.Ch. 662; 95 L.T. 510; 10 Digest (Repl.) 881, *5847*.

Great Western (Forest of Dean) Coal Consumers' Co., Re, (1882), 21 Ch.D. 769; 51 L.J.Ch. 743; 46 L.T. 875; 10 Digest (Repl.) 878, *5808*.

Grimshaw v. *Dunbar*, [1953] 1 All E.R. 350; [1953] 1 Q.B. 408; [1953] 2 W.L.R. 332; 3rd Digest Supp.

Ithaca Shipping Co., Ltd., Re, (1951), 84 Lloyd's Rep. 507.

Karsberg (B.), Ltd., Re, [1955] 3 All E.R. 854; [1956] 1 W.L R 57; 3rd Digest Supp.

Langley Mill Steel & Iron Works Co., Re, (1871), L.R. 12 Eq. 26; 40 L.J.Ch. 313; 24 L.T. 382; 10 Digest (Repl.) 878, *5805*.

Monk v. *Redwing Aircraft Co., Ltd.*, [1942] 1 All E.R. 133; [1942] 1 K.B. 182; 111 L.J.K.B. 277; 166 L.T. 42; 2nd Digest Supp.

Uruguay Central & Hygueritas Ry. Co. of Monte Video, Re, (1879), 11 Ch.D. 372; 48 L.J.Ch. 540; 41 L.T. 267; 10 Digest (Repl.) 878, *5807*.

Vuma, Ltd., Re, [1960] 3 All E.R. 629; [1960] 1 W.L.R. 1283.

Appeal.

This was an appeal by opposing creditors against an order for the winding-up of P. & J. Macrae, Ltd., made by His Honour JUDGE HAROLD BROWN, Q.C., at Brighton County Court, on July 29, 1960.

The company was incorporated in January, 1959, and carried on business as dealers in furniture. The capital of the company was £1,000 divided into one thousand shares of £1 each, all of which were issued and fully paid up. The company was indebted to the petitioning creditor in the sum of £685 19s. 1d. in respect of goods supplied and the costs of obtaining judgment for the amount due in respect of them. Eleven creditors for debts totalling £2,136 supported the petition and forty-two creditors opposed it, having total unsecured debts amounting to £19,101. One of the opposing creditors was (besides his unsecured debts) also a creditor for £7,000 secured by a debenture.

R. A. K. Wright for the opposing creditors.

A. L. Figgis for the petitioning creditor.

Cur. adv. vult.

Dec. 15. **WILLMER, L.J.**: I am sorry that ORMEROD, L.J., is not able to be here today, but I am authorised to say that he concurs in the judgment which I am about to deliver.

I have come to the conclusion that no sufficient reasons have been shown for interfering with the order made by the county court judge. When a right of appeal from the county court on questions of fact was conferred by the County Courts

Act, 1955, s. 12 (now replaced by s. 109 of the County Courts Act, 1959), no such right of appeal on fact was conferred in relation to proceedings for the winding-up of a company. This appeal, therefore, could succeed only if it could be shown that in making the order which he made the learned judge fell into some error of law.

The law which the learned judge had to administer was that set out in the Companies Act, 1948, s. 222 and s. 346. It is unnecessary to quote the words of s. 222, as no argument has turned on the provisions of that section. The argument has been mainly directed to s. 346, the material provisions of which are as follows:

> "(1) The court may, as to all matters relating to the winding-up of a company, have regard to the wishes of the creditors or contributories of the company, as proved to it by any sufficient evidence . . . (2) In the case of creditors, regard shall be had to the value of each creditor's debt."

The first ground of appeal put forward by the appellants (the opposing creditors) in their notice of appeal is in the following terms:

> "That in the circumstances of this case the learned judge was bound to dismiss the said petition having regard to the number and value of creditors opposing the same in the absence of evidence showing special circumstances why the wishes of such creditors should not be given effect to."

In my judgment this ground of appeal will not bear examination. To say that the court is bound to dismiss the petition is to deprive the court of the discretion which Parliament has conferred by the clear terms of s. 346 (1) of the Act. If such were the case the court would be left, as I see it, with no judicial function to perform. The argument involves that in all cases the decision would have to be arrived at by a mere counting of heads. Had this been the intention, Parliament would surely have said so in plain terms, and the wording of s. 346 must have been quite different.

The main argument has been directed to the second ground put forward in the notice of appeal, which is in the following terms:

> "That in so far as the learned judge had a discretion to make the said order he exercised the same under a mistake of law as to the regard which ought to have been paid to wishes of the creditors appearing in opposition to the petition and in disregard of the principles on which such regard should have been paid."

What has been said is that, in the absence of proof of special circumstances, there was only one way in which the learned judge could properly have exercised his discretion, viz., by giving effect to the wishes of the majority of the creditors. No evidence as to special circumstances having been tendered, the failure of the learned judge to give effect to the wishes of the majority amounted, it is said, to a failure to exercise judicially the discretion vested in him.

In support of this contention our attention was drawn to the notes to s. 222 of the Act, as contained in Buckley on the Companies Acts (13th Edn.), at p. 450. There the learned editor, after explaining that as between himself and the company a creditor who cannot obtain payment of his debt is entitled ex debito justitiae to a winding-up order, proceeds as follows:

> "This right of the creditor, however, is not his individual right but his representative right as one of a class. If a majority of the class, viz., the creditors of like degree, take a different view, the court, in the absence at all events of special circumstances making an order 'just and equitable', gives effect to such right as the majority desire to exercise. The court, under s. 346, then has regard to the wishes of the majority and may refuse to make any order . . ."

As authority for this proposition *Re Crigglestone Coal Co., Ltd.* (1), is cited, where BUCKLEY, J., said (2):

> ". . . the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex debito justitiae is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then, upon general grounds and upon s. 91 of the Companies Act, 1862 [now replaced by s. 346 of the present Act] the court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class; that it is for the majority to seek or to decline the order as best serves the interest of their class. It is a matter upon which the majority of the unsecured creditors are entitled to prevail, but on which the debtor has no voice."

It is to be remarked that in that case there was no question of opposition to the petition on the part of other unsecured creditors, the issue being between the petitioning creditor on the one hand and the company and the debenture-holders on the other. What was said by BUCKLEY, J., as to the right of other unsecured creditors was, therefore, obiter, and this point was not dealt with by the Court of Appeal, to which the case subsequently went. But the remarks of BUCKLEY, J., and particularly his insistence on the creditor's right being a class right, have been generally accepted as an authoritative statement, and, indeed, have not been challenged before us on behalf of the petitioning creditor in the present case.

As illustrating the kind of special circumstances which ought to be proved by a petitioning creditor when he finds himself opposed by a majority of the creditors of the same class, we were referred to *Re Clandown Colliery Co.* (3) and *Re Ithaca Shipping Co., Ltd.* (4). In the latter case ROXBURGH, J., said (5):

> ". . . it is said . . . that . . . as it is opposed by a majority in value of the creditors, an order ought not to be made. As a general proposition that is quite true, but it is a proposition which is always subject to the proof of special circumstances, and, in my judgment, those special circumstances have in this case been clearly demonstrated."

These words of ROXBURGH, J., were cited with approval by ROMER, L.J., when giving the leading judgment in this court in *Re B. Karsberg, Ltd.* (6), a judgment in which BIRKETT, L.J., concurred.

In the present case there was no evidence of any special circumstances, and no attempt was made by the petitioning creditor to prove any. In these circumstances it is complained that the learned judge erred in that, in exercising the discretion conferred on him, he failed to give effect to the wishes of the class as revealed by the substantial majority of opposing creditors. In particular, it is alleged that he misdirected himself by putting the onus of proof the wrong way round, the onus, it is said, being on the petitioning creditor, in view of the majority against it, to prove the existence of special circumstances justifying the making of an order. In this respect I think the argument for the opposing creditors hardly did justice to the learned judge, who certainly did not suggest that the onus of proof was on the opposing majority. What he actually said was:

> "I doubt whether any question of onus of proof arises. As I see it, it is for the court to weigh up all the relevant matters and decide whether the prima facie right of the petitioning creditor to an order should give way to the wishes of a majority of creditors expressed by the bare fact of opposition coupled with the nature of their debts."

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(1) [1906] 2 Ch. 327. (2) [1906] 2 Ch. at p. 331. (3) [1915] 1 Ch. 369.
(4) (1951), 84 Lloyd's Rep. 507. (5) (1951), 84 Lloyd's Rep. at p. 507.
(6) [1955] 3 All E.R. at p. 861.

On the other side, counsel for the petitioning creditor argued that the effect of s. 346 is to confer on the court an unfettered discretion to make or not to make the order sought. It was contended that, if the petition is opposed by a majority of the other creditors, the court is entitled, and is indeed bound, to look at such reasons as may be advanced for opposing what is prima facie the right of the petitioning creditor ex debito justitiae. In support of his argument, counsel referred us to the statement contained in Palmer's Company Law (20th Edn.), at p. 701, which is in the following terms:

> " This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding-up order, the court in its discretion may refuse the order."

It will be observed that a significant difference is apparent between the above statement in Palmer and that in Buckley, but the former is well supported by authorities to which we were referred. Thus, for instance, in *Re Uruguay Central & Hygueritas Ry. Co. of Monte Video* (7), the headnote reads as follows:

> " As a general rule, an unpaid creditor of a company is entitled to a winding-up order ex debito justitiae; but that rule is subject to exceptions: e.g., where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order."

Jessel, M.R., in the course of his judgment, said (8):

> " But then I have to look also to the circumstances of the case, and though I should have regard to the wishes of the creditors, I must also see what sort of case it is in which they express their wishes."

This decision was expressly approved by this court in *Re Chapel House Colliery Co.* (9), where Baggallay, L.J., also quoted with approval the words of Fry, J., in *Re Great Western (Forest of Dean) Coal Consumers' Co.* (10), as follows (11):

> " ' . . . The court ought to consider not merely the number of the opposing creditors and the value of their debts, but ought to have some regard to the reasons which they adduce . . .' "

It was objected on behalf of the opposing creditors that these cases were decided before the doctrine of the class right was enunciated by Buckley, J., in *Re Crigglestone Coal Co., Ltd.* (12). This is true enough, though I doubt whether the doctrine of the class right was anything of a novelty in 1906. What is significant, however, is that *Re Chapel House Colliery Co.* (9) was cited by Buckley, J., in the *Crigglestone* case (12), and I do not think that his enunciation of the doctrine of the class right can be taken as intended to cast any doubt on the earlier decisions. In any case, *Re Chapel House Colliery Co.* (9) was a decision of this court, and is therefore binding on us.

We were also referred to the very recent decision of this court in *Re Vuma, Ltd.* (13). The case had not been reported at the time of the argument, but we had the advantage of reading the transcript of the judgments delivered by Lord Evershed, M.R., and Harman, L.J. The facts of the case were rather special, but it is perhaps of some significance that it resulted in a minority creditor obtaining a winding-up order against the opposition of the majority. Substantially the same argument as in the present case appears to have been addressed to the court on behalf of the opposing creditors, but it did not meet with much favour. Lord Evershed, M.R., in the course of his judgment, pointed out that the submission on behalf of the opposing creditors was at variance with the statement in Palmer which I have already quoted, and which he himself quoted without any adverse comment. He summarised his view as follows (14):

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(7) (1879), 11 Ch.D. 372. (8) (1879), 11 Ch.D. at p. 383. (9) (1883), 24 Ch.D. 259.
(10) (1882), 21 Ch.D. at p. 773. (11) (1883), 24 Ch.D. at p. 266.
(12) [1906] 2 Ch. 327. (13) [1960] 3 All E.R. 629. (14) [1960] 3 All E.R. at p. 631.

> " I have no doubt that the opposing creditors have formed the view in their own, quite natural, material interests that if the petition is dismissed they will get something, and perhaps in due time everything, from whoever is providing the money, whereas if the company is wound up they will find an absence of anything available for anybody. That is a good explanation of why they oppose the petition. But again I cannot accept the proposition of counsel for the opposing creditors that, if that perfectly relevant view is taken by the opposing creditors, the court has no function to perform."

HARMAN, L.J., put the case even more strongly. He said (15):

> " In the circumstances disclosed in the petition it was at least incumbent on those who opposed it to say why they opposed it . . . Neither the opposing creditors nor the company chose to file any evidence at all, and in my view it is not the law and never has been that in those circumstances a judgment creditor is not entitled to his remedy."

Reliance was also placed on *Re Langley Mill Steel & Iron Works Co.* (16), where MALINS, V.-C., referring to the corresponding section [s. 91] of the Act of 1862, said (17):

> " I am of opinion that the court has, under that section, complete discretion in all cases of winding-up, and must exercise that discretion with reference to all the surrounding circumstances."

In that particular case the learned Vice-Chancellor in the event gave effect to the wishes of an overwhelming majority of opposing creditors, but not until after he had considered and approved the reasons for their opposition.

In my judgment, the effect of the argument addressed to us on behalf of the opposing creditors is to do violence to the plain meaning of s. 346, and to rob the court of the wide discretion which the Act was intended to confer. I say that for two reasons. First, the argument virtually involves construing the words " may have regard to " as though they were " shall give effect to ". Secondly, the argument appears to me to ignore the important words " as proved to it by any sufficient evidence ", which to my mind can only be construed as imposing a duty on creditors to give adequate reasons in justification of the wishes that they express.

In these circumstances I am satisfied that the view expressed in PALMER is not only well supported by authority, including decisions of this court, but is also in accordance with the plain meaning of s. 346 of the Act. It seems to me that, before a majority of creditors can claim to override the wishes of the minority, they must at least show some good reason for their attitude. In saying this I am not to be taken as necessarily expressing the opinion that the view put forward in BUCKLEY is wrong. I do not think that this follows at all. I have no doubt that, where a majority of creditors do for good reason oppose a petition for the winding-up of a company, then prima facie they are entitled reasonably to expect that their wishes will prevail, in the absence of proof by the petitioning creditor of special circumstances rendering a winding-up order desirable in spite of their opposition. But I am certainly not prepared to accept the view that the bare fact of the opposing creditors being in a majority is of itself sufficient, still less conclusive. So to hold would be to leave the court with virtually no judicial function to perform, and to take away from it the discretion which the words of the Act plainly confer.

In the present case the opposing creditors have not seen fit to explain the reasons for their opposition. We were informed that affidavits from some of them were available; but they were not put before the learned judge, who was thus left in ignorance as to the reasons for the opposition. I suppose the fair inference is that these creditors, being (so far as can be judged from the list put before us) ordinary trade creditors, have taken the view that, notwithstanding the company's indebtedness of £30,000, they are more likely in the long run to obtain payment if the company is not wound up, but is allowed to continue trading. They may or may not have good reasons for taking this view. If they have, then it seems to me that the least they could do was to tell the court what those reasons are. They may have good reasons for taking the view that the company's indebtedness of £30,000 is not such a formidable matter as at first sight appears. They may have reason to think that the company has some substantial assets. If so, they have not said so. Instead, the learned judge was left to draw his own conclusions from the fact of debts amounting to £30,000, with no information as to any assets to set against them. In these circumstances I am of the opinion that the learned judge asked himself the right question. I quote once more what he said:

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(15) [1960] 3 All E.R. at p. 631.

(16) (1871), L.R. 12 Eq. 26.

(17) (1871), L.R. 12 Eq. at p. 29.

> " As I see it, it is for the court to weigh up all the relevant matters and decide whether the prima facie right of the petitioning creditor to an order should give way to the wishes of a majority of creditors expressed by the bare fact of opposition coupled with the nature of their debts."

In the state of ignorance in which he was left, I cannot see that he was guilty of any misdirection in putting the matter in that way. The answer to the question which the learned judge put to himself was a matter for his discretion. The fact that in the event he did not give effect to the wishes of the majority does not mean that in exercising his discretion he did not have regard to them. Plainly, as appears from his judgment, he did have regard, not only to the wishes of the majority, but to the fact that the majority was so large.

It may be that we, or any one of us, if the discretion had been ours, would have exercised it in a different way. That, however, would be no ground for interfering with the learned judge's decision, unless we can see that he misdirected himself, by failing to take into consideration matters which he should, or by taking into consideration matters which he should not. In point of fact he appears to have taken into consideration: (a) the fact that the petitioning creditor had obtained a judgment; (b) the fact that it had the support of a not inconsiderable minority; (c) the fact of the company's indebtedness to the extent of £30,000, of which no explanation was offered; (d) the absence of any evidence as to what, if any, were the assets of what prima facie appeared to be a company in a relatively modest way of business. For myself, I am not prepared to say that any of these were matters which, in the light of the evidence or absence of evidence, he was not entitled to take into consideration. He certainly did have regard to the fact that a majority of the creditors were opposed to the making of an order. It has not been suggested to us that there was any other matter which he ought, but failed, to take into consideration.

In these circumstances I do not think it is possible for this court to interfere with the learned judge's exercise of his discretion, and I would, therefore, dismiss the appeal.

UPJOHN, L.J.: Where a creditor has proved his case against the company to a winding-up order ex debito justitiae, but other creditors of the company have expressed conflicting views as to the desirability of winding it up, the judge has conferred on him a discretion by the Companies Act, 1948, s. 346 (1), which, leaving out immaterial words, provides:

> " The court may . . . have regard to the wishes of the creditors . . . as proved to it by any sufficient evidence . . ."

The discretion is permissive and not mandatory, and is in terms complete and unfettered. However, it is a discretion which must be exercised judicially, and the court is not entitled arbitrarily to disregard the wishes of the creditors as proved to it.

Much argument took place before us whether the statements in BUCKLEY ON THE COMPANIES ACTS (13th Edn.), at p. 450, or in PALMER'S COMPANY LAW (20th Edn.), at p. 701, already quoted by my Lord, represent the law. In my judgment neither make a completely accurate statement of the law, for statute has conferred a complete and unfettered judicial discretion on ~~the~~ court, and, where the statute has seen fit to do so, a judicial or text-book gloss on the terms of the discretion are apt to mislead if they are treated as a complete statement of the law. Reported cases can only be quoted as examples of the way in which in the past judges have thought fit to exercise the discretion, and judicial decision cannot fetter or limit the discretion conferred by statute or even create a binding rule of practice: see per LORD GREENE, M.R., in *Monk* v. *Redwing Aircraft Co., Ltd.* (18).

That the court has a complete discretion was recognised as long ago as 1871, when MALINS, V.-C., in *Re Langley Mill Steel & Iron Works Co.* (19), put the matter in a nutshell in reference to the corresponding s. 91 of the Companies Act, 1862 (20):

> "[Counsel for the petitioners] pressed the order, as being ex debito justitiae; that is to say, that at the instance of one creditor, and against the wishes of all the other creditors, I am bound to make an order to wind up a company compulsorily, however unjust I may think that course to be. In my opinion, that is not the true construction of the Companies Act; and so far from it being so, I find that, by s. 91, the court has power in all cases of winding-up to consider what is most for the interest of all parties, and to have regard to the wishes of the creditors as well as contributories. I am of opinion that the court has, under that section, complete discretion in all cases of winding-up, and must exercise that discretion with reference to all the surrounding circumstances. Therefore, notwithstanding the view so strongly pressed upon me by [counsel], I think I am not bound to make the order."

Nor must it be forgotten that the power to make a winding-up order is by the very terms of s. 222 of the Companies Act, 1948, itself discretionary, and, although an undoubted creditor is as a general rule entitled to an order ex debito justitiae, there may be special cases where, apart altogether from the wishes of creditors generally, the court may not think fit to make an order: see, for an example, *Re Chapel House Colliery Co.* (21).

Although the statute provides that it is the wishes of the creditors to which the court may have regard, it is quite clear that, as the statute gives a complete discretion, the weight to be given to those wishes in determining whether a winding-up order ought to be made varies according to the number and value of the creditors expressing wishes, and the nature and quality of their debts. I certainly do not accept for one moment the proposition that it is merely a matter of counting heads and that a majority of fifty-one per cent. opposing a petition will outweigh the views of the forty-nine per cent. who support the petition. In such a case where the wishes of the creditors are so evenly balanced (and there is no reason to distinguish between creditors as mentioned below) the weight to be given to the majority view is obviously negligible. No judge, in my judgment, could possibly be criticised if, in the absence of other relevant circumstances, he chooses to exercise his discretion by giving effect to the prima facie right of the petitioning creditor to a winding-up order. At the other end of the scale there is the case where an overwhelming proportion of the creditors in number and value oppose the petitioner who is virtually alone. In that case clearly the weight to be given to those creditors, unless there is some reason for disregarding them, must be very great, and in the ordinary case in the absence of special circumstances will be decisive. All one can say as between those two limits is that the weight to be given to the wishes of the opposing creditors must necessarily depend on all the circumstances of the case, but, other things being equal, will increase in the mind of the judge as the majority of opposing creditors increases.

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(18) [1942] 1 All E.R. at p. 137; [1942] 1 K.B. at p. 188.

(19) (1871), L.R. 12 Eq. 26.

(20) (1871), L.R. 12 Eq. at p. 29.

(21) (1883), 24 Ch.D. 259.

Counsel for the opposing creditors naturally pressed us with the observations of BUCKLEY, J., in *Re Crigglestone Coal Co., Ltd.* (22), which have already been read. That is the high-water mark of his case. Those observations must be read in relation to the facts of the case. No unsecured creditors opposed the petition at all, and the ratio decidendi of the case was that the petitioning unsecured creditor was entitled to an order unless it could be established that there was no possibility of obtaining any benefit from a winding-up order: see the opening words of the judgment of COLLINS, M.R. (23), when the case went to appeal. In my view, BUCKLEY, J., cannot have intended to mean that the voice of the majority of creditors was decisive on whether a winding-up order should be made. I think he meant that, when weighing all the circumstances in deciding whether to wind up the company, the voice of the creditors must either ultimately be for or against, and that is in the ordinary case determined by the majority; but the power of the voice must necessarily depend on all the circumstances. If he meant more his words were obiter and I would respectfully not agree with them.

It is not merely a matter of calculating percentages in value. Apart altogether from prospective or contingent creditors whose position may be difficult to assess, a judge may properly take the view that greater weight should be given to the wishes of a large number of small creditors against the wishes of one or two very large creditors, even though the latter are larger in amount in the aggregate. Then there may be differences in the quality of the creditors. The circumstances may be such that the court is rightly suspicious of the opposing creditors and of the motives which are actuating them. In such a case the court may desire to have evidence before it of their reasons for opposing. It must be a question of discretion in each case whether creditors should be asked to file evidence to support the views they have expressed or not. I do not think it is possible to lay down any prima facie rule one way or the other. The judge may prefer to convene a meeting to ascertain their wishes.

Let me refer to two of the reported cases by way of example. In the recent case of *Re Vuma, Ltd.* (24) before this court, the evidence was that the company had no assets at all and the circumstances set out in the petition gave rise to the gravest suspicions as to the company's trading position. In the absence of evidence to explain why two creditors were opposing the petition, the court refused to regard their wishes as out-weighing the prima facie right of the petitioner to a winding-up order, notwithstanding that, as I understand it, their debts greatly exceeded those of the petitioning creditor. I do not, however, read the judgment of HARMAN, L.J., as meaning that the creditor in every case ought to justify his opposition by evidence. The learned lord justice was dealing with the facts of that particular case. Another example is *Re Ithaca Shipping Co., Ltd.* (25). In that case there was much evidence before ROXBURGH, J., with regard to the wishes of a large creditor in opposing the winding-up order. The learned judge was satisfied on the evidence that this creditor was not really interested in the matter as a creditor at all, but in his other capacities in relation to the company, and he made a winding-up order.

Other examples may be given. A familiar one is where one of the large creditors is a relation of one or more of those managing the company, and, until the contrary be proved, it may be proper to assume that he may be actuated by motives of love and affection rather than of business expediency. On the other hand there will be many cases where the creditors are ordinary business or trade creditors and in such cases the court may well assume unless the contrary be proved that their wishes are actuated solely by business considerations. In many such cases there will be no advantage in calling on such creditors to state on oath their reasons for opposition.

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(22) [1906] 2 Ch. at p. 331; see p. 305, letter A, ante.

(23) [1906] 2 Ch. at p. 337.

(24) [1960] 3 All E.R. 629.

(25) (1951), 84 Lloyd's Rep. 507.

When the judge has decided what weight, if any, he is going to give to the wishes of the majority of creditors, he balances that together with all the other relevant circumstances in evidence before him in order to see whether in the end it is proper that a winding-up order should be made. The final decision rests not with the creditors but with the judge.

I turn then to a consideration of this case. I accept the submission of counsel for the petitioning creditor that, as there are no provisions in the Companies Act, 1948, dealing with appeals from winding-up orders made in England, an appeal to this court from a winding-up order made in a county court is governed by the County Courts Act, 1959, s. 108, i.e., the appellant must show that the county court judge has erred in point of law. As the judge was exercising a discretionary remedy, the appellant must show that he has exercised his judicial discretion on wrong principles. The proper test was put very shortly by JENKINS, L.J., in *Grimshaw* v. *Dunbar* (26). He said (27):

> "Applying the observations I have just quoted from the judgment of CROOM-JOHNSON, J. (28), to the present case, did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right considerations? If so, then he decided on wrong principles, his error was a matter of law, and this court can interfere."

What are the relevant factors? In the first place the number of creditors opposing is very large, i.e., both in numbers and amount they are about three-quarters of the unsecured creditors of the company leaving out of account altogether for this purpose the very large unsecured opposing creditor who is also secured for part of his debt. Then the next circumstance is this. The case has been argued before us on the footing that these creditors, or much the greater number and amount of them, are ordinary trade and business creditors. In such a case, I do not myself see any object in asking them to file evidence stating the reasons for opposing the petition for, in the circumstances of this case, I think that it may safely be presumed that they are consulting their business interests and nothing else. This company is in the hands of a receiver, who will probably continue to conduct the business of the company for a time in order to pay off the debenture-holders, and it is quite reasonable in those circumstances for many of the creditors to consider that, on the whole, their chances of getting something out of the company will be better preserved by leaving the position where it is rather than putting it into liquidation. At all events, that is the inference that, as I think, it is proper to draw in the circumstances of this case unless and until the contrary be proved. So, in my judgment, this large majority of trade creditors is entitled in this case to have much regard paid to their wishes.

The next step is to consider the other circumstances to be weighed in the balance with the wishes of the creditors. During the course of his judgment the learned judge said:

> "As I see it, it is for the court to weigh up all the relevant matters and decide whether the prima facie right of the petitioning creditor to an order should give way to the wishes of a majority of creditors expressed by the bare fact of opposition coupled with the nature of their debts."

I do not criticise this approach to the problem. He then referred to the company's comparatively humble capital of £1,000, and the fact that it had incurred debts of £30,000 within eighteen months. He then reviewed the facts with regard A to the supporting and opposing creditors, and continued:

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(26) [1953] 1 All E.R. 350; [1953] 1 Q.B. 408.

(27) [1953 1 All E.R. at p, 353; [1953] 1 Q.B. at p. 413.

(28) In *Dick* v. *Piller*, [1943] 1 All E.R. at p. 635; [1943] K.B. at p. 507.

> " Further, I think that I am entitled to have regard to the large amount of indebtedness that this company has achieved in, at the most, some eighteen months of trading. Its assets are unknown to me, but if the amount of capital is any reflection of this, I am not impressed with its future." B

If those are relevant matters to which the judge was entitled to have regard, then the appeal must fail, for it would not have been shown that he had exercised his discretion on any wrong principle. For my part, however, I think that the circumstances which weighed with the learned judge ought not to have been taken into account by him. Reading his judgment, I am not quite certain how far he thought that the amount of paid-up capital of the company really did C reflect the amount of its assets. If he did so think, and that circumstance weighed with him, he would in my judgment be plainly wrong in law. It is quite impossible to have any views on the amount of the assets of the company merely from a statement of the paid-up capital.

With regard to the amount of the indebtedness, it seems to me that to take that into account, without knowing any other circumstance of the company's assets D or trading position, was also wrong. There was no suggestion here that the company was trading wildly and in fraud of its creditors. A company setting up in Brighton to deal in furniture no doubt incurs a number of liabilities at the commencement of its trading. It has to find premises and to procure fixtures and fittings and stock-in-trade, and it occasions no surprise to find that it has incurred very substantial indebtedness during its first eighteen months' trading. If, E however, nothing is known of its assets position or its trading position, without a knowledge of those matters it does not seem to me permissible, merely from the size of the indebtedness during the first eighteen months of trading, to draw any inference relevant to the question whether it should be put into liquidation or not, especially when a large majority of the creditors has voted against it. It was urged on us by counsel for the petitioning creditor that F another circumstance which the learned judge was entitled to take into account was the fact that the creditors had not established by evidence the reasons for their opposition to the petition, and that, he said, was something which the judge was entitled to weigh in his mind. It does not appear, however, from the judgment that that was a circumstance which affected the learned judge's mind one way or the other. I think that he rightly ignored that circumstance. G

It appears that in fact evidence by opposing creditors was available, but, as counsel for the petitioning creditor said that he would call no evidence beyond the usual affidavit verifying the petition, counsel for the opposing creditors elected not to tender his evidence, and this issue was fought solely on the facts stated in the petition. The absence of evidence on the part of the opposing H creditors is, in my judgment, without significance in this case.

Accordingly, in my view, the situation was this. The wishes of this large majority of creditors speaking with a clear voice were against a winding-up. On the facts of this case, the factors in favour of the winding-up order were that the petitioner had, as against the company, an undoubted right to an order, and was not entirely without support from other creditors. On those facts, however, I I think that the judge ought not to have made a winding-up order. He did so because he wrongly took into consideration the amount of the company's indebtedness, and possibly the amount of the paid-up capital as reflecting the assets position. The former circumstance, at all events, was a major factor in his mind, and he wrongly, in my judgment, allowed it to enter into the balance. In my judgment the judge erred in law in taking these matters into consideration when he should have excluded them. Accordingly, in this court we are at liberty to express our own views on the matter, and, on the facts of this case, I, for my part, would allow this appeal and dismiss the petition.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Burton, Yeates & Hart*, agents for *Nye & Donne*, Brighton (for the opposing creditors); *Aldrich & Crowther*, Brighton (for the petitioning creditor).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* EVANS.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Streatfeild, Glyn-Jones, Ashworth and Elwes, JJ.), December 2, 21, 1960.]

Criminal Law—Sentence—Probation—Compensation order and probation order made by magistrates' court—Breach of probation—Offender committed by another magistrates' court to quarter sessions for sentence on original offence—Sentence of imprisonment imposed—Whether compensation order ceases to have effect with cessation of probation order—Circumstances at date of sentencing to be regarded in assessing sentence—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 58), *s.* 5 (4), *s.* 6, *s.* 11 (2)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 29.

On June 23, 1959, the appellant was convicted by a court of summary jurisdiction, the Waltham Abbey magistrates' court, on four charges of obtaining money by false pretences. He was placed on probation for three years and an order for compensation was made under s. 11 (2)* of the Criminal Justice Act, 1948. After his conviction the appellant moved to Clacton, where he found work; and the magistrates' court there accordingly became the supervising court. He subsequently ceased to be in employment and moved elsewhere, committing a breach of probation by failing to inform the probation officer at Clacton of his change of address. He was brought before the Clacton magistrates' court, under s. 6 of the Act of 1948, as the supervising court, and he was committed by that court under s. 29† of the Magistrates' Courts Act, 1952, to quarter sessions for sentence in respect of the original offence. Quarter sessions imposed under s. 29 (3) of the Act of 1948, terms of imprisonment amounting in all to two years. No reference was made to the order for compensation, although the probation order ceased to have effect, pursuant to s. 5 (4)‡ of the Act of 1948, on the appellant's being sentenced. On appeal against sentence,

Held: the order for compensation still continued in force, because the effect of s. 5 (4) of the Criminal Justice Act, 1948, was that the probation order only had ceased to have effect on the appellant's being sentenced for the offence for which he had been placed on probation.

R. v. *McCarthy*, Oct. 25, 1960 (unreported), disapproved and distinguished.

Per CURIAM: in dealing under s. 6 (3) (a)§ or s. 6 (4) (b) of the Criminal

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* Section 11 (2), so far as material, provides: " A court, on making a probation order . . . may . . . order the offender to pay such . . . compensation for loss as the court thinks reasonable . . ."

† Section 29, so far as material, provides—" Where on the summary trial . . . of an indictable offence triable by quarter sessions a person who is not less than seventeen years old is convicted of the offence, then, if on obtaining information about his character and antecedents the court is of opinion that they are such that greater punishment should be inflicted for the offence than the court has power to inflict, the court may . . . commit him in custody to quarter sessions for sentence in accordance with the provisions of s. 29 of the Criminal Justice Act, 1948 ".

‡ The material terms of s. 5 (4) are at p. 318, letter G, post.

§ Section 6 (3) provides: " If . . . the probationer has failed to comply with any of the requirements of the probation order " the supervising court " may without predjudice to the continuance of the probation order, impose on him a fine . . . or may (a) . . . deal with " him as stated at p. 317, letter E, post.

A Justice Act, 1948, with a probationer for the offence for which the probation order was made the court must deal with him in the light of all circumstances and conditions which exist at that time, not merely those that existed when he was first convicted (see p. 318, letter F, post); and the fact that he is still liable to pay compensation may well be a factor to be taken into account in assessing sentence (see p. 319, letter B, post).

B Appeal allowed in part.

[**Editorial Note.** The principle stated previously, under which the order for compensation continued, applies equally, it seems, to all other orders than the probation order itself, such, e.g., as an order for the payment of costs or for the restitution of money or property under s. 45 of the Larceny Act, 1916 (see p. 318, letter H, and p. 317, letter I, post). The principle of the present decision seems C also to apply where a probationer, having committed a crime while on probation, is before the court to be dealt with under s. 8 of the Criminal Justice Act, 1948 (see p. 317, letter E, post).

As to the powers of the court on breach of a probation order, see 10 HALSBURY'S LAWS (3rd Edn.) 502, para. 915; ibid., 504, para. 918, note (a) and Supplement; and for cases on the subject, see 14 DIGEST (Repl.) 573, 574, D *5738-5741* and 3rd DIGEST Supp.

As to the powers of the court on making a probation order to impose an order for compensation, see 10 HALSBURY'S LAWS (3rd Edn.) 507, para. 921, and ibid., 819, para. 1583.

For the Criminal Justice Act, 1948, s. 5, s. 6, see 28 HALSBURY'S STATUTES (2nd Edn.) 355, 356; and for the Magistrates' Courts Act, 1952, s. 29, see E 32 HALSBURY STATUTES (2nd Edn.) 449.]

Case referred to:

R. v. *McCarthy*, (Oct. 25, 1960), unreported.

Appeal.

This was an appeal by Duncan Frederick Evans against sentences totalling F two years' imprisonment imposed on him by the Appeal Committee of Essex Quarter Sessions on Mar. 29, 1960, in respect of convictions by Waltham Abbey magistrates' court on June 23, 1959, on four counts of obtaining money by false pretences; six other offences were taken into consideration. The Waltham Abbey magistrates had placed him on probation for three years, and, in pursuance of their powers under s. 11 (2) of the Criminal Justice Act, 1948, had ordered him to pay compensation in the sum of £14 15s. He had then moved to Clacton, G where he came within another petty sessional division. On Mar. 16, 1960, he was brought before the Tendring Magistrates' Court (referred to herein as the Clacton magistrates' court), as the supervising court under s. 6 of the Criminal Justice Act, 1948, for breach of the probation order by failure to notify the probation officer of a change of address. The Clacton magistrates committed him to Essex Quarter Sessions for sentence under s. 29 of the Magistrates' Courts H Act, 1952. The appellant appealed against sentences amounting in all to two years' imprisonment. A full Court of Criminal Appeal was constituted in view of the question whether the compensation order had ceased on the appellant's being sentenced, and to consider a decision of the court in an unreported case, *R.* v. *McCarthy**. The case came before the full court on Dec. 2, 1960, when the statutes, authority and cases enumerated below were cited in argument I in addition to those mentioned in the judgment of the court†. The facts are set out in the judgment.

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* LORD PARKER, C.J., ASHWORTH and ELWES, JJ. (Oct. 25, 1960), unreported, Court of Criminal Appeal.

† Probation of Offenders Act, 1907, s. 1, s. 2; Criminal Justice Act, 1925, s. 7; Criminal Justice (Amendment) Act, 1926, s. 1; Criminal Justice Act, 1948, s. 3 (3), s. 12; Magistrates' Courts Act, 1952, s. 63, s. 64, passim ss. 69-72, s. 126; STONE'S JUSTICES' MANUAL (1960), Vol. 1, p. 173, note (1); *R.* v. *Parry*, [1950] 2 All E.R. 1179; *R.* v. *Havant JJ., Ex p. Jacobs*, [1957] 1 All E.R. 475.

E. D. R. Stone for the appellant.
J. H. Buzzard for the Crown.

Cur. adv. vult.

Dec. 21. **GLYN-JONES, J.**, at the request of LORD PARKER, C.J., read the following judgment of the court: On June 23, 1959, the appellant was convicted by a court of summary jurisdiction sitting at Waltham Abbey on four charges of obtaining by false pretences sums of money amounting in all to £14 15s. Six other similar offences were taken into consideration. The court made a probation order for three years and ordered the appellant to pay £14 15s. as compensation. The appellant after his conviction went to live at Clacton where he found work as a baker and there he came under the supervision of the probation officer for that district.

In September, 1959, at the end of the summer season he lost his employment because, according to his employer, he was a bad time-keeper. He told the probation officer that he hoped to find a job with another baker in Clacton; but instead of doing so he left Clacton and committed a breach of the conditions of his probation in that he did not report his change of address to the probation officer, and his whereabouts were not discovered until, a warrant having been issued for his apprehension, he was found in Leytonstone where he had again obtained employment as a baker. In accordance with the provisions of s. 6 of the Criminal Justice Act, 1948, he was brought before the Clacton magistrates as the supervising court, and they, having heard his record, committed him in custody to Essex Quarter Sessions for sentence pursuant to s. 29 of the Magistrates' Courts Act, 1952. He had been previously convicted on many occasions for offences of dishonesty, the first for larceny at the age of sixteen, when he was put on probation. Between the ages of twenty-two and twenty-six he was sentenced on five occasions for offences of larceny or false pretences to short sentences of imprisonment, and finally in April, 1951, to three years' corrective training, from which sentence he was released from prison in April, 1953.

Quarter sessions imposed sentences of twelve months' imprisonment on each of the four charges, of which sentences two were concurrent and two consecutive, making two years in all, and it is against these sentences that the appellant appeals. Leave was given by the single judge on the ground that the magistrates by whom the appellant was originally convicted [i.e., Waltham Abbey magistrates] could not have been of opinion that his character and antecedents were such that greater punishment should be inflicted for his offences than the court had power to inflict (presumably on the ground that had they been of that opinion they would not have put him on probation); hence in the view of the single judge the Clacton magistrates had no jurisdiction to commit him to quarter sessions under s. 29 of the Magistrates' Courts Act, 1952, for the supervising court, having the same character and antecedents to consider, must have based their opinion solely on the conduct of the appellant subsequent to his conviction.

We do not find ourselves in agreement with the single judge. The Waltham Abbey magistrates were entitled to choose between punishment and probation. They doubtless had regard, as they properly might, to the fact that six years had gone by since the appellant served his sentence of corrective training and during those six years the appellant had not been convicted of dishonesty. There had been a conviction at Essex assizes in November, 1956, for causing grievous bodily harm to the woman with whom he was living. This offence was committed by the appellant while in drink and there must have been extremely strong mitigation, for the learned judge imposed no punishment other than a probation order for twelve months. The appellant continued to live with the same woman and has maintained her and her children until sentenced by Essex Quarter Sessions.

In these circumstances the Waltham Abbey magistrates doubtless thought that there was a chance that a probation order might save the appellant from reverting to a life of criminal dishonesty, and we have no reason to criticise their decision; but it does not follow that if they had decided that the appellant must be punished they would not have been of opinion that the appellant deserved greater punishment than they had power to inflict. Moreover, in our opinion the supervising court is not fettered in the exercise of its discretion by a consideration of what might have been the opinion of the court in which the appellant was originally convicted. They have the advantage of knowing what the conduct of the probationer has been since the probation order was made and this may throw light on his character. Section 6 (3) (a) of the Criminal Justice Act, 1948, gives the court before whom a probationer is brought power to deal with him in any manner in which the court could deal with him if it had " just " convicted him; not in the manner in which they would have dealt with him if it had been the court which originally convicted him and was acting at the time of the original conviction.

In our opinion the Clacton magistrates were acting within their powers in committing him to Essex Quarter Sessions for sentence. We come, however, to the conclusion that the total sentence of two years makes insufficient allowance for the effort which the appellant must have made to avoid conviction for dishonesty for six years after his sentence of three years' corrective training and we accordingly substituted such a sentence of imprisonment as enabled the appellant to be discharged on the day after the hearing of the appeal.

At the original hearing of this appeal (1) counsel for the appellant invited the court to restore the probation order on the ground that the sentence of imprisonment had the effect of nullifying the order for payment of compensation made by the Waltham Abbey magistrates and thus depriving the victims of the appellant's dishonesty of their opportunity to enforce the order. Incidentally, counsel stated that the appellant had been at all times ready and willing to pay, but gave no reason why he had not even begun to do so.

It would not be right to withhold punishment which a court thought to be appropriate and necessary to be inflicted merely in order to keep alive an order for compensation; but if the punishment of a probationer by a fine or imprisonment does put an end to the order for compensation that is a factor which might properly be taken into account by a court before whom the probationer is brought because he has committed another offence or is otherwise in breach of a requirement of the probation order. That was the view taken by this court in *R.* v. *McCarthy* (2). In that case, on the making of a probation order, the probationer had been ordered to pay £100 in compensation. He subsequently committed another offence for which he was brought before London Sessions and was sentenced to eighteen months' imprisonment and a concurrent sentence of seven days' imprisonment was imposed for the offence in respect of which the probation order had been made. In that case the attention of this court was drawn to s. 6 of the Criminal Justice Act, 1948, and in particular to the power given by s. 6 (3) to a court to impose a fine for a breach of probation leaving the probation order in existence (3). Oddly enough, in that case counsel for the appellant argued that the order for compensation was still valid notwithstanding the sentence of seven days' imprisonment, while counsel for the Crown contended for the contrary view. In the end the court came to the conclusion that since an order for compensation could not be attached to a sentence of imprisonment the order for compensation had ceased to have effect, and with the object of restoring it the court set aside the sentence of imprisonment and substituted a fine of 20s. for the breach of probation purporting to act under s. 6 (3) of the Act of 1948.

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(1) I.e., on Nov. 14, 1960.

(2) (Oct. 25, 1960), unreported.

(3) The relevant part of s. 6 (3) is set out in the last footnote p. 313, ante.

As was stated by LORD PARKER, C.J., at the original hearing of the present appeal the court has since had reason to think that the arguments in *R.* v. *McCarthy* (4) were founded on the wrong section [of the Act of 1948] and this court of five judges has been constituted in order that that decision may be reviewed.

Having reviewed that decision the court is of opinion that it was wrong. In the first place the court mentioned in s. 6 (3) of the Criminal Justice Act, 1948, is the court of summary jurisdiction before which the probationer is brought on a breach by him of a requirement of the probation order. Courts of assize or quarter sessions are not empowered by that subsection to impose a fine for breach of probation. Moreover, in *R.* v. *McCarthy* (4) the appellant was a probationer who had committed another offence during the period of his probation, and it was for that offence for which he had received his sentence of eighteen months' imprisonment. His case therefore fell to be considered under s. 8 of the Act of 1948 and not under s. 6 at all. A probationer who commits a further offence during the period of his probation doubtless commits a breach of a requirement of his probation; but s. 6 (6) of the Act (5) makes it clear that he must be dealt with under s. 8 and not under s. 6. The appellant in this appeal, however, has not committed another offence during the period of his probation, and the relevant section in this case is s. 6.

The question which remains is this, namely, if a probationer in whose case an order for compensation has been made is subsequently dealt with and punished (whether by fine, detention, order for borstal training or imprisonment) does the infliction of that punishment put an end to the order for compensation? For this purpose it seems immaterial whether the offender is dealt with under s. 6 or under s. 8 for the relevant provisions of both sections are similar. In s. 6 it is provided either that the court which deals with the probationer

> [s. 6 (3) (a) relating to a court of summary jurisdiction] " may . . . deal with the probationer, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if it had just convicted him of that offence;"

or that the court which deals with the probationer

> [s. 6 (4) (b) relating to a court of assize or quarter sessions] " may deal with him . . . in any manner in which the court could deal with him if he had just been convicted before that court of that offence."

Neither the court which originally convicted the offender nor that—whether or not it is the same court—which ultimately deals with him has power at the same time both to inflict punishment and to order payment of compensation; and it is said to be anomalous that the order for compensation should survive the infliction of punishment for if it does the two courts have brought about by their separate orders a result which neither has power to order at one time. Moreover, it is argued that if the second court had just convicted him it would follow that he would be in the position of a man between conviction and sentence with no order or judgment against him. In other words, it is said, the second court must have, as it were, a clean slate on which to write and their order or judgment when made or given takes the place of any order or judgment of the original court which thereupon ceases to have effect. If this be so, then at the moment when the order or judgment of the second court comes into operation not only the probation order and any order for compensation but also any other order, for example, for payment of costs or for restitution of money or property under s. 45 of the Larceny Act, 1916, is nullified.

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(4) (Oct. 25, 1960), unreported.

(5) Section 6 (6), so far as material, provides: ". . . without prejudice to the provisions of s. 8 of this Act, a probationer who is convicted of an offence committed during the probation period shall not on that account be liable to be dealt with under this section for failing to comply with any requirement of the probation order."

In this case the court before which the appellant was brought in consequence of his breach of probation was the court of summary jurisdiction at Clacton. It is that court which dealt with him pursuant to s. 6 (3) of the Act of 1948 as if it had just convicted him. Instead of then inflicting punishment the court committed him to quarter sessions for sentence; but it was before the court of summary jurisdiction that the appellant stood in the position of a man between conviction and sentence; and if the argument set out above be well founded then all the orders made by the first court, including any order for costs, compensation or restitution, ceased to have effect when the appellant was committed for sentence.

When he appeared before quarter sessions that court dealt with him pursuant to its powers under s. 29 of the Criminal Justice Act, 1948, and not under s. 6 (4) of that Act (6). But quarter sessions might have differed from the Clacton magistrates and, taking the view that the breach of probation was trivial, might have made no order, intending to leave the original probation order to stand. If so, does the original probation order revive, and with it the order for compensation, and any other order made by the original court? Or must quarter sessions make a fresh probation order and fresh orders for compensation, etc., to the extent to which the original orders had not been complied with?

This court is of opinion that the fallacy in the argument set out above is that it disregards the presence of the word "just" in the phrase, "if it had just convicted him". The statute does not require the second court to put itself back in the position of the original court at the moment of conviction; and although the statute says that the second court may deal with the offender in any manner in which it would deal with him if it had "*just*" convicted him, that does not mean that the second court has in fact just convicted him; it has not. The second court is dealing with an offender who, since his conviction, may have reached an age when he qualifies for corrective training or preventive detention; he may have become too old for borstal training; and the court has the advantage of hearing how he has behaved himself since the probation order was first made. The second court must deal with the offender in the light of all the circumstances and conditions which exist at the time when it deals with him, not those which existed when he was first convicted, and among them is the circumstance that a valid order or valid orders made against him by the first court is or are still in existence. This court does not think that by implication and in the absence of express words it can read into s. 6 a provision that the orders of the first court are automatically nullified when the second court deals with the offender. The court's opinion is fortified by the fact that s. 5 (4) of the Act of 1948 expressly provides that "Where . . . a probationer is sentenced for the offence for which he was placed on probation, the probation order shall cease to have effect," and this would leave the original probation order in being in a case where the second court does not impose a sentence and negatives the suggestion that when the offender is dealt with by the second court it must be on the footing that all the orders of the original court are of no effect. There is not in the Act any express provision that any orders made by the original court other than a probation order are to cease to have effect when the offender is subsequently dealt with, and in view of the fact that an order for payment of compensation or for costs or for restitution may accompany an order for conditional discharge as well as an order for probation we think the omission is significant. Moreover, an order for payment of compensation vests in the victims of the crime in whose favour the order is made a right to enforce the order for their own benefit, and the court cannot attribute to Parliament an intention to take away that right in the absence of clear words having that effect.

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(6) Section 6 (4), so far as material, provides: ". . . (b) where the probationer is brought . . . before . . . quarter sessions, and it is proved to the satisfaction of that court that he has failed to comply with any of the requirements of the probation order, that court may deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if he had just been convicted before that court of that offence."

The offender who is put on probation and ordered to pay compensation is given a right by behaving himself to avoid punishment. If he chooses to throw away that chance and as a result is punished the court sees nothing inequitable or unreasonable in his continuing to be under the liability to pay compensation, though, as we have already said, the fact that he is still liable to pay compensation may well be a factor to be taken into account by the sentencing court in assessing an appropriate punishment.

This court is of opinion that the decision in *R.* v. *McCarthy* (7) was wrong and holds that the appellant is still liable to pay compensation under the original order notwithstanding that he has since been sent to prison following his breach of the original probation order.

Appeal allowed in part. Sentence varied. Compensation order to stand.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Salmon and Winn, JJ.), January 17, 1961.]

Counsel—Appearance in court on own behalf—Criminal matter—Wearing of robes—Place in court.

[As to counsel appearing in robes on his own behalf, see 3 HALSBURY'S LAWS (3rd Edn.) 49, para. 72, note (u); and for cases on the subject, see 3 DIGEST (Repl.) 395, *494-496*.]

A junior barrister wearing his robes and sitting in counsel's row rose to make an application to the court on his own behalf in a criminal matter. LORD PARKER, C.J., directed the applicant to make this application later, as an applicant in person and not as counsel. The barrister later returned to court unrobed and made his application from the well of the court.

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(7) (Oct. 25, 1960), unreported.

INLAND REVENUE COMMISSIONERS *v.* BERNSTEIN.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), December 6, 7, 8, 9, 1960.]

Surtax—Settlement—Settlor retaining interest—Accumulation of income during settlor's lifetime—Trust in favour of settlor's wife and unborn children—Beneficiaries benefiting on settlor's death—Power of advancement negatived by trust for accumulation—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 405 (1), (2)—*Trustee Act*, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 32 (1), *s.* 69 (2).

Trust and Trustee—Powers of trustee—Power of advancement—Statutory power—Contrary intention in deed—Exclusion by trust for accumulation—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 32 (1), *s.* 69 (2).

In a settlement making provision for his future wife, a settlor directed the trustees to accumulate the income of the trust fund by investing it and the income therefrom in authorised investments in augmentation of the capital of the fund for the benefit of the person eventually becoming entitled thereto. After his death the fund was to be held on trust as to one-third for any children of the marriage then living and as to two-thirds for the wife absolutely, but, if she should die in the settlor's lifetime leaving children, then for the children of the settlor and the wife living at the settlor's death. If there were no children, the trust fund was to be held after the settlor's death for the wife, if living, or, if she were not living, for her sister. There was as yet no child of the marriage. The settlor was assessed to surtax on the basis that half of two-thirds of the income arising under the settlement should be treated as his income under s. 405 (1) and (2)* of the Income Tax Act, 1952, on the ground that he was deemed to have an interest therein because income or property might become payable to his wife by virtue of an exercise of the statutory power of advancement under s. 32 (1) of the Trustee Act, 1925, in her favour in respect of her two-thirds share of capital.

Held: on the true construction of the settlement, the object of which was to build up a capital sum, the power of advancement under s. 32 (1) of the Trustee Act, 1925, did not apply to it, there being an expression of contrary intention (within s. 69 (2)†), since the direction for accumulation showed an intention that there should be no distribution before the settlor's death and was inconsistent with an advancement; accordingly the income under the settlement could not be treated as income of the settlor for surtax purposes.

Re Turner's Will Trusts ([1936] 2 All E.R. 1435) applied.

Decision of DANCKWERTS, J. ([1960] 1 All E.R. 697) affirmed.

[As to income from settlements being deemed to be income of the settlor through retention of an interest therein, see 20 HALSBURY'S LAWS (3rd Edn.) 583, 584, paras. 1139, 1140; and for cases on the subject, see 28 DIGEST (Repl.) 292-294, *1279-1287*.

As to powers of advancement under a settlement, see 29 HALSBURY'S LAWS (2nd Edn.) 776, para. 1083; and for cases on the subject, see 43 DIGEST 789, 790, *2274-2285*.

For the Income Tax Act, 1952, s. 405, see 31 HALSBURY'S STATUTES (2nd Edn.) 382; and for the Trustee Act, 1925, s. 32 (1), s. 69 (2), see 26 HALSBURY'S STATUTES (2nd Edn.) 99, 157.]

Cases referred to:

Fox, Re, Wodehouse v. *Fox*, [1904] 1 Ch. 480; 73 L.J.Ch. 314; 90 L.T. 477; 40 Digest (Repl.) 616, *1122*.

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* See p. 323, letters C and D, post.

† See p. 323, letter I, post.

A *Spencer, Re, Lloyds Bank, Ltd.* v. *Spencer*, [1935] Ch. 533; 104 L.J.Ch. 127; 153 L.T. 121; 28 Digest (Repl.) 569, *842*.

Turner's Will Trusts, Re, District Bank, Ltd. v. *Turner*, [1936] 2 All E.R. 1435; [1937] Ch. 15; 106 L.J.Ch. 58; 155 L.T. 266; 28 Digest (Repl.) 569, *843*.

B **Appeal.**

The taxpayer, the settlor of a settlement, appealed to the Special Commissioners of Income Tax against assessments to surtax made on him in the following amounts: 1950-51, £6,102 (additional); 1951-52, £6,659; 1952-53, £1,338 (additional); 1953-54, £4,630 (additional). The question for determination was whether income arising in each of those years under a settlement dated Oct. 16, C 1947, should be treated as income of the settlor under s. 405 of the Income Tax Act, 1952. All income from the trust fund the subject of the settlement had been accumulated in accordance with cl. 2 of the settlement*. It was common ground that the question depended on whether the settlor had "an interest in any income arising under or property comprised in" the settlement within s. 405 (1), (2), and that this depended on whether the statutory power of advancement D contained in s. 32 (1) of the Trustee Act, 1925, was applicable to the settlement and could be exercised in favour of the settlor's wife. The Crown contended: (i) that the trustees of the settlement had power under s. 32 of the Act of 1925 at any time to pay or apply for the advancement or benefit of the settlor's wife one half of the trust fund; (ii) that by virtue of such power one half of the property comprised in the settlement might become payable to or applicable for the E benefit of the settlor's wife within s. 405 (2) of the Income Tax Act, 1952; and (iii) that by s. 405 (1) and proviso (a) thereto of the Act one half of the income arising under the settlement in the relevant years was accordingly to be treated as the settlor's income. The settlor contended: (i) that the power of advancement contained in s. 32 of the Trustee Act, 1925, was not applicable to the settlement inasmuch as on the true construction of the deed of settlement it contained an F indication of a contrary intention within s. 69 (2) of the Trustee Act, 1925; and (ii) that, even if the statutory power of advancement was to be read into the deed of settlement, such power could not be exercised in favour of the settlor's wife without the prior consent of the persons (born or unborn) who had "prior interests" within s. 32 (1), proviso (c), of the Act of 1925, and that possible children of the marriage had such prior interests and, their consent being un-G obtainable at any time during the period of accumulation, the statutory power of advancement could never be exercised in respect of the money in which such children had such prior interests, which extended to the income of the whole of the trust fund and the accumulations of the income thereof or alternatively to one-third of the trust fund. The commissioners held that the statutory power of advancement was not inconsistent with any express provision in the settlement H and must be read into it but that the interests of the unborn children were prior interests within proviso (c), with the consequence that no advancement could be made owing to the impossibility of obtaining their consents. They therefore allowed the appeal and discharged the assessments. On Feb. 15, 1960, DANCKWERTS, J., dismissed the Crown's appeal by way of Case Stated against this decision ([1960] 1 All E.R. 697), holding that the power of advancement did not I apply to the settlement, income from which could therefore not be treated as income of the settlor for surtax purposes, though children of the parties had not prior interests to that of the wife, necessitating their consent to an advancement under s. 32 (1) of the Trustee Act, 1925. The Crown appealed to the Court of Appeal.

B. L. Bathurst, Q.C., *E. Blanshard Stamp* and *A. S. Orr* for the Crown.

Sir Lynn Ungoed-Thomas, Q.C., and *C. N. Beattie* for the settlor.

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* Set out at p. 322, letter E, *post*.

LORD EVERSHED, M.R.: By a deed of Oct. 16, 1947, the respondent in this court, Mr. William Bernstein, transferred to the trustees of the deed the sum of £500 to be held on the trusts therein declared. In that document Mr. Bernstein was thereafter referred to as the settlor and I will therefore call the document a settlement, though it is of a somewhat unusual nature and also, if I may say so, not in all respects very elegantly drafted. The object of the document was to make provision for a lady called the beneficiary, Sagle Norah Thoms. At the time of the document the settlor and the beneficiary were not married but we have been informed that at some date two or three years thereafter they did become man and wife. The object of the deed manifestly was to make provision on the settlor's own death for the beneficiary and for any children they might have, whether born in or out of wedlock, and there is a final trust in favour of the beneficiary's sister.

In the first clause of the settlement the settlor declared that the trustees should hold the sum of £500 and any further sums which might become vested in the trustees on trust for investment. The clause proceeded:

> " The trustees shall henceforth hold the said sum of £500 and the money and investments for the time being representing the same and any further sums moneys property or investments which may become vested in the trustees (all of which are hereinafter called ' the trust fund ') and the income therefrom "

on the subsequent trusts. Clause 2 I read in full:

> " The trustees shall during the life of the settlor accumulate the income of the trust fund at compound interest by investing the same and the resulting income thereof in any of the investments hereby authorised in augmentation of the capital of the trust fund and for the benefit of the person or persons who shall eventually become entitled thereto."

Clause 3 provides that after the death of the settlor the trust fund is to be held

> " as to one equal third part thereof in trust for all or any of the children or child then living of the settlor by the beneficiary . . . and as to two equal third parts thereof in trust for the beneficiary absolutely but if the beneficiary dies in the lifetime of the settlor leaving children or a child her surviving ",

then the trust fund is to be held in its entirety for such children. Clause 4:

> " If at the death of the settlor there shall be living no child of the settlor by the beneficiary the trustees shall hold the trust fund in trust for the beneficiary absolutely but if the beneficiary dies in the lifetime of the settlor without leaving any children or a child by the settlor or her surviving then the trustees shall hold the trust fund in trust for "

the sister of the beneficiary absolutely. In her case alone there is no requirement of survivorship of the settlor in order that she may take a vested interest. It follows that there is no resulting trust in favour of the settlor. The other clauses are administrative only.

As I have indicated, the settlor and beneficiary were not at the time married but they did subsequently marry. At some date considerably after the date of the settlement and the marriage it appears to have occurred to those responsible in the department of the Inland Revenue that here was a case in which, as a result of the application of the provisions of s. 32 of the Trustee Act, 1925, a claim for surtax fell to be made on the settlor; and according to the Case the assessments against which he later appealed were in respect of the four years, 1950-51 to 1953-54 inclusive, and those assessments, according to the Case (though counsel for the Crown has said the figures are not to be accepted as correct) amounted to no less than £18,729. On the face of it the case is a little startling. No advancement pursuant to s. 32 of the Trustee Act has ever purported to have been made, and we have been informed by counsel for the settlor that at some date, after the claim first arose, by an appropriate instrument, which obviously it would be competent for the parties to execute, the trusts of the settlement have been varied so as henceforth to exclude any possibility of advancement to the beneficiary who is now the wife of the settlor. I do appreciate that those responsible might well take the view that by instruments of this general nature it might be possible for persons of means to provide, as the phrase goes, for a " rolling up " of the income, yet thereafter to make the resultant capital available to a substantial extent by way of advancement to the settlor's wife, and thus to avoid what otherwise might have been a liability to substantial taxes. As it is, the variation which has been made has shown that in this case, at any rate, that is no longer in any circumstances possible.

The claim is made by virtue of s. 405 of the Income Tax Act, 1952, which provides:

> " (1) If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person."

It is not here in doubt that this instrument is a settlement within the meaning of this section. Section 405 continues:

> " (2) For the purpose of sub-s. (1) of this section, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever."

The argument for the Crown is that by reason of the incorporation into the settlement of the power to make advancements, in this case to the beneficiary, in s. 32 of the Trustee Act, 1925, the settlor must be deemed to have an interest in property comprised in the settlement because property comprised in that settlement may at some time become payable for the benefit of the wife of the settlor in some circumstances, viz., on the exercise of the power of advancement. It will be seen, therefore, that the claim rests on the premise that the provisions of s. 32 of the Trustee Act, 1925, must be treated as available for the trustees of this settlement.

As already indicated, s. 32 is the section which confers on trustees the power of advancement. I need not read it at length; it is in general terms. Trustees may at any time apply any capital money subject to a trust for the advancement of any person entitled to the capital of the trust property, whether absolutely or contingently. There follows a proviso, the third paragraph of which states: No such application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money applied unless such person is in existence and of full age and consents in writing to such payment or application. By the first paragraph of the proviso the limit of one half of the presumptive or vested share or interest of the person to whom the advancement is made is imposed on the power of advancement in any case. Subsection (2) confines the application of the section to what I may broadly call personalty settlements and no point turns on that.

Like its immediate predecessor relating to maintenance and many other sections in the Trustee Act, 1925, s. 32 is in terms general and unqualified. But s. 69 (2) of the same Act states:

> " The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument."

A I should have stated, as is indeed obvious from the figures that I have mentioned, that the trust property here involved is by no means confined now to the £500 originally paid over to the trustees. Plainly the settlor has from time to time very substantially increased the capital moneys vested in the trustees.

Put in the form of a question, the problem is this: Does the power of advancement conferred by s. 32 of the Trustee Act, 1925, apply in this case or is its application excluded by the general terms of s. 69 (2)? A second point arises: If the B power of advancement does here apply, then is its effect for practical purposes wholly negatived by para. 3 of the proviso, seeing that there are not in existence any children of the settlor and the beneficiary, on the ground that such children, if in existence, would have a prior life or other interest in the money which might be applied by the exercise of the power? If that paragraph does apply, the circumstances are plainly such that the consent of the non-existent children cannot, C of course, be obtained.

When the case was before the Special Commissioners it was the second point which appealed to them and caused them to reject the Crown's claim to assess the settlor. At that time, in fairness to the commissioners, as counsel for the Crown pointed out, the Crown's claim had not been limited to any share in the trust property—particularly to the two-thirds share of capital in which the D settlor's wife, as she now is, has a vested interest liable to be divested on her failing to survive her husband. Subsequently the Crown revised their claim and limited their case to that two-thirds share. In other words, their claim became thenceforth a claim that, by virtue of s. 32, there was a power to advance to the settlor's wife up to one half of that two-thirds.

The claim was so limited when the matter came before DANCKWERTS, J., and, E regarding the interest created by this instrument in that two-thirds, his view was that it could not here be said that these unborn children had a prior interest of any kind in any sums which might be paid out of that two-thirds. He did not therefore accept the ground of the commissioners for rejecting the Crown's claim. However, he did take the view, differing in this respect from the commissioners, that on a true view of this instrument, s. 32 must be treated as excluded by the F effect of s. 69. I shall read the passage in his judgment which states that conclusion. The learned judge had referred to a case in this court, *Re Turner's Will Trusts, District Bank, Ltd.* v. *Turner* (1), in which the court had to consider the application of the excluding provisions of s. 69 (2) in relation, not to the powers of advancement given by s. 32, but to the maintenance powers given by s. 31. I shall make a reference presently to what ROMER, L.J., in delivering the judgment G of this court, said in concluding that case. DANCKWERTS, J., in the present case, said (2):

> "Now that [i.e., *Re Turner's Will Trusts* (1)] was on a different section, but it seems to me that the decision of the Court of Appeal may be applicable in the present case for this reason: from the way this settlement is drawn and in particular from the fact that cl. 2 of the settlement [i.e., the accumulation clause] is an entirely separate provision from cl. 3 [which states the H rights to capital] and in the plainest possible terms provides for accumulation during the lifetime of the settlor, it seems to me that there is an intention that no income shall be distributed before his death. Though it is true that s. 31 deals directly with income, the matter is very closely allied, since, if the power of advancement be exercised, then the effect is to cut I off the appropriate portion of the income after that advancement and of necessity the operation must put an end to the trust for accumulation to that extent. This trust for accumulation seems to me therefore to be inconsistent with the trust for advancement contained in the Trustee Act. Section 32 therefore is not applicable in the present case and accordingly no advances can be made of either capital or income to the wife during the settlor's

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(1) [1936] 2 All E.R. 1435; [1937] Ch. 15.

(2) [1960] 1 All E.R. at p. 701.

A lifetime. That, of course, is the end of the claim of the Crown under this peculiar section, if it is correct."

Now s. 69 (2) uses the language "so far only as a contrary intention is not expressed in the instrument . . . creating the trust", though those words are followed by this later phrase "and have effect subject to the terms of that instrument". At a first reading of the subsection, it might seem that in order B to exclude the power of advancement one would have to have an express exclusion or something equivalent thereto. Counsel for the Crown has not, however, contended that the section requires anything so positive in expression. He has conceded (and, for reasons which will in a moment appear, I think that he has rightly conceded) that s. 32 is inapplicable if on a fair reading of the instrument in question the application of s. 32 would be inconsistent with the purport of C the instrument. One ground for taking that view clearly emerges from *Re Turner's Will Trusts* (3). There the question was whether the powers of s. 31 as to maintenance were applicable and not whether s. 32 was applicable. At the end of the judgment of the court read by ROMER, L.J., there is this language (4):

> "Another contention, advanced on behalf of the appellant Jessie Turner, D was that the interest of the persons who should ultimately become entitled to the residuary estate in the accumulations of income directed by the will was a prior interest affecting the property within the meaning of s. 31 (1). The question involved in this contention was adverted to but left undetermined by CLAUSON, J., in *Re Spencer, Lloyds Bank, Ltd.* v. *Spencer* (5)."

E That is a reference to a point analogous to the second point which arises in this case. ROMER, L.J.'s language continued:

> "It is a question of some difficulty upon which we need not express an opinion, for in view of the construction that we have put upon s. 69 (2) of the Act, the question can never arise again, inasmuch as the direction to accumulate is in any case an expression of a contrary intention within the F meaning of that subsection."

It follows, therefore, as I apprehend the judgment, that this court in *Re Turner's Will Trusts* (3) was saying that s. 69 (2) will have its excluding effect if on a proper reading of the instrument one finds a contrary intention and one need not seek for an express exclusion. As DANCKWERTS, J., observed, this present case obviously bears an analogy, at any rate, to *Re Turner's Will Trusts* (3) though it G involves the problem of excluding a different section.

I have felt great difficulty about this case and have been aware of changes of view as the case has been argued. I was much impressed with Mr. Bathurst's main argument, which I can I hope adequately summarise thus. He said that when dealing with the exclusion of s. 31 of the Trustee Act, 1925, one is dealing with a section which is primarily directed to an application of income, and that is H none the less true though s. 31 does contain provisions for accumulation. Since an accumulation clause is directed to income, there is at once an obvious conflict between a direction to accumulate income and a power to apply income. But, says counsel, s. 32 deals with a power given to deal with capital or what has become capital, and there is therefore no such inevitable conflict between a trust to accumulate income and a power to deal with capital, albeit the capital will I consist in part of capitalised income. Mr. Bathurst pointed out with great force that to take too easily the view that a trust for accumulation excludes the powers of s. 32 might have very far-reaching effects. Take the ordinary case of a settlement strictly so described, with a life interest to A and afterwards capital payable on the happening of some event to B or to a class of persons, and with a trust for accumulation during some part, say, of A's life interest. Counsel says with force that it would be nothing to the point that advances could not A be made without A's consent; that, in such a settlement, provision for paying out capital by way of advancement and thus diminishing the income of the trust fund, which thereafter would be payable to the life tenant with or without an accumulating provision at the same time, would not be a provision that was inconsistent with the application of income either by way of accumulation (if there were such a provision in the clause) or by paying it to A. From that argu- B ment counsel for the Crown says that the view which commended itself to DANCKWERTS, J., would have an effect so wide as almost to exclude the application of the powers in any kind of case.

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(3) [1936] 2 All E.R. 1435; [1937] Ch. 15.

(4) [1936] 2 All E.R. at p. 1448; [1937] Ch. at p. 28.

(5) [1935] Ch. 533.

As I say, I have been much impressed with that argument, but in the end I have come to the conclusion that the passage which I have read from DANCKWERTS, J.'s judgment ought not to be held to be wrong in this court. After all, C it is a question in every case of examining the instrument and seeing what really was its effect or purpose. In this case it is quite apparent that the whole object of the instrument was to build up a capital sum which would be paid out to the beneficiary or her children, if any, on the settlor's death. The trust for accumulation has, therefore, in this case a special importance and emphasis. Moreover, that circumstance is, I think, emphasised by the language of the clause to which D counsel for the Crown referred us in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (15th Edn.), Vol. 2, at p. 635; for from that precedent this clause does in a material respect slightly differ. I refer to that part of it which states that the resulting investments of income are to go in augmentation of the capital of the trust fund and for the benefit of the person or persons who shall become entitled thereto (i.e., to the trust fund); and, by definition, E taking the two clauses together, it is clear that the trust fund is meant to comprehend whatever from time to time shall be capital in the hands of the trustees. There are no other purposes in this instrument save to provide for the event on the settlor's death of distributing a sum of capital to the persons who then become entitled to it. I cannot, I think, in the circumstances improve on the occasion by trying to add anything to the passage of DANCKWERTS, J.'s F judgment which I have read. It seems to me lucid, it refers to the particular character of this settlement, and on that basis reaches the conclusion which he states, from which I do not feel that I should dissent.

Taking that view, it is unnecessary to pursue the second point raised by counsel for the settlor, the point that the children, though unborn, have here a prior interest in any sums paid out because, as he puts it, they are concerned, or G they would be concerned if they lived, to see that the income in each year is in its totality applied in augmentation of the capital. I confess that the argument has a refinement and philosophical quality which I am not sure that I have entirely been able to appreciate as I should have done. The point is a difficult one and its difficulty is emphasised by *Re Spencer* (6) where CLAUSON, J., adverted to a similar argument. He stated that it would involve grave difficulties at least H if it were applicable in a case where accumulation was not specifically directed by the instrument. As this court said in *Re Turner's Will Trusts* (7) it is " a question of some difficulty upon which we need not express an opinion ". I am glad to be able to follow that precedent in this case by refraining also from expressing an opinion on it, save only to say on this part of the argument that I am not to be taken as intimating that, as at present advised, I think DANCK- I WERTS, J., was wrong in saying that the point was not one which should decide the case in the Crown's favour. I put it no higher than that. Like the learned judge, I rest my conclusion on the view that in the rather special circumstances of this case it is not right to say that the powers of advancement conferred by s. 32 of the Trustee Act, 1925, ever were available to the trustees, and, accordingly, it follows, that there is no property which might become available in any circumstances to the settlor's wife so as to attract liability for tax on the settlor. For these reasons I would dismiss the appeal.

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(6) [1935] Ch. 533.

(7) [1936] 2 All E.R. at p. 1448; [1937] Ch. at p. 28.

HARMAN, L.J.: I agree. That the questions agitated before us are of some difficulty is well illustrated by the fact that, though the learned judge reached the same conclusion at the end of the road as the commissioners, he reached it by a precisely opposite route. The commissioners preferred the prior interest point; the learned judge preferred the other point, and rejected the prior interest point.

I need not say anything more about the document, the so-called settlement, though I should prefer to call it a trust rather than a settlement, except that, as at present advised, I take the view that Mrs. Bernstein's interest is not a contingent one but is a vested interest subject to being divested if ever she predecease the settlor leaving children her surviving or (if she predeceases the settlor) whether she have children or no. It is a very inelegantly drawn document, but that seems to be how it works out.

Section 32 of the Trustee Act, 1925, has at the end of it these words, that it shall have effect subject to the terms of the instrument. It is said that the way to test the matter is to write s. 32 into the instrument, the trust, and then see whether cl. 2 supplies a contrary intention. I take it that s. 32 should be read as being subject to the terms of that instrument, including here cl. 2. No doubt, if there were an express clause for advancement in this instrument, it would be construed as a proviso to operate notwithstanding cl. 2, and in some settlements I do not doubt that such a clause would be held so to operate. However, the judge felt that he ought to hold that there was a contrary intention having regard to *Re Turner's Will Trusts* (8) which my Lord has mentioned.

Now that case was concerned, not with s. 32, but with s. 31, and it was held by the court, and seems to have been assumed on all sides (because there does not appear to have been any argument about it) that, if the so-called trust in s. 31 (2) should be construed as merely being a power so as to be reached by s. 69 at all, there was a contrary intention which overrode it in the terms of the accumulation clause. That accumulation clause was only a subsidiary part of that settlement. The Court of Appeal did so hold, and, as a result in the passage which my Lord has read, ROMER, L.J., concluded that this question could never arise again, because the court had assumed that the accumulation clause did provide a contrary intention. It is accordingly admitted by the Crown that here the statutory power to maintain included in s. 31 of the Act is overridden by the express trust to accumulate, and the Gilbertian position is thus reached that, on the Crown's view, though the children of this union may not be maintained out of income, they may be advanced out of capital.

When one reaches that conclusion, it is time to draw the foot back before slipping into the pond of absurdity. The justification is this, that a decision on s. 31, which goes to income, does not cover an advancement of capital under s. 32. This is true in terms and might, I think, perhaps be justified if the direction to accumulate were merely an ancillary or administrative provision dealing with some contingent event, but here the main object of the settlement is to accumulate income during the settlor's life in order to provide a fund for this lady and his children by her after his death.

I do not think that we should be justified in the suspicion or the possibility suggested by the Crown as to the real object, which is, so they say, to provide the lady during her husband's life, and perhaps him through her, with a sum of money free of surtax and so to be a rich man's device for avoiding surtax. The paramount object of the document, made as it was on a lady who was not his wife, was that which is stated in it, and, that being the object, accumulation being in the forefront of the battle, it seems to me to operate as an express contrary intention so as to override the statutory power in s. 32. If (as the A statute enjoins) the statutory power is read as also subject to cl. 2, it cannot be allowed to operate. It is said that proves too much, but I do not think in a case of this sort that it is anything more than a matter of construing the document with s. 32 added on at the end of it, and seeing whether it is overridden by the trust to accumulate, and I think that it is. The learned judge treated it as a question of income. In that I do not agree with him, for the sum advanced, as counsel for B the Crown pointed out, is taken for all purposes out of the settlement, and this income after the advancement cannot be said to be income of the settled property (see *Re Fox, Wodehouse* v. *Fox* (9)).

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(8) [1936] 2 All E.R. 1435; [1937] Ch. 15.

In that proposition I concur. But s. 405 of the Income Tax Act, 1952, speaks not only of income, but of property, which would include capital advanced and so taken out of the settlement. If my view be right, it is an end of the case, C and an end which is in consonance with the learned judge's finding. Whether, if I took a different view, I should agree with the learned judge in his second finding rejecting the so-called prior interest point, I do not know. CLAUSON, J., shrank from it in *Re Spencer* (10), the Court of Appeal did the same in *Re Turner's Will Trusts* (11), and we need not be ashamed to follow those examples. The point, ROMER, L.J., said, was of some difficulty. CLAUSON, J., thought it of great D difficulty. It may be the answer to it is in the argument submitted in *Re Turner's Will Trusts* (12) and reported in these words:

> " A difficulty in the way of this contention is, however, that ' prior interest' presumably means an interest which during the period of [accumulation] confers a paramount right to call for the income."

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Here there is in a sense a prior interest in income in the lady herself and in her children if she has any, but, as I say, whether that ought to be called a prior interest is a matter of doubt, although I myself feel some inclination towards the view of the commissioners on it. That is not a matter we need decide; the first point concludes the case. There is no power of advancement here. Therefore the danger which the Crown affects to anticipate cannot be real, and the income F cannot be treated as the settlor's income.

DONOVAN, L.J.: The effect of this disposition operating on the initial £500 and the added funds has been to remove a maximum of some £6,000 per annum of the settlor's income from the surtax net: and one can hardly suppose him to have been so unsophisticated as not to foresee and intend that result, G whether as a primary object or only as a secondary one. If so, it is unlikely that he would want anything in the deed to produce at any time the opposite result. No evidence was called as to the circumstances surrounding the creation of the trust and one is confined to the document itself when looking for any contrary intention within the meaning of s. 69 (2).

The document has a number of distinctive and unusual features. There is no H power to apply income for maintenance, no express power to advance capital, no power of appointment or of revocation and no resulting trust. The one reasonable explanation which fits all these omissions is an intention on the part of the settlor that his surtax saving shall be secure. A resulting trust, for example, would have done no harm if estate duty were alone in mind. Accordingly, to I my mind, the document itself raises a presumption that the settlor wanted no power of advancement in it which would substantially reduce his surtax saving the moment he married Miss Thoms.

I do not found my conclusion on these considerations. I agree that a contrary intention is here to be found for the reasons which my Lords have given.

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(9) [1904] 1 Ch. 480.
(10) [1935] Ch. 533.
(11) [1936] 2 All E.R. 1435; [1937] Ch. 15.
(12) [1937] Ch. at p. 19.

Having reached that conclusion, I think that the features of the deed which I have indicated do tend to confirm that it is right. Accordingly, I also would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor of Inland Revenue*; *Gouldens* (for the settlor).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Legal Aid—Costs—Bill of costs—Form—Divorce—Work done partly before and partly after Jan. 1, 1961—*Composite fee—Legal Aid and Advice Act,* 1949 (12 *&* 13 *Geo.* 6 *c.* 51)—*Rules of the Supreme Court* (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2—*Legal Aid* (*General*) (*Amendment No.* 4) *Regulations,* 1960 (*S.I.* 1960 *No.* 2369).

The Legal Aid (General) (Amendment No. 4) Regulations, 1960, affect costs of all work done on or after Jan. 1, 1961. Where bills relate to work done partly before and partly after that date, they must be drawn in separate parts relating to each period, and each part separately summarised. In the case of approved specimen undefended divorce bills, separate printed forms may be used for each part where one form cannot conveniently be divided. The certificate of taxation will set out separately the profit costs, counsel's fees, and other disbursements relating to each period.

The charge for instructions for trial or hearing or for appeal (item 26 or item 27) will be apportioned where necessary between the two parts of the bill.

Where Appendix 2 to the Supreme Court Costs Rules, 1959*, provides a composite fee for work some of which may have been done before and some after Jan. 1, 1961 (e.g., item 1), apportionment between the two parts of the bill would strictly be necessary, but there is some doubt as to splitting individual items in the Appendix, moreover the amounts involved will generally be small. Whereas apportionment is a matter for discretion, it is proposed normally to avoid the complications involved save as to items 26 and 27 by adopting the following guide as to the date which will decide the part into which the item will be placed:—

(i) As to writs, pleadings and other matters covered by Part I of Appendix 2, the deciding date will be the date of issuing, filing or delivery as the case may be.

(ii) As to summonses covered by Part 2 of Appendix 2, the deciding date will be the date of issue of the summons.

(iii) As to affidavits, the deciding date will be the date of swearing.

B. LONG,
Senior Registrar.

Jan. 11, 1961.

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* The rules are set out in the Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2.

R. *v.* SHAW.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Streatfeild and Ashworth, JJ.), December 12, 13, 14, 21, 1960.]

Criminal Law—Conspiracy—Conspiracy to corrupt public morals—Whether an indictable misdemeanour at common law—Test to be applied.

Criminal Law—Prostitution—Living on earnings of prostitution—Publication containing advertisements by prostitutes published with object of enabling prostitutes to carry on their trade—Whether living on profits derived therefrom was living on the earnings of prostitution—Sexual Offences Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 69), *s.* 30.

Criminal Law—Obscene publication—Intention—Evidence—Whether purpose or intention of publisher material—Whether evidence of results of publication admissible—Obscene Publications Act, 1959 (7 *&* 8 *Eliz.* 2 *c.* 66), *s.* 1 (1), *s.* 4 (1).

The appellant published a booklet entitled the "Ladies' Directory" with the object of assisting prostitutes to ply their trade. The booklet contained names and addresses, and sometimes photographs of the women; there were used also, in some instances, abbreviated expressions indicating a type of conduct in which the woman was prepared to indulge. Women paid for their advertisements to be published. The appellant was indicted on three counts—(i) conspiring with others to corrupt public morals by means of the "Ladies' Directory"; (ii) living wholly or in part on the earnings of prostitution contrary to s. 30 (1) of the Sexual Offences Act, 1956*; (iii) publishing an obscene article, namely, issue No. 9 of the "Ladies' Directory", contrary to s. 2 (1) of the Obscene Publications Act, 1959†. At the trial evidence was given of the meaning of the abbreviated expressions, of the results of the advertisements, including the ages of persons who resorted to the prostitutes, of the practices in which they indulged and of objects found on the premises of advertisers. The trial judge did not direct the jury on the question whether honesty of purpose of the appellant was a relevant factor.

On appeal against the appellant's convictions on all counts,

Held: (i) (a) conduct calculated and intended to corrupt public morals (as opposed to the morals of a particular individual) was an indictable misdemeanour at common law (see p. 338, letter D, post).

R. v. *Sidley* ((1663), 1 Sid. 168); *R.* v. *Curl* ((1727), 2 Stra. 788); and *R.* v. *Wellard* ((1884), 15 Cox, C.C. 559), considered.

(b) a conspiracy to debauch and corrupt public morals (being a conspiracy to commit acts that, as decided at (i) (a) ante, were unlawful acts) was a common law misdemeanour (see p. 339, letter I, post).

(c) section 2 (4) of the Obscene Publications Act, 1959, did not prohibit the prosecution of the appellant for such a conspiracy, of which he had been rightly convicted, because the common law offence consisted in agreement to corrupt public morals by means of booklets, but did not "consist of the publication" of the booklets within those words in s. 2 (4) (see p. 340, letters B to E, post).

(ii) if a man knowingly assisted a prostitute with the direct object of enabling her to carry on her trade and knowingly lived wholly or in part on the earnings of the prostitution which he assisted, he was guilty of an offence under s. 30 of the Sexual Offences Act, 1956 (see p. 335, letter E, post; *R.* v. *Thomas*, [1957] 2 All E.R. 342, considered and followed); and,

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* Section 30 (1) reads: "It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution."

† Section 2 (1), so far as material, reads: ". . . any person who, whether for gain or not, publishes an obscene article shall be liable . . . (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding three years or both."

A as in the present case there would have been no profits from the booklets but for the prostitutes' advertisements and the appellant had admittedly derived substantial income from the venture, the income so derived was manifestly in essence money paid by the prostitutes (see p. 336, letter A, post).

(iii) (a) the test for obscenity laid down in s. 1 (1) of the Obscene Publications Act, 1959, depended on the publication and not on there being an
B intention on the part of the author to corrupt (see p. 333, letter F, post); thus honesty of purpose of the appellant would not affect the criminality of the publication.

Dictum of Cockburn, C.J., in *R.* v. *Hicklin* ((1868), L.R. 3 Q.B. at p. 370) applied.

(b) evidence of the results of the advertisements included in the booklet,
C of the practices in which the prostitutes indulged, or of objects found on the premises of the advertisers was inadmissible on the charge of publishing an obscene article; that evidence was, however, admissible on the conspiracy charge and, there having been no substantial miscarriage of justice, the conviction on the charge of publishing an obscene article would stand (see p. 334, letters A to D, post).

D Per Curiam: the answer to the argument that persons likely to read the publication were persons who had come to areas of prostitution seeking it and so were already corrupt and depraved was that there was no warrant for the assumption that a man cannot be corrupted more than once (see p. 334, letter F, post).

Semble: a conspiracy to corrupt the morals of a particular individual was
E an indictable offence at common law (see p. 339, letter B, et seq.).

Dicta of Lord Mansfield in *R.* v. *Delaval* ((1763), 3 Burr. at p. 1438), of Jervis, C.J., in *R.* v. *Mears & Chalk* ((1851), 4 Cox, C.C. at p. 427) and of Viscount Simon, L.C., in *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* ([1942] 1 All E.R. at p. 146) considered.

Appeal dismissed.

F [As to criminal conspiracy affecting public morals and decency, see 10 Halsbury's Laws (3rd Edn.) 313, para. 570, note (e); and for cases on the subject, see 14 Digest (Repl.) 129, 130, *916-919*.

As to publishing obscene matter, see 10 Halsbury's Laws (3rd Edn.) 666, 667, paras. 1274, 1275 and Supplement, especially para. 1276A; and for cases on the subject, see 15 Digest (Repl.) 894-896, *8623-8641*, *8645-8648*, *8650-8655*,
G and 3rd Digest Supp.

As to living on immoral earnings, see 10 Halsbury's Laws (3rd Edn.) 676, para. 1294, and Supplement; and for cases on the subject, see 15 Digest (Repl.) 1023, 1024, *10,052-10,057* and 3rd Digest Supp.

For the Obscene Publications Act, 1959, s. 1, s. 4, see 39 Halsbury's Statutes
H (2nd Edn.) 268, 273.

For the Sexual Offences Act, 1956, s. 30, see 36 Halsbury's Statutes (2nd Edn.) 232.]

Cases referred to:

Bowman v. *Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 15 Digest (Repl.) 880, *8489*.

I *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.

R. v. *Berg, Britt, Carré & Lummies*, (1927), 20 Cr. App. Rep. 38; 15 Digest (Repl.) 902, *8702*.

R. v. *Curl*, (1727), 2 Stra. 788; 1 Barn. K.B. 29; 17 State Tr. 153; 93 E.R. 849; 15 Digest (Repl.) 895, *8624*.

R. v. *Delaval*, (1763), 3 Burr. 1434; 1 Wm. Bl. 439; 97 E.R. 913; 14 Digest (Repl.) 129, *918*.

R. v. *Hicklin*, (1868), L.R. 3 Q.B. 360; 37 L.J.M.C. 89; 18 L.T. 395; sub nom. *Scott* v. *Wolverhampton JJ.*, 32 J.P. 533; 14 Digest (Repl.) 501, *4838*. A

R. v. *Howell*, (1864), 4 F. & F. 160; 176 E.R. 513; 14 Digest (Repl.) 129, *919*.

R. v. *Mears & Chalk*, (1851), 2 Den. 79; 20 L.J.M.C. 59; 16 L.T.O.S. 515; 15 J.P. 81; 4 Cox, C.C. 423; 169 E.R. 426; 14 Digest (Repl.) 129, *917*.

R. v. *Read*, (1708), Fortes. Rep. 98; 11 Mod. Rep. 142; 92 E.R. 777; 15 Digest (Repl.) 894, *8623*. B

R. v. *Saunders*, (1875), 1 Q.B.D. 15; 45 L.J.M.C. 11; 33 L.T. 677; 13 Cox, C.C. 116; 15 Digest (Repl.) 894, *8620*.

R. v. *Sidley*, (1663), 1 Sid. 168; 82 E.R. 1036; sub nom. *Sydlyes' Case*, 1 Keb. 620; 83 E.R. 1146; 15 Digest (Repl.) 892, *8596*.

R. v. *Silver*, [1956] 1 All E.R. 716; 120 J.P. 233; 40 Cr. App. Rep. 32; [1956] 1 W.L.R. 281; 3rd Digest Supp. C

R. v. *Thomas*, [1957] 2 All E.R. 181; 41 Cr. App. Rep. 117; [1957] 1 W.L.R. 747; *affd. on appeal*, [1957] 2 All E.R. 342; 121 J.P. 338; 41 Cr. App. Rep. 121; [1957] 1 W.L.R. 1091; 3rd Digest Supp.

R. v. *Wellard*, (1884), 14 Q.B.D. 63; 54 L.J.M.C. 14; 51 L.T. 604; 49 J.P. 296; 15 Cox, C.C. 559; 15 Digest (Repl.) 892, *8606*. D

Appeal.

This was an appeal by Frederick Charles Shaw against his conviction at the Central Criminal Court on Sept. 21, 1960, before the commissioner (JUDGE MAXWELL-TURNER) and a jury on three counts, namely: (i) conspiring to corrupt public morals by means of a magazine entitled the "Ladies' Directory"; (ii) living wholly or in part on the earnings of prostitution contrary to s. 30 (1) of the Sexual Offences Act, 1956; (iii) publishing an obscene article, namely, an edition of the "Ladies' Directory" No. 9, contrary to s. 2 (1) of the Obscene Publications Act, 1959. The appellant did not give evidence at the trial. He was sentenced by the commissioner to nine months' imprisonment. The facts appear in the judgment. On the question of the honesty of purpose of the appellant, there had been evidence before the commissioner, to which he referred in his summing-up, that the appellant had on Oct. 22, 1959, gone to Scotland Yard and had produced to an officer there the first issue of the booklet, had stated that he proposed to publish it and had said that he had been advised that he could not be prosecuted for publishing it. The appellant had stated that all the names and photographs in the booklet, except the first, were of prostitutes. It was admitted that he had introduced the booklet as a means for prostitutes to advertise for clients, as they would need some other way than soliciting on the streets, in view of the recent change in the law (viz., by the Street Offences Act, 1959). E F G

The statutes and authorities enumerated below* were cited in argument in addition to those quoted in the judgment. H

W. R. Rees-Davies for the appellant.

J. H. Buzzard and *M. D. L. Worsley* for the Crown.

Cur. adv. vult.

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* Indictments Act, 1915, Sch. 1, Form 23; ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (34th Edn.), paras. 2967, 4061; CHITTY'S CRIMINAL LAW, Vol. 2, p. 40 (Precedents of Indictment); RUSSELL ON CRIME (7th Edn.), Vol. 2, 1598, 1633 et seq., 1704, 1705, note (81); *R.* v. *Taylor*, (1685), 1 Vent. 293; *Lord Grey's Case*, (1682), 9 State Tr. 127; *Russell* v. *Corne*, (1704), 2 Ld. Raym. 1031; *R.* v. *Lynn*, (1788), 2 Term. Rep. 733; *R.* v. *Knewland & Wood*, (1796), 2 Leach 721; *Quinn* v. *Leathem*, [1901] A.C. 495; *R.* v. *Bassey*, (1931), 22 Cr. App. Rep. 160; *R.* v. *De Montalk*, (1932), 23 Cr. App. Rep. 182; *R.* v. *Manley*, [1933] 1 K.B. 529; *Calvert* v. *Mayes*, [1954] 1 All E.R. 41; *R.* v. *Martin Secker Warburg, Ltd.*, [1954] 2 All E.R. 683; *Joshua* v. *R.*, [1955] 1 All E.R. 22; *R.* v. *Hudson*, [1956] 1 All E.R. 814; *R.* v. *Owen*, [1956] 3 All E.R. 432; *R.* v. *Winter* (Central Criminal Court, 1960), unreported. I

A Dec. 21. **ASHWORTH, J.**, at the request of LORD PARKER, C.J., read the following judgment of the court: On Sept. 21, 1960, the appellant was convicted at the Central Criminal Court on an indictment containing three counts alleging the following offences:—(i) Conspiracy to corrupt public morals; (ii) Knowingly living on the earnings of prostitution; and (iii) Publishing an obscene article. The jury found him guilty on each of the three counts, and it has been B submitted on his behalf that the conviction on each count should be quashed. In presenting an able argument counsel for the appellant dealt with the counts in the opposite order to that in which they were set out in the indictment, and we think it convenient to follow the same course.

In the third count the charge was brought under s. 2 (1) of the Obscene Publications Act, 1959, and the article alleged to be obscene consisted of a C booklet entitled "Ladies' Directory Issue No. 9". The appellant admitted publication, and his avowed object in publishing this and the two preceding issues was to assist prostitutes to ply their trade when, as a result of the Street Offences Act, 1959, they were no longer able to do so by soliciting in the streets. The booklet contained twenty-eight pages, and most of them were taken up with the names and addresses and, in some instances, photographs of women D who were prostitutes. In addition, there were in some instances expressions in abbreviated form which were said to indicate that the woman in question was prepared to indulge in sadistic or masochistic conduct. For the purpose of this judgment it is unnecessary to refer to the booklet in greater detail.

On this third count counsel for the appellant submitted that the learned judge failed to direct the jury that the appellant's honesty of purpose was a E relevant factor for their consideration. He did not suggest that the appellant's intention or purpose was in any sense conclusive of his guilt or innocence, but he submitted that the jury should have been directed to consider it. If these proceedings had been brought before the passing of the Obscene Publications Act, 1959, in the form of a prosecution at common law for publishing an obscene libel, it would no doubt have been necessary to establish an intention to corrupt. F But the Act of 1959 contains no such requirement, and the test of obscenity laid down in s. 1 (1) of the Act is whether the effect of the article is such as to tend to deprave and corrupt persons who are likely to read it (1). In other words, obscenity depends on the article and not on the author. Moreover, it is to be noted that s. 4 of the Act of 1959 which provides a defence "if it is proved that publication of the article in question is justified as being for the G public good", does not refer to the purpose or intention of the publisher. Apart from this, the question of purpose was considered in *R.* v. *Hicklin* (2), and in the course of his judgment COCKBURN, C.J., said (3):

> "I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not H affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character."

Secondly, on this third count, counsel for the appellant submitted that evidence was wrongly admitted. Such evidence was given partly by some of the prostitutes mentioned in the booklet and partly by police officers. In so far as the prosti- I tutes' evidence was directed to the special meaning of abbreviations and phrases used in the advertisements contained in the booklet, we are of opinion that it was plainly admissible. The abbreviation "Corr.", for example, has apparently a well-known meaning to prostitutes and those who resort to them as indicating sadism and evidence to this effect was admissible to explain to a jury, who would probably be unaware of it, what the words would convey to many who were likely to read it. But the prostitutes' evidence went further and included evidence (4) as to the result of advertisements, the ages of persons resorting to them, and the practices in which they indulged. The police evidence described the premises of some of the advertisers in the booklet and the objects which were found there. In our view, except to the extent already indicated, the prostitutes' evidence and that of police officers was not admissible on this third count in which the only issue was the question whether the article was obscene. On the other hand, as was conceded by counsel for the appellant, such evidence was plainly admissible on the first count alleging conspiracy and, accordingly, the only complaint that could be made was that the jury should have been directed to disregard such evidence when considering the third count. No such direction was given, but it is only right to say that no objection to the evidence was taken at the trial by counsel then appearing for the appellant, nor was the learned judge invited to give any such direction or to order a separate trial of the third count. Notwithstanding the force of the submissions on this point made on behalf of the appellant, we are of opinion that there was no substantial miscarriage of justice, and that the conviction on this third count should not be set aside on this ground.

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(1) Section 1 (1) reads: "For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

(2) (1868), L.R. 3 Q.B. 360.

(3) (1868), L.R. 3 Q.B. at p. 370.

On this third count, it was further submitted that in the course of his summing-up the learned judge wrongly directed the jury to have regard to what persons did after reading the article, in considering whether it was obscene within the meaning of the Act. It is true that there are words in one paragraph which may be said to justify this submission (5), but those words must be read in their context, and in our view they were explanatory of the words preceding them and should not be regarded as a direction to the jury to consider what happened afterwards as a test of the article's obscenity. Lastly, an argument was put forward that inasmuch as the persons likely to read the article were persons who had come to areas of prostitution, such as Soho and Paddington, and were seeking opportunity to indulge in the practices advertised in the booklet, they were already corrupt and depraved. The fallacy in this argument is that it assumes that a man cannot be corrupted more than once, and there is no warrant for this.

The second count is the next to be considered. The main argument of counsel for the appellant was based on an alleged distinction between a person who supplies services for reward to a prostitute and a person who merely received a prostitute's earnings. He pointed out that the offence which is now to be found in s. 30 of the Sexual Offences Act, 1956, was previously to be found in the Vagrancy Act, 1898, as amended by the Criminal Law Amendment Act, 1912.

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(4) Five of the advertisers, who had given evidence that they paid for the advertisements out of their own earnings as prostitutes, stated in evidence that the advertisements were good at bringing clients in. Some of them gave evidence about the sexual perversions referred to in their advertisements and at addresses of their advertisements the police had found paraphernalia associated with the perversions.

(5) In his summing-up the learned commissioner, after reading and explaining s. 2 of the Obscene Publications Act, 1959, to the jury, said these words: " The test, therefore, that you have to apply is laid down by Act of Parliament—is the effect of this publication (i.e., the ' Ladies' Directory ', issue No. 9), taken as a whole, such as to tend to deprave or corrupt persons who are likely to read it . . . [then later on followed the part of the paragraph complained of:] If the effect of this publication is thought by you to encourage or induce readers of it to resort to prostitutes for fornication and/or for the other deviations we have heard about, and that if that is a thing which corrupts or depraves such people and if you think they are then acting in a depraved or corrupt way, then in my view the effect of the article would be obscene within the definition of the Act ". He continued: " Whether to induce or encourage a person likely to read this article to resort to prostitutes for this purpose does, in fact, tend to corrupt or deprave is, of course, a matter for you, in the light of my previous observations to you on the subject ".

It might, therefore, be inferred that the type of person against whom the Acts were directed was someone who could properly be regarded as a rogue or a vagabond and was not someone who pursued a trade or calling of his own and happened to take money from a prostitute for goods or services supplied to her. In our view, it is not open to this court to take so restricted a view of s. 30 of the Act of 1956, having regard to the decision of this court in *R.* v. *Thomas* (6). In that case proceedings were brought under the Vagrancy Act, 1898, and the amending Act of 1912, and the accused was a man who, knowing a woman to be a convicted prostitute, agreed to let her have the use of a room between the hours of 9 p.m. and 2 a.m., charging her £3 a night for the accommodation. At the Central Criminal Court, PILCHER, J., had declined to follow a ruling of JUDGE MAUDE in *R.* v. *Silver* (7) and held (8) that

> ". . . if there is evidence that the accused has let a room, or a flat, at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine on the facts of each particular case, whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution."

The accused was convicted, and his application for leave to appeal was refused by this court. The judgment of the court contains express approval of the direction of PILCHER, J., and disapproval of the contrary ruling of JUDGE MAUDE.

In our view, the principle of *R.* v. *Thomas* (6) is equally applicable in a case such as the one now before us. If a man knowingly assists a prostitute with the direct object of enabling her to carry on her trade and knowingly lives wholly or in part on the earnings of the prostitution which he assists, he is in our opinion guilty of an offence under s. 30 of the Act of 1956.

It was further submitted that there was no evidence (9) that the appellant charged inflated prices for the prostitutes' advertisements, and therefore that *R.* v. *Thomas* (6) was distinguishable. This submission is not well founded and involves a misunderstanding of the relevance of the inflated rent in that case. The purpose of tendering evidence as to the rent was to show that the room was not let for normal accommodation but for the prostitute's professional purposes, and although in the absence of such evidence or other evidence implicating the accused, it might be difficult to prove the charge in the case of a room being let to a prostitute, such evidence was not in our view an essential element in the prosecution's case.

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(6) [1957] 2 All E.R. 342. (7) [1956] 1 All E.R. 716.

(8) [1957] 2 All E.R. at pp. 182, 183.

(9) The evidence before the court at the trial included evidence to the following effect. That the appellant approached a kiosk owner, with a view to the kiosk owner selling the " Ladies' Directory ", assuring him that it would not be actually published unless it was perfectly legal. This kiosk owner subsequently sold some copies of issues No. 7, No. 8 and No. 9, paying the appellant 2s. a copy and selling them at 5s. a copy. On Nov. 4, 1959, the appellant, in an interview, was asked by a police inspector " Are you the same Shaw that publishes the ' Ladies' Directory ' ? ". The appellant said " Yes " and produced a copy. He then said " I publish this and distribute it for 5s. each to help the prostitutes who advertise in it ". He declined to tell the inspector how much he charged for the advertisements.

Evidence was also given that the " Ladies' Directory " was an illustrated advertising magazine and that the appellant's income from it was partly from the payment of advertisers for the insertion of telephone numbers and certain descriptive matter and partly from the sale of the magazine to the public. The advertisers paid twenty-five guineas for the front cover and fifteen guineas for the back cover. Lesser amounts were charged according to the size and position of the insertions, but it was calculated that in issue No. 9 the whole of the space sold for some £250. The public paid 5s. per copy of which the appellant received 2s. 6d. The matter published in the magazine left no doubt that the women who advertised could be got in touch with at the telephone numbers given, and were offering their services for sexual intercourse, and in some cases, for the practice of a variety of sexual perversions. Five of the advertisers gave evidence that they paid for the advertisements out of their own earnings as prostitutes.

Lastly, on the second count, it was submitted that the appellant did not receive the prostitutes' earnings but merely profits arising from the sale of the booklet after all expenses had been met. This submission involves much too narrow a view of the facts. There would have been no profits at all but for the advertisements and the income derived by the appellant from the venture (which he admitted was considerable) was manifestly in essence the money paid by the prostitutes. Accordingly, there is in our view no reason to set aside the conviction on the second count.

The first count, with which we now deal, raises in some ways a more difficult problem. The charge was one of conspiracy, and it is convenient to set out the relevant portion of the indictment:

> " Statement of Offence: Conspiracy to corrupt public morals. Particulars of Offence:—On divers days between Oct. 1, 1959, and July 23, 1960, within the jurisdiction of the Central Criminal Court, conspired with certain persons who inserted advertisements in issues of a magazine entitled ' Ladies' Directory ' No. 7, No. 7 revised, No. 8, No. 9, No. 10 and a supplement thereto, and with certain other persons whose names are unknown, by means of the said magazine and the said advertisements to induce readers thereof to resort to the said advertisers for the purposes of fornication and of taking part in or witnessing other disgusting and immoral acts and exhibitions, with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of Our Lady the Queen and to raise and create in their minds inordinate and lustful desires."

Conspiracy is an offence which takes many different forms, but in the present appeal the matter was greatly simplified when counsel on behalf of the prosecution made it clear that the form of conspiracy which he had alleged at the trial and to which he adhered, was a conspiracy to commit an unlawful act, and not a conspiracy to commit a lawful act by unlawful means. He reserved the right to contend, should it be necessary, that a conspiracy to corrupt the morals of a particular individual was an indictable offence by reason of the conspiracy even if such corruption if done by one person would not be an offence. The unlawful act which he alleged was said to be a common law misdemeanour, namely, the corruption of public morals. His proposition was twofold:—At common law any act calculated or intended to corrupt the morals of the public or a portion thereof in general, as opposed to the morals of a particular individual or individuals, is indictable as a substantive offence. Secondly, an act calculated or intended to outrage public decency is also indictable as a substantive offence. Both parts of this proposition were naturally contested by counsel for the appellant, and the main issue before us on this first count is whether the first of counsel for the Crown's propositions is well founded.

We were referred to a large number of cases, but before alluding to any of them in detail we may usefully refer to the speech of LORD SUMNER in *Bowman* v. *Secular Society, Ltd.* (10) in which is set out an illuminating survey of this branch of the law from the beginning of the seventeenth century. He says (11):

> " The time of Charles II was one of notorious laxity both in faith and morals, and for a time it seemed as if the old safeguards were in abeyance or had been swept away. Immorality and irreligion were cognisable in the ecclesiastical courts, but spiritual censures had lost their sting and those civil courts were extinct, which had specially dealt with such matters viewed as offences against civil order. The Court of King's Bench stepped in to fill the gap."

The first reported occasion on which the Court of King's Bench thus stepped in appears to be *R.* v. *Sidley* (12). Amongst other acts alleged against Sir Charles

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(10) [1917] A.C. at pp. 456 et seq. (11) [1917] A.C. at p. 456.

(12) Referred to in 1 Siderfin and the English Reports as " Sir Charles Sedley's Case ", (1663), 1 Sid. 168.

Sidley [or Sedley] were his exposure of his naked body on a balcony in Covent Garden before a large gathering of people and making water on the persons below. In addition he was said to have thrown down bottles on such persons' heads. This latter conduct was plainly within the jurisdiction of the Court of King's Bench, but there was evidently an issue whether the other conduct was such as could be dealt with in that court. In the short report of the case there appears the statement that " This court is custos morum of all the King's subjects and that it is high time to punish such profane conduct ". In 1708 in *R.* v. *Read* (13) the court expressed a different view when considering a charge of publishing an obscene libel, but the judgment in the defendant's favour was only a " judgment nisi ", that is, a provisional judgment. Not long afterwards *R.* v. *Curl* (14) came before the Court of King's Bench, in which the charge against the accused was that of publishing an obscene libel. Reliance was naturally placed on *R.* v. *Read* (13) by defending counsel, but the Attorney-General's argument to the contrary prevailed (15):

> " What I insist upon is, that this is an offence at common law, as it tends to corrupt the morals of the King's subjects, and is against the peace of the King . . . I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a public nature."

RAYMOND, C.J., in giving judgment said (16):

> ". . . if it reflects on religion, virtue, or morality, if it tends to disturb the civil order of society, I think it is a temporal offence."

After the case had been adjourned the court (17)

> " gave it as their unanimous opinion, that this was a temporal offence. They said it was plain the force used in *Sedley's* case (18) was but a small ingredient in the judgment of the court, who fined him £2,000. And if the force was all they went upon, there was no occasion to talk of the court's being censor morum of the King's subjects. They said if *Read's* case (13) was to be adjudged, they should rule it otherwise: and therefore in this case they gave judgment for the King."

In 1875, in *R.* v. *Saunders* (19) the main issue seems to have been whether a booth on Epsom Downs was a public place, but the decision is of importance as confirmation of the existence of a common law misdemeanour if conduct takes place which openly outrages decency and is injurious to public morality. Similarly, in *R.* v. *Wellard* (20), GROVE, J., said:

> " I am of opinion that this case comes within the ordinary and reasonable meaning of the principle which makes it a misdemeanour to outrage public decency and morality."

HUDDLESTONE, B., said (20):

> " The principle is well established, which is laid down in BLACKSTONE and in HAWKINS' PLEAS OF THE CROWN, viz., that whatever openly outrages decency, and is injurious to public morals, is a common nuisance and indictable as a misdemeanour at common law."

Lastly, in 1927, *R.* v. *Berg, Britt, Carré & Lummies* (21) came before this court.

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(13) (1708), Fortes. Rep. 98.

(14) (1727), 2 Stra. 788.

(15) (1727), 2 Stra. at pp. 789, 790.

(16) (1727), 2 Stra. at p. 790.

(17) (1727), 2 Stra. at p. 792.

(18) (1663), 1 Sid. 168.

(19) (1875), 1 Q.B.D. 15.

(20) (1884), 15 Cox, C.C. at p. 563.

(21) (1927), 20 Cr. App. Rep. 38.

This court has seen the original indictment in that case (22). It contains two counts, the second of which alleged a conspiracy to corrupt public morals, and it is significant that all the accused named in that count pleaded guilty to it. The issues raised in the appeal related only to the first count, which charged all the accused with keeping a disorderly house, but in our view it is impossible to suppose, having regard to the eminence of the counsel engaged in the case (23), that if the charge in the second count alleged an offence unknown to the law, the indictment would have been drafted in that way, that the prisoners would have been allowed to plead guilty or that the point would not have been taken by the court itself, presided over by Avory, J. (24).

In the course of their arguments before us counsel on both sides referred to a well-known text-book published in 1873, Law of Criminal Conspiracies and Agreements by R. S. Wright (25). We do not think it necessary to lengthen this judgment by discussing the points arising out of the learned author's comments on some of the cases already cited or to decide to what extent they are open to question.

In our opinion, having regard to the long line of cases to which we have been referred, it is an established principle of common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable misdemeanour. As the reports show, the conduct to which that principle is applicable may vary considerably, but the principle itself does not, and in our view the facts of the present case fall plainly within it.

The contrary view put forward by counsel for the appellant may be summarised as follows: He accepted for the purposes of his argument the claim of the Court of King's Bench to be custos morum but he contended that acting in that role the court had, so to speak, from time to time declared particular conduct to be an offence, thereby creating an offence rather than applying existing law to the particular facts. He went on to contend that Parliament in the last one hundred years had concerned itself with legislation on issues of morality, decency and the like, that such legislation must be taken to be in effect a comprehensive code, and that there is no longer any occasion for the courts to create new offences in its capacity as custos morum. We are unable to agree with this argument, which fails to give sufficient weight to the repeated statements of the established principle of common law to which we have already referred. The courts in the relevant cases were not creating new offences or making new law; they were applying existing law to new facts. It is perhaps worth adding that the principle itself is not in any way affected or qualified by the fact that in the course of time public opinion as expressed in juries' verdicts may change in regard to matters of public decency and morality. This was emphasised by Lord Sumner in *Bowman* v. *Secular Society, Ltd.* (26):

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(22) The two counts, so far as material, read as follows: (1) Keeping a disorderly house: Particulars of offence: Robert Britt and Constance Carré on Dec. 11, 1926, and on divers days thereafter between that day and Jan. 16, 1927, in the county of London did unlawfully open keep and maintain a certain disorderly house . . . wherein they did cause and procure and permit to assemble and remain on the said premises divers immoral, lewd and disorderly persons of both sexes, tippling, using obscene language and behaving in a lewd obscene drunken and disorderly manner to the manifest corruption of the morals of His Majesty's liege subjects [and that the other persons named in the indictment did aid and abet counsel and procure the said offences].

(2) Conspiracy to corrupt morals: " . . . Robert Britt, Constance Carré, Alexander Berg, Harold Weir, Bert Lummies and Leonard McMillan on Dec. 11, 1926, and on divers days thereafter and between that day and Jan. 16, 1927, in the county of London conspired together with other persons unknown to debauch and corrupt the minds and morals of such persons as should be induced or permitted to come to certain premises . . . and there remain tippling, whoring and behaving in an obscene and disorderly manner ".

(23) Sir Henry Curtis-Bennett, Q.C. (with him Frampton) appeared for Britt and Carré; Byrne (later Byrne, J.) appeared for Berg; Keeves appeared for Lummies and Sir Travers Humphreys (later Humphreys, J.) for the Commissioner of Police.

(24) Avory, J., sat with Shearman and Sankey, JJ.

(25) Counsel referred to pp. 26, 28, 32-33 and 106 of the 1873 edition.

(26) [1917] A.C. at p. 467.

A “The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact.”

B Support for the proposition expressly reserved by counsel on behalf of the prosecution, relating to a conspiracy to corrupt the morals of a particular individual, is to be found in a number of cases, from two of which we take the following extracts: In *R.* v. *Delaval* (27), LORD MANSFIELD said:

> “It is true that many offences of the incontinent kind fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it. Bût, C if you except those appropriated cases, this court is the custos morum of the people, and has the superintendency of offences contra bonos mores: and upon this ground, both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here. However, besides this, there is, in the present case, a conspiracy and confederacy amongst the defendants: which are clearly and indisputably within the proper jurisdiction D of this court.”

LORD CAMPBELL in Vol. 2 of his LIVES OF THE CHIEF JUSTICES (1849 Edn. at p. 425) refers to this case and, after quoting the words already cited, adds the following passage which evidently formed part of the judgment (28):

> “If Sir Francis Delaval had merely seduced this unfortunate girl by his E own solicitations he might only have been liable to an action for damages at the suit of her father: but entering into a wicked bargain by which he purchased her from another, the two must be considered as conspiring to ruin her and they are both guilty of a misdemeanour.”

Secondly, in *R.* v. *Mears & Chalk* (29), the two accused were indicted in three counts for conspiring to procure by false pretences a girl to have illicit carnal F connexion with a man. In giving judgment, JERVIS, C.J., said (30):

> “It is unnecessary to discuss the first and second counts and upon them we give no opinion because we all think that the third is a good count; the court being clearly of opinion that a conspiracy to solicit prostitution being against good morals and public decency is, independently of the statute, an indictable offence.”

G Another illustration is afforded by *R.* v. *Howell* (31). It is also to be noted that in *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* (32), VISCOUNT SIMON, L.C., evidently had this class of case in mind, although he did not find it necessary to deal with it. He said (33):

> “I am omitting consideration of those cases on the borderland of ille-H gality, where the combination was held to amount to a criminal conspiracy because the purpose aimed at, though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct.”

In the present case the issue involved in this third count was fully argued in the absence of the jury, and the learned judge's ruling was in the following terms:

> I “In my opinion a conspiracy to debauch and corrupt public morals is a common law misdemeanour and is indictable at common law.”

We agree with this ruling. If the principle to which we have referred is part of the common law of this country, it must follow that a conspiracy of the type alleged is an indictable offence.

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(27) (1763), 3 Burr. at p. 1438.
(28) See footnote at p. 425: Holliday, 214.
(29) (1851), 4 Cox, C.C. 423.
(30) (1851), 4 Cox, C.C. at p. 427.
(31) (1864), 4 F. & F. 160.
(32) [1942] 1 All E.R. 142; [1942] A.C. 435.
(33) [1942] 1 All E.R. at p. 146; [1942] A.C. at p. 439.

There are passages in the summing-up on this issue which counsel for the appellant criticised, but we do not find it necessary to deal with them in detail. In our view the learned judge took great care to summarise the arguments put forward by the prosecution and the defence respectively, and he made it clear to the jury that it was their task, using their common sense, to decide whether a conspiracy to corrupt was in fact established. In our view there is no substance in the criticism of the summing-up on this count.

A quite separate ground of appeal in regard to the first count was put forward in reliance on s. 2 (4) of the Obscene Publications Act, 1959, which provides:

> "A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene."

It was argued that the object of this subsection is to prevent proceedings at common law based on an obscene article (especially when proceedings are also taken under the Act itself) and that in the present case the reference in the first count to the booklet shows that the proceedings on that count were based on an obscene article. In our view, the short answer to this argument is that the offence at common law, namely, conspiracy to corrupt public morals, did not " consist of the publication " of the booklets. The common law offence alleged by the prosecution consisted of the agreement of the appellant and others to corrupt public morals by means of the booklets, and although it is unlikely that if the appellant had been acquitted on the third count he would have been convicted on the first, the two counts involved different issues and the verdict on each need not necessarily have been the same. In our view, the primary object of s. 2 (4) was to exclude proceedings at common law for the common law offence of publishing an obscene libel. The offence has not been abolished by the Act of 1959, although as a result of the subsection proceedings in respect of it can no longer be brought.

For these reasons, there is in our view no ground for setting aside the conviction on any of the three counts, and the appeal against conviction is dismissed.

By leave of the court, the appellant also appealed against the sentence of nine months' imprisonment concurrent on each count, which the learned judge imposed. We see no ground for interfering with what was in some respects a light sentence which would have been appropriate on any one of the counts standing by itself. The appeal against sentence is also dismissed.

[*There followed a discussion on the question of leave to appeal to the House of Lords under the Administration of Justice Act,* 1960, *s.* 1.]

LORD PARKER, C.J.: The court has come to the conclusion that in regard to count 1 they will certify that a point of law of general public importance is involved in the decision, and they give leave to appeal to the House of Lords. With regard to count 2 the court similarly certify and grant leave. With regard to count 3 the court is not satisfied that there is involved in the decision a point of law of general public importance.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Gerald Black & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

GROSVENOR PLACE ESTATES, LTD. *v.* ROBERTS (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), December 1, 2, 5, 6, 20, 1960.]

Income Tax—Deduction of tax—Failure to deduct—Rent on long lease—Liability of recipient to be assessed—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 1, *s.* 122, *s.* 148, *s.* 170 (1), (2), (3), *s.* 177 (2), *Sch. D.*

The National Coal Board held a lease from the taxpayer company for a term of eighty-one years at an annual rent of £96,177. They omitted to deduct tax or to render an account of tax deducted to the Commissioners of Inland Revenue to enable the Special Commissioners of Income Tax to assess the board thereon, which, the rent not being paid out of profits or gains brought into charge to tax, they were required to do under s. 170 (1), (2) and s. 177 (2) of the Income Tax Act, 1952. The taxpayer company was charged to tax on assessment by the Additional Commissioners in respect of the rent received.

Held (HARMAN, L.J., dissenting): the taxpayer company was properly charged to tax, since the duty of assessing the National Coal Board imposed on the Special Commissioners by s. 170 (2) did not deprive the Additional Commissioners of their jurisdiction to assess tax on the taxpayer company as the recipient of the rent under Sch. D by virtue of s. 177 (2).

Glamorgan Quarter Sessions v. *Wilson* ([1910] 1 K.B. 725) and dictum of UPJOHN, J., in *Stokes* v. *Bennett* ([1953] 2 All E.R. at p. 316) approved and applied.

Decision of DANCKWERTS, J. ([1960] 1 All E.R. 643) affirmed.

[As to persons assessable in cases of deduction of tax from sums not payable out of profits or gains brought into charge to tax, see 20 HALSBURY'S LAWS (3rd Edn.) 376, para. 683; and for cases on the subject, see 28 DIGEST (Repl.) 169-177, *678-709*.

For the Income Tax Act, 1952, s. 1, s. 122, s. 148, s. 170 (1), (2), (3), and s. 177 (2), see 31 HALSBURY'S STATUTES (2nd Edn.) 17, 112, 145, 165 and 175.]

Cases referred to:

Glamorgan Quarter Sessions v. *Wilson*, [1910] 1 K.B. 725; 79 L.J.K.B. 454; 102 L.T. 500; 74 J.P. 299; 5 Tax Cas. 537; 28 Digest (Repl.) 163, *646*.

Lang Propeller, Ltd., Re, [1927] 1 Ch. 120; 95 L.J.Ch. 516; 136 L.T. 48; 11 Tax Cas. 46; 10 Digest (Repl.) 1058, *7352*.

London County Council v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 4 Tax Cas. 265; 28 Digest (Repl.) 191, *790*.

Lord Advocate v. *Edinburgh Corpn.*, (1905), 7 F. (Ct. of Sess.) 972; 42 Sc.L.R. 691; 13 S.L.T. 241; 28 Digest (Repl.) 187, *508*.

Rye & Eyre v. *Inland Revenue Comrs.*, [1935] All E.R. Rep. 897; [1935] A.C. 274; 104 L.J.K.B. 401; 152 L.T. 493; 19 Tax Cas. 164; 28 Digest (Repl.) 188, *776*.

Stokes v. *Bennett*, [1953] 2 All E.R. 313; [1953] Ch. 566; 34 Tax Cas. 337; [1953] 3 W.L.R. 170; 28 Digest (Repl.) 179, *726*.

Tennant v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest (Repl.) 216, *916*.

Whitney v. *Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 88; 28 Digest (Repl.) 357, *1578*.

Whitworth Park Coal Co., Ltd. v. *Inland Revenue Comrs.*, [1959] 3 All E.R. 703; [1959] 3 W.L.R. 842.

Appeal.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments made on them for 1955-56 and 1956-57 by the Additional Commissioners under Sch. D to the Income Tax Act, 1952, in respect of long lease rents.

The question for decision was whether the taxpayers were assessable or whether, as they contended, the person paying such rents was solely accountable for the tax thereon.

The National Coal Board were tenants of Hobart House under an underlease for eighty-one years less four days granted from Mar. 25, 1955, by the taxpayers at an annual rent of £96,177. The underlease was a " long lease " within s. 177 of the Income Tax Act, 1952. Under the terms of the lease the National Coal Board made payments of rent, without deduction of tax, of £24,044 5s. for each of the quarters ending on June 24, Sept. 29 and Dec. 25, 1955, and Mar. 29, June 24, and Sept. 29, 1956. These payments of rent were chargeable to tax in accordance with s. 177 (2) of the Act under Case VI of Sch. D and were subject to deduction of tax under s. 170, for s. 169 did not apply, as the rents were not paid out of profits or gains of the board brought into charge to tax. Under s. 170 the board should have deducted tax on payment and delivered an account of the payments to the Commissioners of Inland Revenue for the use of the Special Commissioners, who were required by the section to " assess and charge the payment for which an account is so delivered on that person," i.e., the National Coal Board. The board omitted to deduct tax on payment and no assessment was made on them.

The taxpayers contended that it would be obligatory on the assessing Special Commissioners under s. 170 to assess the person making the payment; that it must be presumed that such an assessment either had been or would be made by the commissioners in pursuance of their statutory duty and that accordingly no assessment could be made on the taxpayers as payees. The Crown contended that the taxpayers were directly assessable, having received the rents in full without deduction of tax. The Special Commissioners dismissed the appeal and confirmed the assessments. The taxpayers appealed by way of Case Stated to the High Court. On Feb. 11, 1960, DANCKWERTS, J., dismissed the appeal, reported [1960] 1 All E.R. 643, holding that the assessments to tax were properly made on the taxpayers. The taxpayers appealed to the Court of Appeal.

Heyworth Talbot, Q.C., and *C. N. Beattie* for the taxpayers.

F. N. Bucher, Q.C., and *A. S. Orr* for the Crown.

Cur. adv. vult.

Dec. 20. The following judgments were read.

LORD EVERSHED, M.R.: In this case I have had the advantage of reading in advance the judgment to be delivered by DONOVAN, L.J. I agree with the conclusions of DONOVAN, L.J., and with his reasons for them. Out of respect, however, for the opposite conclusion which HARMAN, L.J., has reached and for the arguments of the learned counsel for the taxpayers, I state shortly my own reasons for thinking that this appeal should be dismissed.

The case is indeed a remarkable one. The taxpayers granted to the National Coal Board a long lease (as that phrase is defined by s. 172 of the Income Tax Act, 1952) of premises known as Hobart House, the lease being for a term of eighty-one years from Mar. 25, 1955, at an annual rent of £96,177. The National Coal Board proceeded to pay to the taxpayers in respect of each of the first six quarters under their lease the rent in full, i.e., sums on each occasion of £24,044 5s., without any deduction in respect of income tax. Why the board omitted to make the deductions which it was their duty under s. 170 of the Act to make is not explained and is irrelevant for present purposes. The taxpayers appear to have accepted these quarterly payments—perhaps naturally enough—without demur. The Additional Commissioners of Income Tax have now proceeded to assess the taxpayers in respect of these quarterly sums of rent as being profits or gains liable to tax under Sch. D to the Income Tax Act, 1952. That they are such profits and gains was not disputed by counsel for the taxpayers, but it is contended by him that the inevitable effect of the statutory language in the relevant sections of the Act is such that the taxpayers cannot now be assessed

A for income tax in respect of them. Counsel also submitted, in opening his case, that the board remained liable to assessment in respect of their various payments, that it was indeed the duty of the Special Commissioners so to assess the board, but that the board could not now claim to deduct from any future payment of rent any tax which they would be made liable to pay on such assessments. I am glad to say that, for the purposes of this appeal, it is unnecessary B for the court to express any view on any part of this submission.

That the sums of rent in question are profits and gains in the hands of the taxpayers is not in doubt: and counsel for the taxpayers also conceded that, if the taxpayers were surtax payers, they would have to pay such tax in respect of the total sums so received by them. It was, however, the main burden of counsel's argument that the effect of the amendment made in 1927 to what is C now s. 170 of the Income Tax Act, 1952 (formerly r. 21 of the All Schedules Rules) has been inevitably to liberate persons in the position of the taxpayers from any liability to assessment for income tax in such circumstances as have occurred in the present case. In the end of all the question turns, as I think, on the short and single question: Are the words of s. 36 (1) of the present Act—

D

> "Statements of profits or gains under Sch. D shall, unless an assessment thereon is required to be made by the Special Commissioners, be laid before the Additional Commissioners . . ."

such as to produce the effect, when read in conjunction with s. 170 of the Act, that the only assessment which may now lawfully be made in respect of rent payable under a long lease is an assessment to be made by the Special Commis- E sioners on the lessee and so to disable the Additional Commissioners from themselves making any assessment in any circumstances on the recipient? A similar point arises from the effect of s. 170 on s. 6 of the Act; but the main argument has revolved round s. 36 and I do not desire to add anything to what DONOVAN, L.J., says in his judgment in regard to s. 6.

If such is the effect of s. 170, it was not suggested by counsel for the taxpayers F that the result was other than an oblique effect of an amendment to the law intended only to relate to the mechanics of income tax collection. DONOVAN, L.J., has, in his judgment, traced the history of the relevant sections. Prior to 1888, liability for assessment to income tax in respect of annual payments made otherwise than out of the profits or gains of the payer rested exclusively on the recipient as being part of his profits or gains subject to the general charge G for income tax. In 1888 what later became r. 21 of the All Schedules Rules was introduced in terms which corresponded to the first part of sub-s. (1) of the present s. 170. In 1927 it emerged, as a result of *Re Lang Propeller, Ltd.* (1), that the debt to the Crown thereby created, not being an assessed tax, gave to the Crown no priority in a winding-up of the debtor. As a result r. 21 was amended by the Finance Act, 1927, and has since been in the form now repre- H sented by s. 170. It will be observed that Parliament, in making this amendment, though it had before it the language of r. 19 of the All Schedules Rules (now s. 169 of the Act of 1952), did not think fit to introduce into the amended r. 21 the language of s. 169 (1) (a): "no assessment shall be made on the person entitled to the interest, annuity or annual payment." It has been consistently held by the courts that the amendments introduced by the Acts of 1888 and I 1927 were intended as changes only in the machinery of collection—see, e.g., the judgment of FINLAY, J., in *Rye & Eyre* v. *Inland Revenue Comrs.* (2), and the observations of UPJOHN, J., in *Stokes* v. *Bennett* (3). It is also not in doubt as a result of *Glamorgan Quarter Sessions* v. *Wilson* (4), that under the law as it then stood (in 1910) failure on the part of a lessee to make the deduction in respect of tax required by the terms of r. 21 (now found in s. 170 (1)) did not have the effect that the lessor was not himself liable to be assessed in respect of the gross sum of rent which he had received. A

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(1) 11 Tax Cas. 46.
(2) 19 Tax Cas. at p. 168.
(3) [1953] 2 All E.R. at p. 316; 34 Tax Cas. at p. 343.
(4) 5 Tax Cas. 537.

It is, however, now contended—and I return to the fundamental question in the case to which I have already adverted—that the references to assessment by the Special Commissioners introduced into what are now the later subsections of s. 170 have, when read in conjunction with the terms of s. 36 of the present Act, not only altered the machinery of tax collection by getting rid of the difficulty B encountered in the *Lang Propeller* case (5) but have materially altered the policy and substance of the law itself by making no longer possible, in circumstances such as the present, assessment of the lessor in respect of rents received by him without deduction by the lessee.

If the purpose of the amendments to the statute was to alter only the machinery for collection, then I apprehend that the court should not give to such amendment C the much wider effect for which it is now contended, unless such a conclusion is inevitable according to the strict construction of the material language of the statute. As LORD DUNEDIN observed in *Whitney* v. *Inland Revenue Comrs.* (6):

> " A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable." D

The general scheme or policy of income tax may be discerned, so far as relevant to this appeal, from s. 1, s. 122 and s. 148 of the Act of 1952. By the first of those sections, tax is charged in respect of " all property, profits or gains " described in s. 122 (i.e., Sch. D) including (by para. 1 (a)): E

> " the annual profits or gains arising or accruing—(i) to any person residing in the United Kingdom from any kind of property whatever . . ."

By s. 148 the tax under Sch. D

> " shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under " F

that Schedule is directed to be charged. Rents under long leases are brought within the scope of Sch. D by s. 177 of the Act. To such rents, if paid by a lessee wholly out of profits or gains brought by him into tax, s. 169 of the Act (formerly r. 19 of the All Schedules Rules) is applicable. Where, however, and to the extent that such rents are not payable out of profits or gains brought into G charge, s. 170 (1) requires the lessee, on making the payment, to deduct out of it a sum representing the amount of the tax thereon at the standard rate in force at the time of the payment. Subsections (2) and (3) of s. 170, so far as relevant, provide:

> " (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland H Revenue, for the use of the Special Commissioners, an account of the payment . . . and of the tax deducted out of the payment . . . and the Special Commissioners shall assess and charge the payment for which an account is so delivered on that person.
>
> " (3) The Special Commissioners may, where any person has made default in delivering an account required by this section . . . make an assessment according to the best of their judgment . . ." I

Section 36 of the Act—the vital section for the purposes of this appeal—occurs in Ch. II of Part 2 of the Act, a chapter concerned according to its heading with returns and assessment. I therefore agree with DONOVAN, L.J., that, according to the scheme and policy of the Act, a person in receipt of profits or gains of the nature of the rent here in question would prima facie be taxable in respect thereof and bound accordingly to make a return relating thereto. But the machinery of Part 7 of the Act (and of s. 170 and s. 177 in particular) provides that, in the case of a rent paid otherwise than out of the profits or gains of the lessee, the duty of the lessee is to deduct the appropriate tax out of his " payment " of the rent and to render an account accordingly for the use of the Special Commissioners who will assess him in respect of such " payment " of rent. Thus the ordinary liability of the recipient of the rent (as his profits or gains) is discharged on his behalf by the lessee so that the lessor is regarded for income tax (though not for surtax) purposes as having accounted for tax in respect of the rent.

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(5) 11 Tax Cas. 46.

(6) 10 Tax Cas. at p. 110.

We are only in this appeal concerned with the case where the lessee has paid the contractual rent in full without making any deduction or rendering any account as he should have done according to the terms of s. 170 (1). What the position might be (or, indeed, might have been prior to 1927) where a lessee having made the deduction then failed to account therefor to the Commissioners of Inland Revenue (whether or not after assessment by the Special Commissioners under the existing Act) it is unnecessary for us to decide. I observe only that, since the rent in the cases supposed are profits or gains of the lessor and of no other person, any attempt to assess both the lessor and the lessee in respect thereof would appear at least to be open to the objection that an attempt was being made to tax the same person twice in respect of the same taxable income.

These problems do not, however, arise in the present case. The question on the facts of the present case remains; the lessor having received " profits or gains from . . . property ", is he, according to the general scheme and policy of the Act, liable to make a return in respect thereof? Or is he exempted from so doing by the language of s. 36 (1)? I agree with DONOVAN, L.J., that, on the facts of the present case, the exemption of that subsection is inapplicable. According to its strict language and in the context of Ch. II of Part 2 of the Act, the subsection is related to profits or gains under Sch. D and the exemption is similarly limited to cases where assessment of such profits or gains is " required " to be made by the Special Commissioners—e.g., on the request, as provided by s. 38, of the person chargeable. As a matter of strict language, s. 170 is concerned with the assessment of the " payment " of rent by the lessee. True, the " payment " is, by the section, identified with what would in the lessor's hands be profits or gains. Still, in the hands of the lessee, the subject-matter charged is the rent payment which in his hands is not profits or gains, nor is it paid out of profits or gains for which he is chargeable. I refer again to the divergence in language in this respect between s. 169 and s. 170, the former of which (but not the latter) states expressly that no assessment shall be made on the recipient of the payment.

But, if this be too narrow a view, it is still, as I conceive, necessary to construe the word " required " in s. 36 (1). True it is that, where the lessee has made the deduction when paying his rent and has accounted accordingly to the commissioners, then by the terms of s. 170 (2) the Special Commissioners " shall " assess him. In such case, I will now assume that the assessment on the lessee is " required " to be made by the Special Commissioners within the terms of s. 36 (1) of the Act. But in the present case no deduction was made and no account delivered by the National Coal Board.. It is therefore conceded by counsel for the taxpayers that sub-s. (3), and not sub-s. (2), of s. 170 is applicable and the relevant words of sub-s. (3) are " The Special Commissioners may . . . make an assessment." Though counsel was at first disposed to contend that " may " meant " shall ", he later conceded that the powers of assessment conferred by sub-s. (3) are discretionary and not obligatory. If this is right, then can it fairly be said that, in the circumstances of the present case, the Special Commissioners are " required " to make an assessment within the terms of s. 36 (1) of the Act? In my judgment it cannot. In my judgment, if it is contended that the amendment of the machinery provisions of what is now

s. 170 have the oblique but wide effect on the general scheme of the Act so as, in a case such as the present, to absolve the lessor from his previously existing tax liability, such result must be justified by a strict construction of the Act, i.e., of s. 36 (1); and in my judgment the word " required " is not satisfied by a mere discretion.

It was said by counsel for the taxpayers that this view had been dismissed as " preposterous " by Lord Dunedin, when Lord President of the Court of Session in the Scottish case of *Lord Advocate* v. *Edinburgh Corpn.* (7) in 1905. That case was, however, decided long before the amendment introduced by the Finance Act, 1927, and the argument characterised as " preposterous " was different from that which has appealed to me. The Corporation of Edinburgh, having failed to deduct tax from certain interest payments on money borrowed by the corporation (as it should have done under the Customs and Inland Revenue Act, 1888), was none the less assessed to tax on the interest payments. It was contended by the corporation that, since it had, in breach of its statutory duty, failed to deduct the tax, therefore no debt was due to the Crown; that accordingly the only remedy of the Crown was for damage at common law; and that the Crown had failed to prove such damage since (as was then admittedly the law) it could assess and recover the tax from the recipient of the interest. It was this contention which Lord Dunedin described as " preposterous ". In my judgment the case provides no authority for the view that the epithet is applicable to the construction which I would give to the word " required " in what is now s. 36 (1) of the Income Tax Act, 1952.

For these reasons, as for the reasons stated by Donovan, L.J., I think this appeal fails and should be dismissed.

HARMAN, L.J.: Under r. 21 of the All Schedules Rules of the Income Tax Act, 1918, and, indeed, as far back as 1888, it was provided that, on payment of such a sum as the rent here in question, if not paid out of profits or gains already brought into charge to tax, the payer must deduct a sum equal to the tax in force at the time of payment. By r. 21 (2), the payer must account for this sum to the Commissioners of Inland Revenue and the sum became a debt due from him to the Crown and recoverable accordingly.

This continued to be the law until 1926, when the point emerged that, in a case where bankruptcy principles applied (*Re Lang Propeller, Ltd.* (8)), the Crown had no priority for what was merely a debt having regard to r. 21 (2), and not an assessed tax, priority being confined to the latter. Accordingly, by s. 26 of the Finance Act, 1927, the law was altered and r. 21 (2) was replaced by the provision which is now s. 170 (2) of the Income Tax Act, 1952. The new subsection obliges the payer to deliver his account to the Commissioners of Inland Revenue " for the use of the Special Commissioners ", who are directed to assess and charge " the payment of which an account is so delivered." Subsection (3) authorises but does not require the Special Commissioners to make an assessment on the payer who has made default in delivering an account under the rule and he became liable to forfeit £100 (9).

Now it is conceded that, under the law as it stood till the alteration of 1927, the Crown could, having regard to r. 1 of the Miscellaneous Rules of Sch. D to the Act of 1918, charge the payee of the rent who had received it without deduction. The ordinary process would apply, i.e., the Additional Commissioners would make the assessment under s. 121 of the Act of 1918, now s. 36 of the Act of 1952. This was so held in *Glamorgan Quarter Sessions* v. *Wilson* (10), with which I see no cause to quarrel; but the Act of 1927, which turned the retained sum from a debt due to the Crown into an assessed tax, also directed the assessment of it to be made by the Special Commissioners, and it is said here that the result is that these alone have the power to make an assessment under s. 170 (2) as the law now stands, and therefore there is no power in the Additional Commissioners which enables them to assess the payee.

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(7) (1905), 7 F. (Ct. of Sess.) 972.

(8) 11 Tax Cas. 46.

(9) New provisions as to penalties in connexion with failure to make returns were made subsequently by the Finance Act, 1960, Part 3. By s. 46 (1) (b), Sch. 6, a penalty not exceeding £50, plus in certain circumstances a further penalty not exceeding £10 per day, can be imposed for failure to furnish any information or produce any document in accordance with specified provisions of the Income Tax Act, 1952, including s. 170 (2); and by s. 79 of, and Sch. 8, Part 2 to, the Act of 1960, the penalty provisions of s. 170 (3) of the Act of 1952 are consequentially repealed.

(10) 5 Tax Cas. 537.

The grounds for this argument are s. 6 and s. 36 of the Act of 1952 which, so far as relevant, are in these terms:

> " 6. (1) All matters relating to the income tax under Sch. . . . D, so far as they are not directed by this Act to be executed by any other commissioners . . . shall be executed, as heretofore, by the Commissioners for the General Purposes of the Income Tax (in this Act referred to as 'General Commissioners') . . .
>
> " 36. (1) Statements of profits or gains under Sch. D shall, unless an assessment thereon is required to be made by the Special Commissioners, be laid before the Additional Commissioners . . .
>
> " (2) . . . the Additional Commissioners shall direct an assessment to be made in accordance with the statement."

Now by reason of the alteration of the law in 1927 it is said that the latter section does not apply by reason of the exception, and, if these payments can properly be said to be " profits or gains ", I can see no answer to this argument that the assessing power of the General Commissioners is now excluded. It is objected that the exception only applies to " profits or gains " and that these deductions from rents are not the lessee's profits or gains, but are payments, and it is pointed out that in s. 170 they are so called and that it is payments and not profits or gains which the Special Commissioners are there directed to assess and charge. This portion of the rents, however, if not deducted (as here), but paid over to the lessor, is undoubtedly a profit or gain in his hands and must be included under those words in order to be taxable subject-matter under Sch D: for it is under that Schedule alone that it can be taxed. It seems to me, therefore, that the exception in s. 36 does extend to these payments even though they are there looked at from the payee's end and, therefore, so styled.

If this be right, the position is confused by the fact that s. 148 of the Act of 1952 provides that tax under Sch. D shall be charged on and paid by the recipient. These moneys are, as I have said, part of his profits or gains. Section 177, however, which is the charging section for rents under long leases, provides by sub-s. (2) that any payment under that section shall be subject to deduction of tax under Ch. I of this Part, a reference back to s. 170, which enjoins the payer and not the recipient to account for the tax, thus being an exception to the generality of s. 148.

If I am right so far, it would look as though the Crown, like the dog in the fable, in reaching for the reflected bone in the water—i.e., for a tax assessed on the lessee and having priority in bankruptcy—has dropped the bone in its mouth represented by the power to assess the lessor. No doubt this is a casus omissus which can be remedied in due course. It is in my judgment an additional argument against the Crown's view that it may result in two assessments, one on lessee and the other on lessor, which are both equally valid in law and both in respect of the same sum of money, first in the hands of the payer and second in those of the payee. This is contrary to the general principle that tax on one sum is not to be charged twice.

I am conscious that there are very formidable arguments on the other side. As I have said, it seems unlikely that Parliament by granting to the Crown in 1927 the additional advantage which the 1926 decision showed it to require, intended by the same section to deprive it of a right which went back to the origins of the income tax law, and which had been until 1888 the only means of collecting the tax on rents not paid out of profits or gains already charged, but this is in my judgment to impute too exalted a standard of consistency to the legislative patchwork embodied in the 532 sections, not to mention twenty-five Schedules, of the Act of 1952. Any judge with experience of income tax cases, either in this court or below, cannot fail to be conscious of the fact that there are many holes in the net, to which the work of patching is still yearly applied. The whole subject cries out for a drastic overhaul which is often promised but never so far achieved. Until the advent of that hoped for day, I think the court should only follow the language which it finds set down. Pedentium, as Lucretius would say, progredientes. It seems to me dangerous to talk of "the policy of the Act" or the "equity of the statute": I speak here under the great aegis of Rowlatt, J. (11), and refer also to the observations of Lord Halsbury, L.C., in *Tennant* v. *Smith* (12). The court should construe the sections as it finds them, and, if unexpected results emerge, the cure of them is for Parliament and not for us.

Another objection is that by s. 170 (3) of the Act the Special Commissioners in cases where, as here, default has been made, are not required but merely empowered to assess. My answer to that is that none the less tax under s. 177 is one required (by s. 170 (2)) to be assessed by the Special Commissioners and so answers to the exception found in s. 36.

The strongest argument for the Crown, as it seems to me, is that in s. 169, which deals with deductions where the lessee has paid his rent out of taxed income, there is an express prohibition against assessing the lessor. No such provision is to be found in s. 170 and it is therefore argued that the formerly existing power to tax him is not taken away. The answer seems to me to be that neither r. 19 and r. 21 of the All Schedules Rules of the Income Tax Act, 1918, nor their predecessors were concerned with assessment of these sums. In one case the lessee was only recouping himself tax already paid; in the other he was till 1927 left with a debt to the Crown. When the latter was converted into an assessed tax, it was not perceived that the result might be that s. 36 would be involved.

Danckwerts, J., was obviously impressed by the taxpayers' argument and would apparently have accepted it but for the dicta of Finlay, J. (13), and Upjohn, J. (14), which he mentions. For myself I do not feel bound to accede to them, neither being necessary to the decision the judge was pronouncing.

DONOVAN, L.J.: This appeal raises afresh the question whether an assessment to income tax may validly be made on the recipient of income in a case where the payer of the income should have deducted tax at source and accounted for it to the Revenue, but has failed to make any such deduction. The problem can be stated in that general way, because it affects all annual payments charged to tax under Sch. D to the Income Tax Act, 1952, although the particular payment here involved is rent.

The National Coal Board are tenants of Hobart House in Westminster at a rent of some £96,000 per annum. Between June, 1955, and September, 1956, they made six quarterly payments of rent—about £24,000 each time—to the taxpayers, who are the landlords. This rent is rent under a long lease as defined in s. 172 of the Income Tax Act, 1952. The facts are such that the National Coal Board should have deducted tax at source from these payments and handed the tax in due course over to the Revenue. For some reason the board failed to make any such deductions, and so assessments have been made on the taxpayers direct as recipients of the income.

The rent in question is charged to tax under Sch. D by s. 177 of the Income

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(11) See *Cape Brandy Syndicate* v. *Inland Revenue Comrs.* ([1921] 1 K.B. 64, 71)—"There is no equity about a tax".

(12) 3 Tax Cas. at p. 163.

(13) *Rye & Eyre* v. *Inland Revenue Comrs.*, 19 Tax Cas. at p. 168.

(14) *Stokes* v. *Bennett*, [1953] 2 All E.R. at p. 316; 34 Tax Cas. at p. 343.

Tax Act, 1952, and normally under Case VI of that Schedule. Section 177 (2) also enacts that such rent shall be subject to deduction of tax as if it were a royalty or a sum paid for the user of a patent. This means that the machinery of collection of tax at source, which is provided by s. 169 and s. 170 of the Act, becomes applicable. Under s. 169, if the taxpayer has a fund of taxed profits out of which he pays the rent, he must pay tax himself on the whole fund without any deduction for the rent, though the rent is not really his income. When he comes to pay the rent, he may recoup himself by deducting tax at the current standard rate and retain it, and the landlord must allow the deduction. In this class of case an assessment on the recipient in respect of the rent is expressly forbidden by the section.

On the other hand, where, as in the present case, the rent is not paid out of a taxed fund, the Revenue clearly cannot get its tax on the rent in the manner just described. Section 170 therefore provides that in such a case the payer of the income *must* deduct tax at source at the standard rate and send an account of the payment and of the tax deducted to the Commissioners of Inland Revenue for the use of the Special Commissioners. The Special Commissioners are then to make an assessment in respect of the payment on the payer: and, on such assessment, he will be liable to pay over to the Revenue the tax so deducted. If the payer makes default in rendering such an account, or the Special Commissioners are not satisfied with the account which he has delivered, then they may make an assessment on him to the best of their judgment. They can also inflict a penalty if he neglects or refuses to deliver the account, which, up to 1960, was the sum of £100 (15). In this class of case there is no express prohibition of an assessment direct on the recipient of the income.

The history of s. 169 goes back to 1803, when it appeared in the Income Tax Act of that year as s. 208. In the Act of 1842 it was s. 102. In the consolidating Act of 1918 it became r. 19 of the General Rules Applicable to All Schedules. Its wording has remained unchanged in any radical sense down to the present day. The history of s. 170 begins, however, in 1888. Up to that time the only way provided for getting tax on annual payments made out of untaxed funds was an assessment direct on the recipient. But s. 24 (3) of the Customs and Inland Revenue Act, 1888, introduced the system of collecting the tax at source in this case also. The payer was to deduct tax and to render an account to the Commissioners of Inland Revenue of the amount deducted. That sum was then to be a debt due from him to the Crown and recoverable as such. There was no provision for any *assessment* on him.

In the consolidating Act of 1918, s. 24 (3) became r. 21 of the General Rules Applicable to All Schedules. Its wording remained substantially unchanged until 1927. In that year this court decided *Re Lang Propeller, Ltd.* (16). That company was being wound up, but before the winding up began it had deducted tax under general r. 21 from mortgage interest but failed to hand it over to the Crown. The Crown proved in the liquidation as a creditor. Under the Companies (Consolidation) Act, 1908, then in force (s. 209) the Crown was entitled to preferential payment in respect of assessed tax. It claimed that this description applied to the tax which the company had deducted under general r. 21. This court, affirming EVE, J., held that it did not, and that such tax could not be described as an " assessed tax ". So the Crown got no preference for the debt. The legislature then proceeded—if I may borrow the euphemism customary on these occasions—to " put the matter right ". In the Finance Act of the same year s. 26 was enacted, requiring the payer of the income to render an account of the payment made out of untaxed funds, and of the tax deducted, and requiring the Special Commissioners to make an assessment on him accordingly. In short, the system was introduced which exists today and which has been reproduced without material alteration as s. 170 in the consolidating Act of 1952.

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(15) See footnote (9), p. 346, ante.

(16) 11 Tax Cas. 46.

A In that way the tax deducted in such circumstances became an " assessed tax " and so the Revenue acquired that preference in respect of it in a winding-up which it had unsuccessfully sought in the *Lang Propeller, Ltd.* case (17).

It is, I think, important to bear in mind the reason for the amendment of general r. 21, inasmuch as the taxpayers are contending in the present case that it has had another and more far-reaching result. It is said on their behalf that B the amendment also deprived the General Commissioners of the power which they admittedly had from 1803 to assess the recipient of the income directly in such cases. It had been decided long before 1927 that an assessment could validly be made on the recipient of an annual payment made out of untaxed funds where no tax had been deducted at source. See *Glamorgan Quarter Sessions* v. *Wilson* (18), which was decided in 1910. It has also been held that, where the C payer of the income omits to deduct the tax at source, he is still liable to account to the Crown for it; see *Lord Advocate* v. *Edinburgh Corpn.* (19) decided in 1905, and *Rye & Eyre* v. *Inland Revenue Comrs.* (20), decided by the House of Lords in 1935. In these cases it was for one reason or another pointed out that general rr. 19 and 21 were simply machinery for collecting tax. FINLAY, J., also said in the *Rye & Eyre* case (21) that the change in r. 21 in 1927 was a change in the D machinery of collection and no more. In 1953 UPJOHN, J., expressed the view in *Stokes* v. *Bennett* (22) that an assessment of tax could validly be made on the recipient of untaxed income in a case where general r. 21 should have been operated but was not; but this expression of opinion was obiter.

In the present case both the Special Commissioners and DANCKWERTS, J., have rejected the taxpayers' argument that since 1927 no assessment to tax E in what I may call a general r. 21 case can be made on the recipient of the income. After considering the authorities, the learned judge thought he should follow the decision in *Glamorgan Quarter Sessions* v. *Wilson* (18) and adopt the dictum of UPJOHN, J., in *Stokes* v. *Bennett* (23).

The alteration in the law made in 1927 converting tax deducted under r. 21 into tax assessable by the Special Commissioners on the payer could hardly F of itself deprive the General Commissioners of a different jurisdiction which they admittedly had before that date to make an assessment on the payee. It is argued, however, that this result is brought about by the language of s. 26 of the Act of 1927—now reproduced without material change in s. 170 of the Act of 1952—when construed together with s. 6 and s. 36 of the Act of 1952, and also in the light of the general scheme of that Act. It is also contended that a number of G anomalies, which would otherwise arise, are avoided by the taxpayers' construction. As to s. 170 itself, the mandatory nature of the direction to the Special Commissioners is emphasised: " the Special Commissioners shall assess and charge the payment ". Then in s. 6 of that Act appears these words:

> " All matters relating to the income tax under Schedules A, B and D, so far as they are not directed by this Act to be executed by any other H commissioners . . . shall be executed, as heretofore, by the Commissioners for the General Purposes of the Income Tax . . ."

The assessment of the rent in the present case is a matter under Sch. D: and it is said that the effect of s. 6 is to confine the jurisdiction to assess in cases like the present to the Special Commissioners. The words relied on in s. 36 are these:

> " Statements of profits or gains under Sch. D shall, unless an assessment I thereon is required to be made by the Special Commissioners, be laid before the Additional Commissioners . . ."

This again indicates, it is argued, that the Special Commissioners have exclusive jurisdiction to assess to tax the payments here in question: and that this conclusion is reinforced by what is said to be the general scheme of the Act to allot the duty of assessment of different kinds of income to different bodies of commissioners with no overlapping.

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(17) 11 Tax Cas. 46.
(18) 5 Tax Cas. 537.
(19) (1905), 7 F. (Ct. of Sess.) 972.
(20) [1935] All E.R. Rep. 897; 19 Tax Cas. 164.
(21) 19 Tax Cas. at p. 168.
(22) [1953] 2 All E.R. 313; 34 Tax Cas. 337.
(23) [1953] 2 All E.R. at p. 316; 34 Tax Cas. at p. 343.

The payments which are assessed to tax under s. 170 do, of course, become income in the hands of the recipient—which is why they are taxed. But in the context of the present problem it is, I think, both relevant and important to remember that what the Special Commissioners are in terms told to do in s. 170 is to " assess and charge the payment " and to do so on the payer. With this in mind, and turning back to s. 6, it is strictly true to say that an assessment on the recipient in respect of his receipt would not offend against the section, for such an assessment is not directed to be executed by commissioners other than the General Commissioners.

In view of the stress laid on s. 36, I must deal with it in some greater detail. It is not a section which can properly be construed in isolation. It is one of a number of sections in Ch. II of the Act headed " Returns and assessment " and in this Chapter are found the provisions imposing an obligation on the taxpayer who is in receipt of profits or gains to make an income tax return, and a duty on the General Commissioners to make an assessment of those profits and gains to income tax. Thus any person chargeable to income tax for any year of assessment is to give notice to that effect to the surveyor (s. 28). If required to do so by notice, an individual must make a return of his total income for the preceding year (s. 19): and also a return of the profits and gains arising to him for the current year estimated according to the provisions of the Act (s. 20). The form of the return is to be such as the Commissioners of Inland Revenue shall prescribe, and in prescribing such forms those commissioners are to have regard to the desirability of limiting such returns to one per annum. In addition, each such return is to contain a declaration by the person making it that it is truthful and comprehensive of all his profits and gains (s. 25). A penalty is imposed for neglect or refusal to make such a return, which penalty, up to 1960 (24), was £20 and treble the tax (s. 25). The return of profits under Sch. D is to be laid before the Additional Commissioners, they are to consider them, and if satisfied with them, are to direct an assessment to be made in accordance with the statement. This is subject to the exception so much relied on by the taxpayers here " unless an assessment thereon is required to be made by the Special Commissioners " (s. 36 (1)). Finally, a person chargeable under Sch. D may require that all the proceedings, in order to have an assessment on him under that Schedule, shall be taken before the Special Commissioners instead of before the Additional Commissioners (s. 38 (1)).

It is I think quite clear that these sections, including s. 36, are dealing with the annual statement of profits and gains accruing to a taxpayer and with the assessment to be made on him in respect thereof. They are not dealing with the " accounts " of payments required from the payer of money under s. 170, which " accounts " have to be made on each occasion of such a payment; for which " account " no form is prescribed and for default in rendering which a different penalty can be imposed (25). Nor are the sections in Ch. II dealing with assessments on such a payer, but with assessments on the person who has made a return of his profits and gains. It is therefore in my respectful opinion fallacious to construe the words in s. 36 (1) " unless an assessment thereon is required to be made by the Special Commissioners " as including a reference to the payments assessed to tax on the payer under s. 170. Those words refer to the various cases where the Act directs an assessment on profits or gains by the Special Commissioners, e.g., where a taxpayer makes an election to this effect under s. 38, and

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(24) New penalties are introduced by the Finance Act, 1960, Part 3; see now s. 46 (1) (a) of, and Sch. 6 to, that Act.

(25) New penalties are introduced by the Finance Act, 1960, Part 3; see footnote (9), p. 346, ante.

(under s. 430) to the income of foreign assurance companies with a head office in A
the United Kingdom in respect of the income of their life insurance funds, and so on.

With regard to anomalies, the example was given of mortgage interest from which tax had been deducted for some years and accounted for under s. 170 until in one year no such tax was deducted. If the General Commissioners then made an assessment direct on the recipient, they would under Case III of Sch. D B
have to base the assessment on the income of the preceding year, and, if that were less than the income of the current year, a different figure of income and a different amount of tax would be the result of such an assessment compared with the result of operating s. 170. This indeed would be true, but such anomalies are not uncommon where for one reason or another the preceding year basis of computation is substituted for the actual year basis, or vice versa. I do not find C
the anomaly, or the others which were suggested, to be so startling as to compel the conclusion that the taxpayers' contentions here must be right.

I should briefly mention s. 180 of the Act of 1952, which was said to support the argument. The section deals with the taxation of rents in respect of land not separately assessed and charged under Sch. A and in respect of easements: it enacts that these shall in certain cases be taxed under Sch. D and be subject D
to deduction of tax at source. Subsection (2) deals specifically with rents in respect of easements enjoyed in connexion with electric wires and cables: and proviso (b) to the subsection enacts that any payment of such rent shall, unless tax is assessed thereon under s. 170, be chargeable to tax under Case III of Sch. D. It is said that this direction would be otiose if the rent were always so chargeable under the general provisions of the Act. In my opinion this is incorrect. The rents E
to which proviso (b) are referring are not the kind of annual payment normally falling within the charging provisions of Case III of Sch. D. But the proviso specially makes these provisions applicable, and so specifies the head of charge under which such rents are, if need be, to be assessed. I do not think much can be spelled out of this circumstance either way; but it is interesting to observe that the very anomaly the court is asked to avoid by adopting the taxpayers' F
argument is here introduced by the legislature itself. For to charge these rents under Case III will impart the preceding year basis of liability as opposed to the actual year basis which is always a feature of taxation at source under s. 170.

The Crown's argument begins with the first section of the Act of 1952, which provides that, whenever any Act enacts that income tax is to be charged for any year, it is to be so charged at the prescribed rates, and in accordance with Schedules A, B, C, D and E. G
Section 6 of the same Act, part of which I have already read, then enacts that the General Commissioners are to execute all matters relating to income tax under Schedules A, B and D in so far as they are not directed by the Act to be executed by other commissioners. Section 122 of the Act provides that under Sch. D tax shall be charged, inter alia, in respect of profits and gains arising in the United Kingdom to any person from any kind of property H
here. And s. 148 provides that tax under Sch. D shall be charged on and paid by the persons receiving or entitled to the income coming within that Schedule. The rent in question in this case is charged to tax under Sch. D by virtue of s. 177 (2) of the Act and the taxpayers are the persons receiving it. They must therefore, if required, make a return of such income and the Additional Commissioners must then assess it to income tax under the provisions of the Act of 1952, which I have I
already cited.

There would thus seem to be complete authority for the Additional Commissioners to make the assessments they have made on the taxpayers. It is admitted that such authority existed before the Finance Act, 1927, back at least to 1842, in fact it goes back to 1803. The contention that this jurisdiction was taken away by the amendments to general r. 21 made in 1927 rests on the arguments which I have already outlined. I can find nothing in them to justify the conclusion that the granting of a new jurisdiction to the Special Commissioners to collect tax at source in a particular way destroyed the jurisdiction of the General Commissioners to collect it in some other way if need be. Had such a result been intended, then I think that an express prohibition against an assessment on the recipient would have been introduced into general r. 21 of the same kind as has always been contained in general r. 19 and its predecessors. There is sound reason for not doing this and for preserving the jurisdiction of the General Commissioners. For there may be cases where, for one reason or another, an assessment on the payer cannot be made or made effectively. He may be elusive, or he may be a person not amenable to s. 170, e.g., the Crown itself or a foreign ambassador or a resident High Commissioner.

The taxpayers agree that in such a case the payee would be directly assessable, as indeed Viscount Simonds appears to indicate in *Whitworth Park Coal Co., Ltd.* v. *Inland Revenue Comrs.* (26). In other words, it is conceded that, where s. 170 cannot be operated because the payer is not amenable to its provisions, the power of the General Commissioners to assess the payee still endures. This seems to me to increase the difficulties of the argument, for one would certainly expect a partial withdrawal of the General Commissioners' jurisdiction to be by express enactment.

In my opinion s. 26 of the Finance Act, 1927, did not have the effect which the taxpayers here claim. The power and duty of the General Commissioners to make assessments on annual payments charged with tax under Sch. D where such payments are made out of profits and gains not brought into charge to tax still remains. This does not involve liability to double taxation, once by deduction at source and again by assessment on the same income. It is true that there is nothing in the Act expressly prohibiting such an injustice, but the prohibition is implicit in its provisions, as the courts have frequently said. See, e.g., Lord Davey in *London County Council* v. *A.-G.* (27).

I think that the Special Commissioners and the learned judge came to the right conclusion in this case and that this appeal fails.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Stanley Attenborough & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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(26) [1959] 3 All E.R. at p. 711.

(27) 4 Tax Cas. at p. 299.

Re A.B.C. COUPLER & ENGINEERING CO., LTD.

[CHANCERY DIVISION (Pennycuick, J.), December 19, 1960.]

Company—Winding-up—Compulsory winding-up—Petition by judgment creditor—Majority of creditors opposing—Discretion—Reasonableness of wishes of opposing creditors—Absence of special circumstances for making order—Costs—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 346 (1).

A judgment creditor of a company for £17,542 18s. 3d. which was the balance due under a judgment debt, petitioned for an order that the company be compulsorily wound up. The petition was opposed by a number of creditors to whom the company owed about £18,328. There were no creditors supporting the petition. The company had extensive goodwill, and, at the date of the petition, had orders amounting to £110,000. The statement of the company's financial position on Aug. 31, 1960, showed an excess of assets over liabilities amounting to £689,687.

Held: (i) in deciding whether to make a compulsory winding-up order the court should, under s. 346 (1)* of the Companies Act, 1948, have regard to the wishes of the majority of the creditors, because those wishes, although not conclusive, possessed great weight and, if they were reasonable, the court should follow them in the absence of special circumstances; in the present case, the wishes of the majority of the creditors, the opposing creditors, were reasonable, and an order for compulsory winding-up would not be made (see p. 356, letter E, and p. 357, letter C, post).

Re Vuma, Ltd. ([1960] 3 All E.R. 629) considered and distinguished.

(ii) in the circumstances, there would be no order as to costs.

Re R. W. Sharman, Ltd. ([1957] 1 All E.R. 737) applied.

[**Editorial Note.** This decision should be considered with that of the Court of Appeal in *Re P. & J. Macrae, Ltd.* (p. 302, ante).

As to the wishes of creditors on the hearing of a winding-up petition, see 6 HALSBURY'S LAWS (3rd Edn.) 552, para. 1064; and for cases on the subject, see 10 DIGEST (Repl.) 877-879, *5801-5819*.

For the Companies Act, 1948, s. 222, s. 346 (1), see 3 HALSBURY'S STATUTES (2nd Edn.) 639, 723.]

Cases referred to:

Karsberg (B.), Ltd., Re, [1955] 3 All E.R. 854; [1956] 1 W.L.R. 57; 3rd Digest Supp.

Sharman (R. W.), Ltd., Re, [1957] 1 All E.R. 737; [1957] 1 W.L.R. 774; 3rd Digest Supp.

Vuma, Ltd., Re, [1960] 3 All E.R. 629; [1960] 1 W.L.R. 1283.

Petition for compulsory winding-up order.

This was a petition by F. A. Lloyd & Co., Ltd., a judgment creditor of the respondent company, A.B.C. Coupler & Engineering Co., Ltd., for the compulsory winding-up of the company on the ground that it was insolvent and unable to pay its debts. The petition was opposed by other creditors of the company. Evidence was filed jointly by the company and the opposing creditors which showed that the business was sound and had good prospects for the future. The facts appear in the judgment.

R. B. S. Instone for the petitioning creditor.
Charles Sparrow for the company.
Raymond Walton for the opposing creditors.

PENNYCUICK, J.: This is a petition by F. A. Lloyd & Co., Ltd., for the compulsory winding-up of a company, A.B.C. Coupler & Engineering Co., Ltd. The petitioner is now a creditor of the company in the sum of £17,542 18s. 3d., being the balance of a judgment debt of £20,542 18s. 3d. recovered by them in September, 1960.

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* The relevant terms of the subsection are printed at p. 355, letter E, post.

The facts regarding the company are, summarily, as follows. The company was incorporated as long ago as in March, 1904. It had a substantial capital, its paid-up capital being £194,000. Its business is that of railway engineers: the company specialises in the design and manufacture of railway couplers. The evidence is that it has an exclusive goodwill in various parts of the Commonwealth and the Empire. At the moment there are orders amounting to about £80,000 in the Commonwealth and to about £30,000 from the Crown Agents. The petition is opposed by a number of creditors whose debts (disregarding those owed to the subsidiary companies of the company) amount to £18,328 odd, that being a sum about £800 larger than the debt owed to the petitioning creditor. There are no supporting creditors. There are also owing by the company debts amounting to about £99,041 to its own subsidiary companies, but, for the purposes of this judgment, I propose to disregard those debts. The position, therefore, is, disregarding those debts, that there is one creditor with a debt of about £17,542 who wants the company wound-up, and a number of creditors with debts amounting in all to over £18,000 who do not want the company wound-up.

The petition is brought under s. 222 of the Companies Act, 1948, which provides:

> " A company may be wound up by the court if . . . (e) the company is unable to pay its debts; [or] (f) the court is of opinion that it is just and equitable that the company should be wound up."

Then there is another section, s. 346, which is important in this connexion. Section 346 (1) provides:

> " The court may, as to all matters relating to the winding-up of a company, have regard to the wishes of the creditors or contributories of the company, as proved to it by any sufficient evidence . . ."

Until the recent decision of the Court of Appeal in *Re Vuma, Ltd.* (1), it might have been contended that, in order to decide this petition, it was sufficient to show that it was opposed by creditors the amount of whose debts exceeded that of the petitioning creditor, but that simple line of argument is no longer available. In *Re Vuma, Ltd.* (1), a petition presented by an unsatisfied judgment creditor for the compulsory winding-up of a company was opposed by the two other creditors; but no evidence was filed as to the grounds of opposition. The petitioner showed that the company was insolvent and had no assets with which to pay debts. It was held that, under s. 346 of the Companies Act, 1948, the court had a discretion to decide whether it was just and equitable to order that a company should be wound-up, and, although the wishes of the majority of the creditors was a relevant consideration, opposition to a winding-up by the majority was not conclusive; and that the exercise of the discretion in favour of a winding-up order was not confined to cases where the petitioning creditor showed that the opposition was founded on irrelevant or improper motives or that the company's business was being conducted fraudulently. *Re B. Karsberg, Ltd.* (2) was distinguished. LORD EVERSHED, M.R., set out the facts and said (3):

> ". . . it appears from the evidence before us that the company has no assets whatever and no attempt has been made on the respondents' side to show that it has any assets or any prospects of successful business."

Later in his judgment, he said (4):

> " Any assets which would be or could be found would be subject to execution at once, and, as I say, if special circumstances have to be shown, I

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(1) [1960] 3 All E.R. 629.
(2) [1955] 3 All E.R. 854.
(3) [1960] 3 All E.R. at p. 630.
(4) [1960] 3 All E.R. at p. 631.

> would have thought on the evidence that enough has been shown. With great respect to BUCKLEY, J., I do not think it was right simply to treat the fact of the majority opposition as conclusive. I am persuaded on the material in this case that the court, in the exercise of its discretion, ought to order a winding-up, and I would accordingly allow the appeal." A

HARMAN, L.J., said (5):

> "I agree. In the circumstances disclosed in the petition it was at least incumbent on those who opposed it to say why they opposed it and to explain to the court what it was that induced them, a company in Ireland and another one in Rotterdam, to leave this hopelessly insolvent and assetless company encumbering the ground. They did not do that but they persuaded the judge that all he had to do was to count heads. With every respect to him, I do not think that is right . . . It does seem to me that a creditor who has pursued his remedy to judgment and has proceeded to execution and finds no assets at the company's place of business other than assets claimed by some third party is at least entitled to put the opposition on their oath as to why they oppose his otherwise just demands." B C

That judgment is conclusive that it is not sufficient merely to count heads, but it seems to me that it goes no further than this; even if after counting heads, one finds that there is a majority opposed to liquidation one must still look at the position of the company at the time and decide whether it is just and equitable to wind-up the company. In *Re Vuma, Ltd.* (6) it was decided that the company had no assets and no prospects of successful business, and on those particular facts the Court of Appeal considered that it was right to wind-up the company. It seems to me, however, that it must still be right, having regard to the terms of s. 346, to have regard to the wishes of the majority of the creditors. Although those wishes may not be conclusive, they still possess great weight, and it seems to me that, where the wishes of the majority of the creditors are, on the face of them, reasonable, the court ought to follow those wishes in the absence of any special circumstances. As I understand the judgment of the Court of Appeal in *Re Vuma, Ltd.* (6), there is nothing in it to the contrary. D E F

In the present case there seem to be grounds which show that the wishes of the majority of the creditors of this company that it should not be wound-up are reasonable. In the first place, the statement of the company's financial position on Aug. 31, 1960, shows that the company had an excess of assets over liabilities amounting to no less than £689,687. In the second place, according to the evidence filed on behalf of the company, there are at least prospects that the company will be able to continue the business which it has carried on for over half a century. Those prospects appear sufficiently good to the considerable number of creditors who oppose this petition for them to prefer that the company should be carried on rather than be wound-up, and it seems to me that they are the best judges of that. On those facts, I am not disposed to make an order for the winding-up of the company. G H

Counsel for the petitioning creditor put the proposition to be derived from the judgment of the Court of Appeal in *Re Vuma, Ltd.* (6) in these terms: the court will be disposed to make a winding-up order if it considers that the petitioner has been acting reasonably. I have found it impossible to derive that proposition from anything in the judgment of the Court of Appeal, and it seems to me that it goes much too far. It seems to me that, if it is thought right to take account of the wishes of the majority of the creditors, and if those wishes are reasonable, then the court can properly refuse at their request to make a winding-up order. Counsel for the petitioning creditor also relied on certain specific matters in support of his contention. He pointed out that the debt of the petitioning creditor had been outstanding for at least six months, but it is to be observed that, al- I though the debt became a judgment debt in September, 1960, there has so far been no attempt by the petitioning creditor to enforce it by execution; so that that remedy is still open. Moreover, it is to be observed that during the period since Aug. 19, 1960, the company has paid no less than £8,000 of the debt, which was originally £25,522, and has offered the petitioning creditor a payment of £1,000 a month in further reduction of the judgment debt, but that offer has been refused. Counsel then said that there had been no attempt by the company to realise the interests, shown by its balance sheet, in various subsidiary companies, but I do not think that that fact in itself is a ground for winding-up the company. He also said that, at a date shortly after the presentation of this petition, there was a meeting of creditors of the company to which the petitioning creditor was not invited. I do not think that it would be improper for the company after the presentation of the petition to hold a meeting of other creditors, and I do not think that any weight can be given to that circumstance. It seems to me clear according to the evidence that, before the date of the winding-up petition, the company had endeavoured to co-operate with the petitioning creditor. In all the circumstances it seems to me that in the present case the right course for me to take is to have regard to the wishes of the majority in value of the creditors (disregarding the subsidiary companies) and to refuse to make an order on the petition.

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(5) [1960] 3 All E.R. at p. 631.

(6) [1960] 3 All E.R. 629.

On the question of costs, I have been referred to the decision of WYNN-PARRY, J., in *Re R. W. Sharman, Ltd.* (7). In that case, a petitioning creditor asked, as a judgment creditor, for an order for the compulsory winding-up of the debtor company. The petitioning creditor's judgment was for £167 5s. 11d. and £8 10s. costs, and the petition was opposed by a majority of the creditors for a total of £33,202 19s. 3d. and also by the company itself. The petitioning creditor, while recognising that the petition must in the circumstances be dismissed, asked that no order should be made as to costs. Dismissing the petition, WYNN-PARRY, J., held (8) that, with regard to a judgment creditor deprived, as in that case, of the right ex debito justitiae to a winding-up order only by the opposition of a majority of the creditors. the fair practice would be to make no order as to costs. It seems to me that that rule of practice is equally applicable today, and for the present purpose it can make no difference, where the judgment creditor's ex debito justitiae right to a winding-up order is defeated by the opposition of the majority, that their wishes merely guide the court, in contradistinction to binding the court. I propose therefore to follow the practice laid down by WYNN-PARRY, J.

Order accordingly.

Solicitors: *Tamplin, Joseph & Flux*, agents for *Slater, Miller & Co.*, Darlaston (for the petitioning creditor); *Sherwood & Co.*, agents for *Stirk & Co.*, Wolverhampton (for the company); *Elwell & Binford Hole* (for the opposing creditors).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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(7) [1957] 1 All E.R. 737.

(8) [1957] 1 All E.R. at p. 739.

WILKINS (INSPECTOR OF TAXES) *v.* ROGERSON.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), December 9, 12, 13, 1960.]

Income Tax—Income—Perquisites or profits of office or employment—Employer's gift of suit of clothes—Computation of value—Cost to employer or second-hand value to taxpayer—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch.* 9, *r.* 1 (*Rules applicable to Sch. E*).

Under a scheme of his employers to make a gift of clothes to twenty-one of their employees, the taxpayer obtained a suit of clothes from Montague Burton, Ltd., the price of which, £14 15s., was paid by the employers. He was assessed to income tax in the sum of £14 15s. in respect of the gift, although the value of the suit second hand was only £5.

Held: the taxpayer should be assessed only on the £5, which was the value in money's worth of the perquisite that he received, and not on the amount spent by his employers in providing the perquisite that the taxpayer accepted, for at no time had he any contractual right against anyone to obtain the suit and until it was delivered he got nothing.

Nicoll v. *Austin* ((1935), 19 Tax Cas. 531) and *Hartland* v. *Diggines* ([1926] All E.R. Rep. 573) distinguished.

Decision of DANCKWERTS, J. ([1960] 1 All E.R. 650) affirmed.

[As to perquisites of an office or employment under Sch. E, see 20 HALSBURY'S LAWS (3rd Edn.) 311-313, paras. 573, 574; and for cases on the subject, see 28 DIGEST (Repl.) 225-237, *971-1040.*

For r. 1 of Sch. 9 to the Income Tax Act, 1952 (Rules applicable to Sch. E), see 31 HALSBURY'S STATUTES (2nd Edn.) 522.]

Cases referred to:

Hartland v. *Diggines*, [1926] All E.R. Rep. 573; [1926] A.C. 289; 95 L.J.K.B. 392; 134 L.T. 492; 10 Tax Cas. 247; 28 Digest (Repl.) 234, *1023.*

Nicoll v. *Austin*, (1935), 19 Tax Cas. 531; 28 Digest (Repl.) 230, *1003.*

Sutton v. *Inland Revenue Comrs.*, (1929), 14 Tax Cas. 662; 28 Digest (Repl.) 338, *1498.*

Tennant v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest (Repl.) 216, *916.*

Appeal.

The taxpayer appealed to the Special Commissioners of Income Tax against an assessment made on him in the sum of £1,036 for 1955-56 under Sch. E to the Income Tax Act, 1952. The point for determination was whether a sum of £14 15s. was correctly included in computing the amount of his salary, fees, wages, perquisites or profits from his employment within the meaning of r. 1 of Sch. 9 to the Income Tax Act, 1952, The sum of £14 15s. was the sum paid by the taxpayer's employers for a suit of clothes given by the employers to the taxpayer as a Christmas present. The Crown contended that the suit represented an advantage in money's worth received by the taxpayer, in addition to the cash emoluments of his employment, the value of which fell to be measured by the price for the suit paid by the taxpayer's employers and which was correctly included in computing the amount of the salary, fees, wages, perquisites or profits of the taxpayer's employment under r. 1 of Sch. 9. The taxpayer contended that the gift of the suit did not fall within that provision and alternatively that the value of the suit was not the price paid by the employers but the sum which the taxpayer would have realised by the sale of the suit in November, 1955, when he received it, and was very small. The commissioners held that the taxpayer received in the year 1955-56 in addition to the cash emoluments of his employment an advantage which was capable of being turned into money, but that the money's worth of the suit must be valued at the market value when it became the taxpayer's property, i.e., the second-hand value of the suit in November, 1955. This value was subsequently agreed at £5. The commissioners therefore reduced the assessment accordingly. On Feb. 16, 1960 ([1960] 1 All E.R. 650), DANCKWERTS, J., dismissed the Crown's appeal against that decision. The Crown appealed to the Court of Appeal.

H. B. Magnus, Q.C., E. Blanshard Stamp and *A. S. Orr* for the Crown.
Heyworth Talbot, Q.C., and *C. N. Beattie* for the taxpayer.

LORD EVERSHED, M.R.: The point involved in this appeal falls indeed within the narrowest compass; but it is or appears to be novel in the sense that no strictly comparable case seems to have come before the court before. The taxpayer at the relevant date in 1955-56 was in the service of a company known as the Anglo-Oriental & General Investment Trust, Ltd. As the season of good will approached in 1955 the company wrote to him, and to some twenty or twenty-one fellow servants, a letter which was as follows, so far as material:

> " The board have decided to make a Christmas present to all male members of the staff of clothes suitable for wear at the office up to the value of £15. Arrangements have been made with Messrs. Montague Burton, Ltd., 112, Cheapside, E.C.2, for you to be able to acquire from them a choice from or combination of the following: Suit, overcoat, raincoat. The bill will be sent to the trust, and it is stressed that no cash payment either way can be made between £15 and the actual cost of the goods. Please take this letter with you when you visit Messrs. Montague Burton, which can be done on or after Thursday, Nov. 10, 1955. Messrs. Montague Burton will provide a fitting if this is required and asked for. They will also make alterations if required. Both fittings and alterations will take additional time."

On the same date the company wrote to Montague Burton, Ltd., of 112, Cheapside, and the letter is as follows:

> " We write with reference to the visit of Mr. W. Peter Spens on Nov. 4, 1955. This company, a subsidiary of London Tin Corpn., Ltd., has decided to give its male staff a Christmas present (purchased from Messrs. Montague Burton, Ltd.) up to the value of £15 of clothes suitable for wear at the office drawn from a choice from or combination of a suit, overcoat or raincoat. We enclose a copy of a letter which we will write to each male member of the staff whose names are given below ",

and then there follows the list of names.

> " Please supply them with suits, overcoats or raincoats as above, and send us your account in due course. We stress that the bill will be paid by this company, and no cash payment either way can be made between £15 and the actual cost of the clothes. We have advised the staff to call on you on or after Thursday, Nov. 10, 1955 ",

etc. The only other document to which I need refer is the receipt in February of the following year for a total sum of £311 12s. 6d., which was the cost of the suits, overcoats or raincoats which had been supplied to the various members of the company's staff.

It has been necessary to read in full those documents because in the end much turns on the exact nature of what was done. The taxpayer availed himself of the generosity of his employers, and acquired clothing from Montague Burton, Ltd., for which the bill was delivered to the company, the price in his case being not quite £15, but £14 15s. The claim of the Crown has been that that figure, £14 15s., is to be treated as part of the taxable income of the taxpayer for the tax year in question. It is said that it falls within the terms of r. 1 of Sch. 9 to the Income Tax Act, 1952:

> " Tax under Sch. E shall be annually charged on every person having

> or exercising an office or employment of profit mentioned in Sch. E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment . . ." A

It is the Crown's case that the £14 15s. must be treated as perquisites or profits from the employment for the year of assessment, 1955-56.

On behalf of the taxpayer it was said that any perquisite or profit was limited B in this case to the value expressed in money of the thing which he got, viz., the clothing. For the purposes of this case, the value of the clothing, treated, of course, as second-hand the moment it has been delivered, has been agreed at £5. This involves no reflection on Montague Burton, Ltd., who are not before the court; and it should not, of course, be assumed for a moment that goods which they supply are worth only one-third of the price which they charge. It is C notorious that, apart from purchase tax, the value of clothing is very much reduced the moment it can be called second-hand. In any case the value is one which has been mutually accepted and agreed, and nothing turns on it. It may have been agreed at a low figure to discourage any cross-appeal by the taxpayer. If so, it has achieved its purpose, for it is now accepted on his behalf that he is rightly taxed, as the learned judge in the court below held, on the D money value of what he got.

I can now state again the point: What must be regarded for the purpose of r. 1 in Sch. 9 to the Act as the perquisite or profit from the taxpayer's employment? The case for the Crown, which Mr. Magnus presented with clarity and attraction, I think can be summarised in the way in which he put it at the end of his argument: " I say " (and I read from my note of the argument) " that E where the employee accepts an offer from his employer to spend money on his behalf, then he is chargeable on the money spent, and not on the value of the thing bought for him."

If that is a correct statement of the true nature of this transaction, it may be that the conclusion follows. Counsel referred to a few cases, one of which is *Nicoll* v. *Austin* (1), before FINLAY, J. In that case a director of a company F was told that, in order to do justice to his standing in the company, he should continue to live at a place called Debden Hall, but his employer, as part of the bargain of service, promised to pay the charges incurred for its use, such as rates and telephone charges, and also the cost of maintaining the gardens. In that case it was held that what the director had got from the arrangement in money's worth was the sums which were paid for rates and telephone charges, G and also the sums paid for the gardener's wages and the like as regards the gardens. In *Hartland* v. *Diggines* (2), an employing company had agreed to pay the income tax on its employee's salary; and there the House of Lords likewise held that the tax so paid must be treated as within the scope of r. 1 of the Schedule. The argument of counsel for the Crown was that, when this case is viewed according to his argument (as I have stated it), the same reasoning would compel a similar H answer to that given in *Nicoll* v. *Austin* (1) and *Hartland* v. *Diggines* (2).

I have said that the point is a very short one, and I think it does not lend itself to elaboration. I reject the premise involved in the formulation of counsel for the Crown. In a sense it is no doubt true that the letter of Nov. 7 was an offer, and one which the person to whom it was addressed was not bound to accept. Indeed, anyone who proposes to give a present to somebody else may I find that the somebody else says: " I will not have it ". But, in the submission which counsel has formulated, the word " offer ", I think, is used in a sense in which it would be used in a legal context. The suggestion is that here was an offer which, on acceptance, created some right; and it is at that point that I venture to part company with counsel.

It seems to me that the taxpayer never acquired any rights against anybody.

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(1) 19 Tax Cas. 531.

(2) [1926] All E.R. Rep. 573; 10 Tax Cas. 247.

A He received this letter; armed with it he went to Montague Burton, Ltd.'s establishment, and Montague Burton, Ltd. expressed themselves as willing to supply him with the clothes he ordered. When the clothes were delivered, then (and then only) the taxpayer got something which was his own. He acquired at that point of time a suit, albeit he had no right against anyone to get the suit. Nor had he, as I conceive, any right against the company, though B as a matter of ordinary decency as between master and servant he could no doubt rely on the company doing what they said they would do. But this was not a case in which he was entitled to call on the company to pay some sum of money on his behalf as that phrase is ordinarily understood.

If I have incurred a debt—e.g., my debt due for income tax comparable to that in *Hartland* v. *Diggines* (3)—and my employer chooses to discharge that C debt for me, then it is no doubt true that what I have received in money or money's worth is the equivalent of the debt; and the sum of money is, therefore, properly brought within the scope of the charge. But as I think in this case, and in accordance with the argument of counsel for the taxpayer, what the taxpayer got—what the company intended to give him, what the letters to him, and Montague Burton, Ltd. said would be done, and was done—was a present D of a suit. Until he got it, he got nothing; and when he got it, the thing which came in (which was his income expressed in money's worth) was the value of the suit.

As I have said, I do not propose to elaborate it because I think it would be of no service either in this or in other cases. I agree with DANCKWERTS, J., when he said that, on the grounds which I have also tried to express, the case is E distinguishable from *Nicoll* v. *Austin* (4). So far as the rates and telephone charges in that case were concerned, the result was on all fours with the decision in *Hartland* v. *Diggines* (3), where the employer discharged a liability or an obligation of the servant. Strictly that might not be true as regards the gardens. The facts in regard to that case are not known. We do not know who in fact employed the gardener. But, as the learned judge pointed out, there is no F doubt that the director (Mr. Austin) got the benefit; and there is no other way of assessing value than by reference to what was in truth paid for the upkeep of the gardens. This case, as I think, is different. We are here concerned with the present of a suit; that is the subject-matter, and the value of the suit in money seems to me to be the amount for which the taxpayer is properly taxable. I would therefore dismiss the appeal.

G **HARMAN, L.J.:** I agree. The taxpayer here does not dispute the liability. He agreed that he had received from his employers a perquisite, or something of that nature, which made him chargeable under Sch. E to the Income Tax Act, 1952. The only controversy was whether he was to pay tax on the cost of that perquisite to his employers, or the value of it to him, and it appears to me that this perquisite is a taxable subject-matter because it is H money's worth. It is money's worth because it can be turned into money, and when turned into money the taxable subject-matter is the value received. I cannot myself see how it is connected directly with the cost to the employers. It is quite true that in *Hartland* v. *Diggines* (3), for instance, the employer made certain payments of money for the employee's benefit. The only way to make a valuation of money is by money. It is not like a chattel, which is the case I here, and therefore there was no difference in the standard of what was paid by the employer, and the advantage received by the employee.

Here there is a difference. It is admitted that as a conventional matter the difference can be taken as that between £14 15s. and £5. Income tax is a tax levied on income. The taxpayer has to pay on what he gets. Here he has got a suit. He can realise it only for £5. The advantage to him is therefore £5. The detriment to his employers has been considerably more, but that seems to

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(3) [1926] All E.R. Rep. 573; 10 Tax Cas. 247.

(4) 19 Tax Cas. 531.

A me to be irrelevant, and I do not see that it makes any difference that no property in this suit ever passed to the employers. I think, in LORD WATSON's words in *Tennant* v. *Smith* (5), that it is a benefit consisting in something acquired which the acquirer becomes possessed of and can dispose of to his advantage—in other words, money or that which can be turned to pecuniary account. This can be realised in cash, and it is that realisable quality which is the measure of the taxpayer's liability. I would therefore dismiss the appeal. B

DONOVAN, L.J.: I agree, and I add a few words only because of the novelty of the point. The case wears an aspect of triviality which is deceptive. Tax on £15 alone is involved, but the proposition on which the claim is based is of much wider significance, and it will look very different when applied to other cases which can easily be foreseen, and some of which were referred to during C the argument.

The proposition was stated thus: Where an employer offers to spend money for an employee as a reward for service, and that offer is accepted, the employee is liable to be taxed on the money so spent, and not on the thing which the money provides for him. A good many qualifications would be needed to add to that proposition to make it true. It looks true in cases like *Hartland* v. *Diggines* (6) and *Nicoll* v. D *Austin* (7), where money liabilities of the employed officers were discharged by the employer. But what the officers were really taxed on was the money's worth of the immunity they were thus given from their own liabilities. No valuation of that money's worth was required; and it was obviously of the same value as the liability which had been discharged. In the present case the taxpayer never became liable to pay the £14 15s. to Montague Burton, Ltd. Between him E and them there was no privity of contract at all; and, when the employers paid this sum, they discharged their own liability, and nobody else's.

On what principle is this payment nevertheless to be treated as the taxpayer's income? To that question, I think, no satisfactory answer is or can be given. At first the Crown suggested that it was the principle underlying certain surtax cases, where taxed income had been applied under a trust for the benefit of the F beneficiaries; but the court in those cases explained that once the trustees so applied the income, that income itself became the beneficiaries'; see, e.g., *Sutton* v. *Inland Revenue Comrs.* (8). In the end the Crown conceded (I think rightly) that no true analogy could be drawn between that class of case and the present. That being so, I can discover no test which yields the result that the payment by the employers to Montague Burton, Ltd. in the circumstances of G this case is the income of the taxpayer.

In that situation one must get back to what, so far as I know, has always been accepted as the basis of liability under Sch. E to the Income Tax Act, 1952, viz., that liability extends to the profits or gains arising or accruing to the holder of the office or employment as such, whether those profits take the form of money or money's worth. No money arose or accrued to the taxpayer here from this H transaction. Money's worth did, in the shape of the suit. The suit (and the suit alone) answers the description of profit accruing to the taxpayer from his employment. On that basis it should be assessed to income tax at its money value in the taxpayer's hands, i.e., what he could get for it if he sold it as soon as he received it. It is agreed between the parties that this is the sum of £5; and I therefore also think that the Special Commissioners and DANCKWERTS, J., I came to the right conclusion in this case, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Slaughter & May* (for the taxpayer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(5) 3 Tax Cas. at p. 167.
(6) [1926] All E.R. Rep. 573; 10 Tax Cas. 247.
(7) 19 Tax Cas. 531.
(8) 14 Tax Cas. 662.

THOMAS *v.* NATIONAL FARMERS UNION MUTUAL INSURANCE SOCIETY, LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), December 20, 1960.]

Agriculture—Agricultural holding—Termination of tenancy—Crops grown on holding in last year of tenancy—Property in crops left on holding passing to landlord on tenant quitting the holding—Whether tenant continued to have insurable interest in hay and straw—Whether property in crops passed to landlord by operation of law—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 63), *s.* 47, *Sch.* 4, *Part* 2, *para.* 8.

Insurance—Fire insurance—Agricultural holding—Tenant's insurance—Crops—Crops destroyed by fire after tenant quitted holding pursuant to notice to quit—Whether tenant had insurable interest in crops after quitting holding.

The claimant was the tenant of Iscoed Home Farm, Carmarthenshire, from November, 1954, until Oct. 5, 1956, on which date he quitted the holding pursuant to a notice to quit served by his landlord under the Agricultural Holdings Act, 1948. The claimant left on the holding a quantity of hay and straw which were produce of the preceding twelve months and which, as a result of a claim in writing by the landlord to be entitled to these crops, had not been put into the sale held by the claimant before he quitted the holding. Under a policy of insurance issued by the respondents, the claimant was insured against the damage or destruction by fire of certain items of property on the holding, including hay and straw, for the period Feb. 15, 1956, to Feb. 15, 1957. By condition 3 (a) of the policy, if any of the insured property passed from the claimant to any other person " otherwise than by . . . operation of law " the policy ceased to be in force in relation to that property. On Dec. 4, 1956, the hay and straw were destroyed by fire.

Held: (i) by virtue of the Agricultural Holdings Act, 1948, particularly s. 12 (1)*, s. 47 (1)*, the property in the hay and straw (being crops left on the holding pursuant to s. 12 (1)) passed to the landlord on the termination of the tenancy on the claimant's quitting the holding, and the claimant acquired instead the right to compensation given by s. 47; therefore on Oct. 5, 1956, when the claimant quitted the holding, he ceased to have any insurable interest in the hay and straw (see p. 367, letters G and H, post).

(ii) the passing of the property in the hay and straw to the landlord was a passing by operation of law within the meaning of condition 3 (a) of the policy; accordingly, by virtue of condition 3 (a), the policy continued in force after the claimant quitted the holding and he was entitled to recover under the policy for the loss of the hay and straw.

[As to the tenant's right to compensation for crops at the termination of his tenancy, see 1 HALSBURY'S LAWS (3rd Edn.) 301, para. 628.

As to what constitutes an insurable interest for the purpose of fire insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 310, 311, paras. 623, 624.

For the Agricultural Holdings Act, 1948, s. 47 (1) and Sch. 4, Part 2, para. 8, see 28 HALSBURY'S STATUTES (2nd Edn.) 65 and 103.]

Case referred to:

Kestell v. *Langmaid,* [1949] 2 All E.R. 749; [1950] 1 K.B. 233; 2nd Digest Supp.

Special Case.

This was an appeal from an award stated in the form of a Special Case by an arbitrator, W. L. Mars-Jones, Q.C., made in a dispute between the claimant, William Walter Thomas, and the respondents, the National Farmers Union Mutual Insurance Society, Ltd., in respect of a claim under a fire policy of insurance for the loss by fire of hay and straw at Iscoed Home Farm, Ferryside, Carmarthenshire, on Dec. 4, 1956. Prior to the fire, on Oct. 5, 1956, the claimant had quitted the farm under a notice to quit served by his landlord under the Agricultural Holdings Act, 1948. The issues raised on the Special Case were whether after quitting the holding the claimant had an insurable interest in the hay and straw and, if not, whether his property in the crops had passed to his landlord by operation of law within the meaning of condition 3 (a) of the policy so as to continue the claimant's cover after the property had passed. The facts and the relevant provisions of the policy and of the Agricultural Holdings Act, 1948, are set out in the judgment.

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* For the terms of s. 12 (1) and s. 47 (1) see p. 365, letter I, and p. 366, letter F, post.

J. D. James for the claimant.
Tudor Evans for the respondents.

DIPLOCK, J.: This is an appeal from an award in the form of a Special Case arising out of a claim under a policy of insurance covering property situate on a farm in Carmarthenshire. It raises a short but interesting point under the Agricultural Holdings Act, 1948. The facts can be summarised shortly. The claimant, the insured, Mr. William Walter Thomas, was the tenant of a farm in Carmarthenshire called Iscoed Home Farm, of which the owner was his father, and was in occupation of the farm from November, 1954, until Oct. 5, 1956. On Mar. 23, 1956, his father served on him a notice to quit on or before Sept. 29, 1956. That notice to quit contravened the provisions of the Agricultural Holdings Act, 1948, s. 23 (1). The claimant, however, acted on the notice and quitted Iscoed Home Farm on Oct. 5, 1956, and it is common ground between the parties that the notice, despite its contravention of the statutory provisions, operated as a valid notice to quit because the claimant quitted the holding in pursuance of that notice. The authority for that proposition, in respect of which both the parties are agreed, is *Kestell* v. *Langmaid* (1). The claimant left on the premises a quantity of hay and straw (2). He announced a sale to take place immediately before he quitted on Oct. 2, and his father's solicitors wrote a letter to the auctioneers saying, in relation to the hay and straw crops:

> "We have been instructed to inform you that our client claims to be entitled to these crops, and we shall be obliged if you will give us an undertaking that they will not be sold at the sale by your firm: we would like to have this undertaking today without fail."

In consequence, the hay and straw were not put in the sale.

The claimant having left Iscoed Home Farm, moved to a smaller farm, also in Carmarthenshire, and shortly after he moved there an agent of the respondents to the arbitration, the National Farmers Union Mutual Insurance Society, Ltd., called on him to effect the necessary insurances at his new farm. The question then arose as to the insurances at the former farm, Iscoed Home Farm, in respect of which the claimant was insured under a policy of insurance issued by the respondents which I shall have to construe. That policy was, inter alia, against fire, and it contained an undertaking by the respondents to

> " pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at [the respondents'] option reinstate or replace such property or any part thereof ",

with the proviso that

> " the liability of the [respondents] shall in no case exceed in respect of each item the sum expressed in the said schedule to be insured thereon."

The schedule to the policy contained five items of insured property. The schedule stated the name and address of the insured as: "William Walter Thomas, of Iscoed Home Farm, Ferryside, Carmarthenshire ". The property insured was described as:

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(1) [1949] 2 All E.R. 749; [1950] 1 K.B. 233.
(2) The hay and straw were crops grown in the preceding twelve months.

> " On the undermentioned, the property of the insured only, situate on Iscoed Home Farm in the parish of St. Ishmaels in the county of Carmarthen."

Item No. 1, insured for £1,500, was hay, corn, straw and all other agricultural, market garden and horticultural produce, fruit, wool, cheese, cider, natural manures and on growing crops (other than roots and pasture), excluding the property mentioned in item No. 2. Item No. 3, insured for £1,000, was farm implements. Item No. 4, insured for £200, was all other farming dead stock, including artificial manures, manufactured feeding stuffs, fuels, lubricants, etc. Item No 6, insured for £2,000, was horses and other live-stock. Item No. 7, insured for £1,000, was household goods and personal effects. The period of the policy at the relevant time was from Feb. 15, 1956, to Feb. 15, 1957. I do not think that it is necessary for me to read any of the conditions set out on the back of the policy, except condition 3 (a), which appears under the sub-title of " Transfer of interest ". It reads as follows:

> " This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law unless notice thereof be given to the society and the continuance of the insurance in favour of such other person be declared by indorsement hereon and registered in the books of the society and the expression—the insured—shall include any person in whose favour the insurance is so declared to be or is otherwise continued and such person shall thereupon become a member of the society."

At the meeting with the representative of the respondents, shortly after the claimant's moving from Iscoed Home Farm to his new farm, the claimant asked the representative of the respondents to keep the hay at Iscoed Home Farm covered for insurance as the claimant had still not sold it to his father, the owner. As a result of that request, which was agreed to by the representative of the respondents, a memorandum was indorsed on the policy in the following terms:

> " It is hereby declared and agreed that the address of the insured is now Ystafell, Llanddarog, Carmarthen, and not as otherwise stated. It is further declared and agreed that the insurance by Items Numbers 3, 4, 6 and 7 of this policy is cancelled ",

that is to say, all the items except Item No. 1, which was the hay, straw and crops. There is then a provision for a return of part of the premium and the total sum insured thereafter remained £1,500.

The claimant appointed a valuer to value the hay and straw and the valuers in fact did that between Nov. 23 and 30, 1956, that is to say, round about the time, Nov. 27, 1956, when the indorsement was put on the policy. The claimant's father did not appoint a valuer although he was asked to do so and no valuation was ever made by him on his behalf. On Dec. 4, 1956, the hay and straw was lost by fire at Iscoed Home Farm. The claimant claims under the policy in respect of that loss.

Three points are taken on behalf of the respondents as constituting a defence to this claim. The first two points are, I think, really different aspects of the same point. It is contended on behalf of the respondents that the result of the provisions of the Agricultural Holdings Act, 1948, is that on quitting the holding the claimant's property in the hay and straw passed to his landlord, his father, and that thereafter the claimant had no proprietary, possessory or other insurable interest in respect of that hay and straw. The argument is put in this way. Section 12 (1) of the Agricultural Holdings Act, 1948, provides:

> " Where notice to terminate the tenancy of an agricultural holding is given either by the tenant or by the landlord, the tenant shall not, subject

> to any agreement in writing to the contrary, at any time after the date of the notice sell or remove from the holding any manure or compost or any hay or straw or roots grown in the last year of the tenancy unless before the sale or removal the landlord has consented thereto in writing."

It is not suggested that that prohibition divests the tenant of his property in the hay and straw until he quits the holding; indeed, it is clear law that he is entitled to use it in any way he likes—to feed it to his stock, or otherwise use it—in the course of husbandry. The subsection merely places a restriction on what he can do with that particular property, the restriction being that he may not sell it or remove it from the holding without the consent of the landlord in writing. In summarising the effect of the subsection I have omitted those words " subject to any agreement in writing to the contrary " which refer to the terms which one often finds in a tenancy modifying the powers in the subsection.

That, then, is the position up to the time at which the tenant quits the holding. His position thereafter is regulated by other sections of the Act. Those to which I must refer are, first, s. 46 (1), which provides, so far as is relevant, as follows:

> " The provisions of the nine next following sections shall have effect with respect to the rights of the tenant of an agricultural holding with respect to . . . (b) compensation for the matters specified in Part 2 of the said Sch. 4."

Included in Part 2 of Sch. 4, para. 8, is this:

> " Growing crops and severed or harvested crops and produce, being in either case crops or produce grown on the holding in the last year of the tenancy, but not including crops or produce which the tenant has a right to sell or remove from the holding."

Section 46 therefore provides that in respect of this hay and straw, which is the subject-matter of this case, the tenant's rights were governed by the nine sections following on s. 46 of the Act. The relevant section dealing with his rights in respect of these crops is, first, s. 47 (1), which provides, so far as is relevant, as follows:

> " The tenant shall, subject to the provisions of this Act, be entitled on the termination of the tenancy, on quitting the holding, to obtain from his landlord compensation for a new improvement carried out by the tenant and for any such matter as is specified in Part 2 of Sch. 4 to this Act."

Then there follow provisos which do not matter. The next section is s. 51:

> " (1) The amount of any compensation under this Act . . . for any matter falling within Part 2 of [Sch. 4] shall be the value thereof to an incoming tenant calculated in accordance with such method, if any, as may be prescribed.
>
> " (2) Nothing in this Act shall prevent the substitution, in the case of matters falling within Part 2 of Sch. 4 thereto, for the measure of compensation specified in sub-s. (1) of this section, of such measure of compensation, to be calculated according to such method, if any, as may be specified in a written contract of tenancy."

Then s. 70 deals with the method of settlement of claims for compensation:

> " (1) Without prejudice to any other provision of this Act, any claim of whatever nature by the tenant or landlord of an agricultural holding against his landlord or tenant, being a claim which arises—(a) under this Act or any custom or agreement; and (b) on or out of the termination of the tenancy of the holding or part thereof, shall, subject to the provisions of this section, be determined by arbitration under this Act.
>
> " (2) No such claim as aforesaid shall be enforceable unless before the expiration of two months from the termination of the tenancy the claimant

> has served notice in writing on his landlord or tenant, as the case may be, of his intention to make the claim. [Then there is a provision as to what the notice shall contain.]
>
> "(3) The landlord and tenant may, within the period of four months from the termination of the tenancy, by agreement in writing settle any such claim as aforesaid, and the Minister may, upon the application of [either of them extend the period.]
>
> "(4) Where, by the expiration of the said period and any extension thereof made under the last foregoing subsection, any such claim as aforesaid has not been settled, it shall cease to be enforceable unless . . ."

In effect, the Minister extends the time.

It is unnecessary for me to deal with the method of arbitration under the Act, save to observe that it provides that any award made by the arbitrator shall fix a day not later than one month after delivery of the award for the payment of the money awarded as compensation, costs or otherwise.

Section 71 and s. 72 deal with the recovery of sums due under the Act. Section 71 provides:

> ". . . where a sum agreed or awarded under this Act to be paid for compensation, costs or otherwise by a landlord or tenant of an agricultural holding is not paid within fourteen days after the time when the payment becomes due, it shall be recoverable upon order made by the county court as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable."

Section 72 gives to the tenant the power to obtain a charge on the holding for compensation.

Those being the relevant sections of the Act, counsel for the respondents argues that the effect of those sections is that on the termination of the tenancy and on quitting the holding the property in the hay and straw is divested from the tenant to the landlord and the tenant in its place is given the right to obtain from his landlord compensation for the hay and straw. It seems to me quite clear that at some point, either on or after the tenant quitting the holding, the property which he undoubtedly had before that date is divested from him and vested in the landlord. Counsel for the claimant has argued that that does not occur until the amount of the compensation has been fixed by one method or other under the Act. I cannot accept that argument. It seems to me that once the tenant has quit the holding, or, in the words of s. 47, "on the termination of the tenancy, on quitting the holding", the tenant is divested of all rights in respect of the crops left on the holding pursuant to s. 12 of the Act and is granted instead the right to obtain compensation under the Act. He is not entitled to go on to the holding; he is not entitled to remove the hay and straw from the holding, and it seems to me that the clear scheme of the Act is that the property passes in the crops left pursuant to s. 12 on the termination of the tenancy, on quitting the holding, as is stated in s. 47; the property then passes to the landlord and the tenant instead acquires the right to obtain compensation under the Act through the machinery which I have already dealt with. It follows, therefore, that I accept the contention of the respondents that after he had quitted the holding on Oct. 5, 1956, the claimant had no property in the hay or straw, the subject matter of the insurance, nor had he any insurable interest therein. It is not necessary for me to cite the authorities which refer to what is necessary to constitute insurable interest (3). It follows from what I have said that all his interest in the hay and straw was divested and a right to obtain compensation under the Act was substituted.

The claimant, however, argued that even if that be the case, yet condition 3 (a of the policy has the result that his cover is not terminated by the passing o the property in the hay and straw to the owner as a result of the provisions of the Agricultural Holdings Act, 1948, to which I have referred, for it is said on his behalf that this is a case where the property has passed from the insured to another person by operation of law and, accordingly, condition 3 (a) has not the effect of divesting the claimant of his right under the policy as insured. I have held that the property did pass from the claimant, the insured, to his father, the landlord, on Oct. 5 when the claimant quitted the holding and that it so passed as a result of what I hold to be the true construction and effect of s. 12, s. 46, s. 47, and the other sections which I have read of the Agricultural Holdings Act, 1948. I find great difficulty in seeing how it can be argued that that is not a passing of property by operation of law. It seems to me to be the result only of the statutory provisions to which I have referred. Counsel for the respondents has argued that because s. 12 of the Act entitles a landlord to consent in writing to the removal of hay or straw, it cannot be said that the passing of the property is by operation of law because the landlord and the tenant could have made an agreement to the contrary. I do not think that that is a sound argument and it does not seem to me to affect the meaning of the expression " operation of law ". Where property passes automatically as the result of statutory provisions when certain circumstances arise it seems to me that that is a passing of property by operation of law. It follows, therefore, that under condition 3 (a) of the policy it did not cease to be in force when the property passed to the claimant's landlord, his father.

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(3) As to what constitutes an insurable interest for the purposes of fire insurance see 22 HALSBURY'S LAWS (3rd Edn.) 310, 311, paras. 623, 624.

For the purposes of the dispute between the claimant and the respondents, it is unnecessary for me to express any view as to the capacity in which the claimant will hold the respondents' moneys when they are paid to him. So far as his rights against the respondents are concerned, he is, in my view, entitled to recover the proper sum representing the value of the property destroyed at the time of its destruction. Questions of quantum do not arise on this Special Case.

A further point was raised by counsel for the claimant based on estoppel resulting from the conduct of the respondents in renewing the policy and placing the indorsement on it when they knew that the hay and straw had been left on the farm. In the view that I have formed and the answer which I have given to the question of law arising on the construction of the policy and of the Act, it is unnecessary for me to express any view on the estoppel point.

The learned arbitrator made his award in three alternative forms, the first two depending on the answer to the question and the third expressing his own opinion which coincides with mine. The question put to me at para. 7 of the Special Case is:

> " whether the respondents are liable to indemnify the claimant for the loss of the said hay and straw."

I answer that question in the affirmative.

Judgment for the claimant.

Solicitors: *Theodore Goddard & Co.*, agents for *Ungoed-Thomas & King*, Carmarthen (for the claimant); *Barlow, Lyde & Gilbert* (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

PURNELL *v.* PURNELL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Cairns, J.), December 7, 8, 16, 1960.]

Variation of Settlement (Matrimonial Causes)—Adopted child—Jurisdiction to admit adopted child to benefit under settlement—Compensation for natural children—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 25.

The court has jurisdiction to vary a marriage settlement by admitting an adopted child to benefit under the settlement provided that anything which the natural children of the marriage are called on to give up is compensated for in some sufficient way (see p. 374, letter G, post).

[As to variation of marriage settlements to bring in adopted children, see 12 HALSBURY'S LAWS (3rd Edn.) 451, para. 1014, note (d); and for cases on the subject, see 27 DIGEST (Repl.) 639, *6019* and Supplement.

For the Adoption Act, 1950, s. 13 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 477.

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

For the Matrimonial Proceedings (Children) Act, 1958, s. 1 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 477.

For the Adoption Act, 1958, s. 16 (2), Sch. 5, para. 4 (1), (2), see 38 HALSBURY'S STATUTES (2nd Edn.) 553, 584.]

Cases referred to:

Barras v. *Aberdeen Steam Trawling & Fishing Co., Ltd.*, [1933] All E.R. Rep. 52; [1933] A.C. 402; 102 L.J.P.C. 33; 149 L.T. 169; 18 Asp. M.L.C. 384; Digest Supp.

Best v. *Best*, [1955] 2 All E.R. 839; [1956] P. 76; [1955] 3 W.L.R. 334; 3rd Digest Supp.

Garforth-Bles v. *Garforth-Bles*, [1951] 1 All E.R. 308; [1951] P. 218; 27 Digest (Repl.) 651, *6131*.

Newson v. *Newson, Tagart* v. *Tagart & White*, [1934] All E.R. Rep. 523; 151 L.T. 159; 27 Digest (Repl.) 642, *6049*.

Scollick v. *Scollick*, [1927] All E.R. Rep. 523; [1927] P. 205; 96 L.J.P. 96; 137 L.T. 485; 27 Digest (Repl.) 642, *6048*.

Whitton v. *Whitton*, [1901] P. 348; 71 L.J.P. 10; 85 L.T. 646; 27 Digest (Repl.) 643, *6063*.

Applications.

These were applications by the wife and by the husband to vary a report of Mr. Registrar RUSSELL dated Oct. 10, 1960, made on the wife's application in a suit for divorce, wherein a decree of dissolution had been granted, for the variation of a marriage settlement and for permanent maintenance and secured provision for herself and maintenance for the children of the family.

The parties were married in 1942. There were two sons, one born in 1943 and the other born in 1945; and on Nov. 15, 1951, the parties adopted a daughter, a girl who was born on Nov. 25, 1949. On Feb. 3, 1947, the husband's father, as settlor, made a deed of settlement in favour of the husband "his wife and issue", whereby he transferred certain investments (the trust fund) to certain trustees to hold the annual income thereof "upon protective trusts for the benefit of the [husband] during his life". The deed continued:

> "3. From and after the death of the [husband] then upon trust if he shall leave a widow to pay to her during her widowhood the whole of the income of the trust fund and subject as aforesaid then as to as well the capital as the annual income of the trust fund in trust for such one or more of the children or remoter issue of the [husband] in such manner in all respects as the [husband] shall by deed or will appoint and in default of and subject

> to any appointment in trust for all the children or any the child of the [husband] who being a male shall attain the age of twenty-one years or being female shall attain that age or marry and if more than one in equal shares . . .
>
> " 4. The trustees may with the consent of the settlor during his life and after his death in their absolute discretion raise out of the trust fund a sum not exceeding £8,000 and apply the same for the purpose of starting the [husband] in business or otherwise for his benefit or advancement in the world in such manner as the trustees shall think fit."

In May, 1959, the wife presented a petition for divorce on the ground of the husband's cruelty, in which she prayed for custody of the children, maintenance and a secured provision. The petition was undefended and a decree granted to the wife was made absolute on Nov. 5, 1959. By notice dated Sept. 24, 1959, the wife applied to vary the settlement in certain respects of which the following are material to this report:

> " . . . 2. by making the second life interest payable to the [wife] though not the [husband's] widow. 3. by extinguishing the [husband's] power to appoint to the children of an after-taken wife. 4. by extinguishing the [husband's] power to appoint as to one half of the trust fund."

This application, together with the application for maintenance and secured provision, came before Mr. Registrar RUSSELL, who made a report dated Oct. 10, 1960. The value of the investments in the settled fund at the time of the hearing was some £29,000 and the income therefrom was some £1,180. It was agreed, before the registrar, that the adopted daughter was not within the terms of settlement as they then stood, and that she should, if possible, be brought within them by some variation. Counsel for the sons contended that a sufficient quid pro quo must be found for them, and it was sought on their behalf that this should be found at the expense of the husband. The registrar, of his own motion, decided that, if a variation were made in favour of the wife by giving her the interest which she would have enjoyed as widow, she should make some sacrifice; accordingly he proposed to reduce her second life interest to three-quarters of the total fund. He arrived at this decision because he found that certain losses to the settled fund had been brought about by the extravagance of the wife and by an unsuccessful business having been started at her instigation. These matters were not in evidence before him, but his findings were based on statements made to him by the solicitor on behalf of the trustees.

The registrar's report, dated Oct. 10, 1960, proposed that the settlement should be varied as follows—(a) So that the wife should retain her second life interest thereunder, notwithstanding that she would not be the widow of the husband; but so that her life interest should be limited to three-quarters of the income arising from the settled fund and should terminate on her re-marriage. (b) That the power of the trustees under cl. 4 to raise and pay to the husband up to £8,000 from the settled fund should be further exercised only on the husband giving a charge on a reversionary interest under the will of his late father to repay to the trustees the whole of any sums that had been or might be paid to him under cl. 4. (c) By extinguishing all and any power therein of the husband to appoint as to either capital or income. (d) So that the term child or children therein should in all respects include the adopted child of the wife and husband as if such child were the child of the body of the wife and husband.

The wife, by notice dated Oct. 25, 1960, applied to vary the registrar's report as follows—1. By increasing the amount of maintenance recommended to be paid to the wife. 2. By deleting the recommendation that the life interest of the wife should be reduced to three-quarters of the income of settlement and by substituting a provision that the wife should be entitled to receive the whole of the income of the settlement for her life interest. 3. By providing that no after-taken wife or the children of any after-taken wife should have any interest

A in the settlement save on failure of any of the children of the family of the applicant wife and the husband to attain a vested interest therein. 4. By deleting reference to alleged extravagances of the wife. Paragraph 1 of this application was not pursued. It was agreed that variation 3 should be made and to this the court acceded. The court acceded to para. 4 and deleted the findings concerning the wife's extravagances, as the matters on which the findings B were based appeared not to have been in evidence before the registrar.

In reference to the £8,000 that the trustees had power to raise under the settlement the registrar's report stated that a certain amount had already been expended under this power for the schooling of the adopted girl and more would be so spent; £500 had been spent in clearing family debts. He had been told that the husband was anxious to repay a loan of £5,000 that was secured on his C reversionary interest under his father's will. This interest was a half share in the father's estate subject only to the life interest of the husband's mother, who was aged seventy-four; the half share had an expected value of £52,000. The husband was also prepared to pay debts incurred by the wife of some £1,250 in decorating etc. the matrimonial home and on the purchase of a car.

By notice dated Nov. 10, 1960, the husband applied for the registrar's report D to be varied as follows. (A) By adding at the end of para. (b) of the registrar's proposals the following proviso—" Provided that no charge on the reversionary interest need be given in respect of any sums that have been or may be paid under cl. 4 for any of the following purposes: (1) payments of debts incurred by the wife (whether before or after decree absolute); (2) payment of school fees or clothing bills or other matters for the benefit of the adopted daughter; (3) E payment off of the £5,000 loan referred to in the registrar's report. (B) By adding at the end of para. (d) further words as follows—" and in particular (for the avoidance of doubt) so that the statutory powers of advancement shall extend to moneys payable for school fees or clothing bills or other matters for the benefit of the adopted daughter ". (C) By adding a provision with regard to costs, not material to be set out in this report. (D) By making the F maintenance (including that payable to or in respect of any of the children) payable not from the date of the decree absolute (Nov. 5, 1959) but instead from the date of the judge's order herein: but so, however, that no credits should be given in respect of—(a) any sums paid before that latter date, whether such sums had been paid to the wife for her support or had been paid to her or on her behalf to pay off debts incurred by her; nor (b) the sum of £1,161 which the G husband proposed to request the trustees to raise under cl. 4 for the purpose of paying to the wife or on her behalf in respect of further debts incurred by her. In connexion with para. (A) of this notice the husband's solicitors wrote to the wife's solicitors on Nov. 8, 1960—

> " If the judge does accede to the husband's suggestion in this respect* then the husband will make a settlement on the three children of one-sixth H of the reversionary interest, that one-sixth being sub-divided in the proportion of three-eighths to the elder boy, three-eighths to the younger boy and two-eighths to the adopted girl, payable at the respective ages of twenty-five or earlier marriage (or, of course, at a later date if the reversionary interest had not yet fallen into possession)."

I There was no opposition to the insertion of the proviso requested by the husband, conditionally on the husband's making the settlement promised in the letter. Under the promised settlement the children would enjoy income on attaining twenty-five or earlier marriage or at the death of their grandmother, instead of on the death of the survivor of their parents, which probably would be a later date. The sons would receive between them only about £6,000 under the new settlement but, even assuming that the bulk of the £8,000 had been wrongly advanced to the husband and that no further advancement to him could be justified, the court considered that by reason of the difference in timing the boys would gain more by the new settlement than they would lose by foregoing any claim to restoration of the £8,000. The court, therefore, acceded to the request contained in para. (A) of the husband's notice on condition that he made the proposed new settlement, which should be effected before the court's order was drawn up. All parties agreed that, as to para. (B) of the husband's notice, the words " and maintenance " should be inserted after " advancement " and that, if the adopted daughter were to receive an interest, the words requested in para. (B) as altered should be inserted. Paragraph (D) was uncontested and the court approved the variation.

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* I.e., the suggestion that there should be deleted the registrar's proposal that sums raised under cl. 4 be charged on the reversionary interest under the father's will.

D. A. Fairweather for the wife.
J. R. Macgregor for the husband.
J. A. Crawley for the two sons.
W. G. Brown for the adopted daughter.

Cur. adv. vult.

Dec. 16. **CAIRNS, J.**, read the following judgment. [After stating the nature of the applications before him and that the main question that arose was whether the settlement could be varied so as to make provision for an adopted daughter, and after adopting the registrar's statement of facts and referring at some length to his report and proposals, and after reaching the decisions of the court previously mentioned, HIS LORDSHIP continued as follows:]

Having thus disposed of all the issues raised by the two notices to vary I now come, oddly enough, to the really difficult problem in the case, namely, whether I can and should confirm the giving to the adopted daughter of an interest under the marriage settlement. To start with, it is, in my opinion, rightly conceded that she has no interest in the settlement as it stands. She is not a " child " of the husband at common law and the Adoption of Children Act, 1926, does not assist here. The settlement was made before the passing of the Adoption Act, 1950, and she had not been adopted at the time of the settlement. For these reasons no rights under the settlement are conferred on her by that Act or by the Adoption Act, 1958: see the Act of 1950, s. 13 (2) and the Act of 1958, s. 16 (2) and Sch. 5, para. 4 (1) and (2). Nor is there any statutory provision which expressly authorises the variation of a settlement in her favour. The variation of settlements is provided for in s. 25 of the Matrimonial Causes Act, 1950, while maintenance is dealt with in s. 26. The Matrimonial Proceedings (Children) Act, 1958, s. 1 (1), expressly provides that s. 26 of the Act of 1950 is to be applied to adopted children but no such provision is made in relation to s. 25. The Variation of Trusts Act, 1958, does not assist the adopted daughter since she has no interest under the settlement as it stands.

I have, therefore, to construe s. 25 of the Matrimonial Causes Act, 1950, in the light of the relevant authorities and to consider whether, and if so on what condition, I can bring the adopted daughter into the settlement. Section 25 is in these terms:

> " The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage."

Those last words do not apply here.

A section in similar terms was first enacted in s. 5 of the Matrimonial Causes Act, 1859, and was thereafter carried into s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and eventually into s. 25 of the Matrimonial Causes Act, 1950. One of the difficulties of the section is that it is not clear from it whether the words "for the benefit of the children . . . or of the parties" qualify the word "settled" or the word "application". If it is the former, then so long as the settlement is a settlement for the benefit of the children or the parties, the court's discretion is at large; but if it is the latter, then the variation has to be such as will benefit the parties or the children. It was, I think, the submission of all counsel before me that the former meaning is the right one. I find it difficult to adopt that construction because it seems a strained reading and also because a comparison with the language of s. 24 (1) tends to support the other reading. This point is not, however, of so much importance as I was inclined to think during the argument. The variations must be considered as a whole: see *Whitton* v. *Whitton* (1) where JEUNE, P., said:

> " . . . I think I am entitled to consider what the effect of the whole order I ought to make will be, and not that of any particular portion alone."

Considered as a whole the variations are at least clearly for the benefit of one of the parties, namely, the wife. It is a recognised principle that the variations must not, taken as a whole, be to the disadvantage of the children, but this principle is, I think, derived from broad equitable considerations and not from the words of the Act. To quote again from the same judgment of JEUNE, P. (1):

> ". . . one has . . . to consider what is really for the benefit of the children, because I think the authorities show that nothing must be done that on the whole would be for the disadvantage of the children. This does not so much turn on the words of the Act of Parliament, but generally on the principle that the children, being innocent parties, ought not to have their interests injuriously affected by the conduct of either of their parents."

Now it is well established by authority that the variation may be such as to confer a benefit on a stranger to the settlement provided that it also confers a benefit on children interested in the settlement, and I think that the authorities establish that it is sufficient if the variation contains some benefit to those children which can be regarded as being approximately equivalent to what is taken from them for the benefit of the stranger.

In *Scollick* v. *Scollick* (2) HILL, J., varied a settlement under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, by introducing into it a power of appointment for the wife in favour of any children whom she might have by a second marriage which had already taken place. He considered that this would be for the benefit of the existing child because her stepfather would be more likely to be generous in her upbringing and education if he did not have to save money to provide for any further children of his own. HILL, J., said (3):

> " It must always be in the interests of a child that, if she has half-brothers and half-sisters, she should not be in some superior position in her expectations than they. I do not think that is an important consideration. Unless there is some financial interest I do not think I ought to interfere on that ground taken by itself."

That passage reads rather curiously and I cannot help feeling that what HILL, J., intended to say was: " I *do* think that is an important consideration ". What is clear is that he did think that it was *a* consideration but that there must be some pecuniary benefit to the child as well to justify the variation. The pecuniary benefit which he did find sufficient was not one which could be measured precisely and set against the detriment involved in giving rights to unborn children who were strangers to the settlement. Nevertheless, Hill, J., approved the variation which conferred such rights.

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(1) [1901] P. at p. 353. (2) [1927] All E.R. Rep. 523; [1927] P. 205.
(3) [1927] All E.R. Rep. at p. 525; [1927] P. at p. 209.

In *Newson* v. *Newson* (4) Sir Boyd Merriman, P., under the same section, made a similar variation, being satisfied that the variation itself and certain collateral arrangements ancillary to the proposed scheme were sufficient compensation to the child there concerned for the disadvantage accruing to him from the variation. In *Tagart* v. *Tagart & White* (5) Sir Boyd Merriman, P., refused a similar variation saying that in such cases the court would require to be satisfied that the variation as a whole was clearly for the benefit of the existing child or children and in that case he was not so satisfied.

The section was re-enacted in 1950 after the cases to which I have referred and it must be taken, therefore, that Parliament intended it to be applied as it had been in those cases: see *Barras* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.* (6).

In *Garforth-Bles* v. *Garforth-Bles* (7) Pearce, J., in approving a variation attached weight to the probable effect of the variation in maintaining happy relations between father and child.

In *Best* v. *Best* (8) Karminski, J., was asked to approve a variation conferring an interest on an adopted child. No financial compensation at all was afforded to the natural child of the marriage and the variation was supported solely on the ground that it would provide equality between two boys who had been brought up as brothers and that it was for the benefit of the natural son of the marriage that there should be such equality. It is clear that Karminski, J., considered that he had jurisdiction to make a variation bringing in an adopted son provided that a sufficient benefit to the natural son was thereby achieved. But he said (9):

> " Counsel for Anthony emphasised that in none of the reported authorities had the power to appoint to a future spouse or to the children of a subsequent marriage been given on sentimental or personal grounds alone. In all the authorities to which I was referred the variation was accompanied by a substantial monetary benefit to the child or children of the marriage. I can well understand the desire of the wife in the present case to put these two boys on an equality in respect of financial matters, since to do so would at least remove any feeling of future inequality between them. In my view, although I fully appreciate the importance of this argument, I feel myself unable to obtain equality of this kind at the price of so large a financial sacrifice on the part of Anthony."

Anthony was the natural son of the marriage.

In my opinion, the result of these cases is to establish that the court has jurisdiction to admit an adopted child to benefit under the settlement provided that anything which the natural children of the marriage are called on to give up is compensated for in some sufficient way. In considering this compensation the court cannot do any exact sum because such intangible factors as the benefit of equality, or something approaching equality, within the family can be taken into account, though there must be some pecuniary benefit as well. The conclusion to which I have come is that it is possible to bring the adopted daughter into the settlement and to make other variations which on the whole will be an adequate quid pro quo for the boys. But I should not feel satisfied that this could be effected, without undue detriment to the husband and the wife, if the adopted daughter were placed as the registrar proposed on an equal footing with the boys. In my opinion, the right way to divide the interests of the children is the same as that which the father has put forward for the new settlement, namely, in the proportion of three-eighths for each boy and one-quarter for the girl. I consider that this is fair, partly because the needs of a girl may be considered to be rather less than those of a boy and partly because the boys are entitled as of right to benefit under the settlement and she is not. I think that as far as the "sentimental" aspect of the case is concerned, the boys, assuming them to be normal boys, would be pleased that their adoptive sister should have this share though they might resent it if she was placed on an exact equality with them.

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(4) [1934] All E.R. Rep. 523.

(5) [1934] All E.R. Rep. 528.

(6) [1933] All E.R. Rep. at p. 55; [1933] A.C. at p. 411.

(7) [1951] 1 All E.R. 308; [1951] P. 218.

(8) [1955] 2 All E.R. 839; [1956] P. 76.

(9) [1955] 2 All E.R. at p. 844; [1956] P. at p. 86.

What financial gain do the boys get from the variation as a whole? That depends partly on whether the husband could have been required to restore that part of the £8,000 which has been advanced to him and to obtain no more similar advances. This issue was not fully argued before me and I do not consider that there is any need for me to determine it. The registrar was of opinion that the husband was "almost certainly" entitled to these sums. It is sufficient for me to say that it is a very substantial benefit to the boys to have that £8,000 restored to the settled fund or, alternatively, to have the three-quarters share of the new settlement which the husband has promised, rather than to be left with a very doubtful disputed claim to have the £8,000 restored. As I have differed from the registrar's view that the wife's interest should be reduced by a quarter, I cannot, of course, take that reduction into account as part of the benefit to the boys. This would not, however, be a very important benefit to them; actuarially it would amount to approximately one year's income (the husband being about four years older than the wife, and one-quarter of the income being involved). The fact that I do not confirm this reduction of the wife's interest is, however, one of the factors that have led me to think that the boys should each retain a greater interest than the adopted daughter receives.

Finally, there is the benefit to the boys of having the power of appointment extinguished and the rights of any future wife or children of the husband postponed to their own. The termination of the power of appointment as between the boys is in itself, I consider, a benefit to each of them. The assurance of obtaining a fixed share of a fund is of more value than the uncertain prospect of obtaining a greater or less share of it. It has been said that the husband is unlikely to marry or to have another family. Though there exists a circumstance that may make re-marriage less likely than usual, it was one which, so far as I know, has always existed and which did not prevent the marriage recently dissolved, nor the birth of the two children of that marriage. The husband is a reasonably well-to-do man of forty-two years and the risk of his re-marrying, and of his leaving a widow (who would have had a life interest prior to that of the boys if the settlement had not been varied), and children (who might have shared with or been altogether preferred to the boys with whom I am concerned), is, in my opinion, sufficient to make the variation which excludes the interests of such persons very useful from the boys' point of view.

I am satisfied that the benefits which I have mentioned are sufficient to enable me to approve the variations bringing in the adopted daughter to the extent which I have stated. I, therefore, confirm the registrar's report subject to the following variations: The variations mentioned in paras. 2, 3 and 4 of the wife's notice (10); the variation (11) mentioned in para. (A) of the husband's notice (if, but only if, the husband shall have made the settlement mentioned in the last paragraph of his solicitor's letter of Nov. 8, 1960); the variation mentioned in para. (B) of the husband's notice (12) with the addition of the words "and maintenance" after "advancement"; the variations mentioned in paras. (C) and (D) of the husband's notice; and the addition to para. (d) in the report (13) of the words "but so that the share of the said adopted child shall be two-thirds of the share of each boy and no more in the capital and interest of the trust fund, or if one of the boys dies before attaining the vested interest then two-thirds of the share of the survivor, and if both boys die, the whole ".

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(10) See p. 730, letter I, to p. 371, letter A, ante.
(11) See p. 371, letter D, ante.
(12) See p. 371, letter E, ante.
(13) See p. 371, letter F, ante.

Order accordingly.

Solicitors: *Barnett Janner, Davis & Janner* (for the wife, the two sons and the adopted daughter); *Cripps, Harries, Hall & Co.* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

R. v. EDIRIMANASINGHAM.

[PRIVY COUNCIL (Lord Reid, Lord Tucker, Lord Denning, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva), December 5, 6, 1960, January 17, 1961.]

Criminal Law—Appeal—Sentence—Conviction quashed on one count of indictment—Whether court has power to pass sentence on other counts of indictment on which trial judge has not passed sentence—Ceylon Court of Criminal Appeal Ordinance (No. 23 of 1938), *s.* 6 (1).

Privy Council—Ceylon—Criminal law—Appeal—Sentence—Conviction quashed on one count of indictment—Whether court has power to pass sentence on other counts of indictment on which trial judge has not passed sentence—Ceylon Court of Criminal Appeal Ordinance (No. 23 of 1938), *s.* 6 (1).

The respondent was indicted in Ceylon on three counts, one of murder and two of attempted murder. He was found guilty on all counts. Sentence was passed on the first count only, viz., rigorous imprisonment for life, which sentence exceeded the maximum sentence for attempted murder permitted by the Ceylon Penal Code. On appeal to the Ceylon Court of Criminal Appeal, the respondent's conviction on the count charging him with murder was quashed, but the court held that they had no jurisdiction to pass appropriate sentences on the two counts of attempted murder on which the jury's verdict of guilty stood. By s. 6 (1) of the Ceylon Court of Criminal Appeal Ordinance*, if it appeared to that court that an appellant, though not properly convicted on some charge or part of the indictment, had been properly convicted on some other charge or part, the court might pass such sentence in substitution for that passed at the trial as they thought proper and as might be warranted in law by the verdict on the charge or part of the indictment on which the court considered the appellant had been properly convicted.

Held: on the true construction of s. 6 (1), the Court of Criminal Appeal had power to pass sentence on the two counts of attempted murder.

R. v. *O'Grady* ((1941), 28 Cr. App. Rep. 33) approved.

Appeal allowed.

[**Editorial Note.** Section 6 (1) of the Ceylon Court of Criminal Appeal Ordinance is in the same terms as s. 5 (1) of the Criminal Appeal Act, 1907.

As to the power to amend sentence, see 10 HALSBURY'S LAWS (3rd Edn.) 539, para. 990.

For the Criminal Appeal Act, 1907, s. 5, see 5 HALSBURY'S STATUTES (2nd Edn.) 930.]

Cases referred to:

R. v. *O'Grady*, (1941), 28 Cr. App. Rep. 33; 14 Digest (Repl.) 259, *2264*.

R. v. *K. G. Sediris*, (Mar. 5, 1956), unreported.

Appeal.

Appeal by special leave by the Crown from an order of the Court of Criminal Appeal of Ceylon (BASNAYAKE, C.J., PULLE and H. N. G. FERNANDO, JJ.),

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* Section 6 (1) is set out at p. 378, letter G, post.

A dated Jan. 26, 1959, allowing the respondent's appeal from a judgment of a Criminal Sessions of the Supreme Court of Ceylon for the Eastern Circuit held at Batticaloa, dated Sept. 12, 1958. The facts are set out in the judgment of the Board.

F. H. Lawton, Q.C., and *T. O. Kellock* for the Crown.

B *E. F. N. Gratiaen, Q.C.* (of the Ceylon Bar), *Walter Jayawardena* and *Miss M. de Silva* for the respondent.

LORD TUCKER: In an indictment dated Apr. 8, 1958, the respondent was charged jointly with his son in the first count that, on or about July 27, 1957, they did murder one Sembakutti Kandapodi and thereby committed an offence punishable under s. 296 of the Penal Code of Ceylon. The second count charged C them at the time and place aforesaid, and in the course of the same transaction, with shooting one Palipody Nagamany with a gun and causing him hurt with such intention or knowledge and in such circumstances that, had they by such act caused the death of the said Palipody Nagamany, they would have been guilty of murder and that they thereby committed an offence punishable under s. 300 of the Penal Code (1). The third count charged them at the time and place D aforesaid, and in the course of the same transaction, with shooting at one Eliyathamby Palipody with a gun, with such intention or knowledge and in such circumstances that, had they by such act caused the death of the said Eliyathamby Palipody, they would have been guilty of murder and that they thereby committed an offence punishable under s. 300 of the Penal Code (1). The two accused were tried at a session of the Supreme Court of Ceylon in its criminal E jurisdiction for the Eastern Circuit at Batticaloa on Sept. 8, 1958, and following days. On Sept. 12, 1958, after the judge's summing-up, the jury retired and on their return to court were asked with regard to each separate count whether they were unanimously agreed on their verdict in respect of each of the accused and by their foreman they answered on each count that they found both accused guilty. The judge thereupon said:

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> "Inform the verdict to the accused. Tell the first accused that I sentence him to rigorous imprisonment for life. I sentence the second accused for rigorous imprisonment for life."

The verdict and sentence were formally recorded as follows:

G

> "The unanimous verdict of the jurors sworn to try the matter of accusation in this case is that the prisoners (i) P. Edirimanasingham and (ii) E. Gopalapillai are guilty of the offences as set out in counts (1), (2) and (3).
>
> Sgd.
> Foreman."

"Sgd. O. W. Wanniachy
H Clerk of Assize, S.C.
Batticaloa.

On this indictment the sentence of the court, pronounced and published this day, is that the prisoners (i) P. Edirimanasingham and (ii) E. Gopalapillai be kept in rigorous imprisonment for life.

Sgd. O. W. Wanniachy
I Clerk of Assize, S.C.
Batticaloa."

A sentence of rigorous imprisonment for life exceeds the maximum permitted by the code for the offences charged in counts (2) and (3). On Jan. 26, 1959, on appeal to the Court of Criminal Appeal by both accused, the appeal of the second accused was dismissed but the appeal of the first accused (the present respondent) against the verdict and sentence on the first count of the indictment A was allowed on the ground that the verdict was not warranted by the evidence, and a verdict of acquittal in his case was directed to be entered in respect of that charge. The jury's verdict against the respondent on the second and third counts was not challenged by counsel on the appeal.

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(1) Legislative Enactments of Ceylon, Vol. 1, c. 15. Section 300 lays down the punishment for attempted murder as rigorous or simple imprisonment "for a term which may extend to ten years," and also to fine.

It is clear from the above narrative of events that the trial judge passed sentence on the respondent on one count only, and that no question of the B effect of what is generally referred to as a "general sentence", i.e., a sentence intended by the judge to cover more than one count, arises in the present case. Such a sentence which is sometimes to be found in cases in England both before and since the establishment of the Court of Criminal Appeal and the Indictments Act, 1915, appears to be unknown in Ceylon, having regard to the provisions of the criminal code, and may well be illegal, but it is not necessary further to explore C this question as no such sentence was in fact imposed in this case. The Court of Criminal Appeal, having quashed the conviction of the respondent on count (1), held they had no jurisdiction to pass the appropriate sentences on counts (2) and (3) on which the jury's verdict of guilty stood.

In Ceylon, where the trial judge has omitted to pass sentence forthwith, he may of his own motion or at the instance of the prosecution pass sentence at a D later date but not after the close of the sessions. The relevant part of s. 251 of the Criminal Procedure Code (2) is as follows:

> "If the accused is convicted the judge shall either forthwith or before the close of the sessions pass judgment on him according to law."

Accordingly, the sessions having closed, no question of remitting the case to E the trial judge for sentence arose on the appeal. The Attorney-General, on behalf of the prosecution, obtained special leave by Order in Council of Aug. 12, 1959, to appeal against the decision of the Court of Criminal Appeal.

The sole question in the appeal is whether or not the Court of Criminal Appeal were right in holding that s. 6 (1) of the Court of Criminal Appeal Ordinance (No. 23 of 1938) does not give them jurisdiction in a case such as this to impose F the appropriate sentences on those counts of an indictment on which the judge has omitted so to do. Section 6 (1) is as follows:

> "If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial G or pass such sentence in substitution therefor as they think proper and as may be warranted in law by the verdict on the charge or part of the indictment on which the court consider that the appellant has been properly convicted."

The Court of Criminal Appeal accepted the argument of counsel for the present respondent that the subsection only conferred power on the court to H pass sentence in substitution for the sentence passed by the trial judge and that, when the trial judge has passed no sentence at all, the question of substitution does not arise. After referring to certain English decisions and, in particular, to *R.* v. *O'Grady* (3), the learned chief justice (BASNAYAKE, C.J.), delivering the judgment of the court, said they were unable to accept *R.* v. *O'Grady* (3) as having any persuasive force as no reasons were given in that case for what seemed I to them a disregard of the words of s. 5 (1) of the English Criminal Appeal Act, 1907, which are in the same terms as those of s. 6 (1) of the Ceylon Ordinance. The judgment proceeded:

> "In the instant case as the learned judge has not passed any sentence at all on the second and third charges we are unable to pass a sentence in

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(2) Legislative Enactments of Ceylon, Vol. 1, c. 16.

(3) (1941), 28 Cr. App. Rep. 33.

A substitution of that passed at the trial. The ordinance does not empower this court to supply the omission of the trial judge."

Their Lordships with respect feel unable to accept this interpretation of the section. It is, in terms, dealing with a case where an appellant has not been properly convicted on some charge or part of an indictment. This applies to count (1) in the present case. The conviction and sentence thereon no longer B stand, but the court is empowered to substitute for that which has disappeared such sentence as may be warranted in law by the verdict on the charge or part of the indictment on which the appellant has been properly convicted. This, in their Lordships' view, can only mean that, in place of the sentence that has been quashed, the court can pass the sentence appropriate to the convictions on the remaining counts on which the appellant has been convicted but not sentenced. C The section refers to "the sentence passed on the appellant at the trial". Where the court affirms such sentence, the application of the subsection may be restricted to cases where there has been a general sentence, but where the sentence passed on the appellant at the trial—in this case rigorous imprisonment for life—has been quashed the words of the subsection in their ordinary and natural meaning appear to their Lordships to confer power on the Court of D Criminal Appeal to substitute a proper sentence for that which has been quashed, which can only be done by passing sentence on the remaining good counts. This was the course adopted in *R.* v. *O'Grady* (4) in this country, and their Lordships see no reason to suppose that this was done per incuriam.

It is not necessary to express any opinion whether or not the subsection warrants the court in increasing a sentence passed at the trial on some other E count with regard to which there has been no appeal against sentence. Their Lordships prefer the view taken by the Court of Criminal Appeal in Ceylon in the unreported case of *R.* v. *K. G. Sediris* (5) to that reached in the present case.

For these reasons, their Lordships will humbly advise Her Majesty that this appeal be allowed and that the case be remitted to the Court of Criminal Appeal in Ceylon for such action as they may consider appropriate in the F circumstances.

Appeal allowed.

Solicitors: *T. L. Wilson & Co.* (for the Crown); *Goodman, Derrick & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(4) (1941), 28 Cr. App. Rep. 33.

(5) Mar. 5, 1956.

AKERIB *v.* BOOTH & OTHERS, LTD.

[COURT OF APPEAL (Devlin, Danckwerts and Davies, L.JJ.), January 16, 17, 18, 1961.]

Contract—Exception clause—Tenancy agreement including agreement for tenant's goods to be packed exclusively by landlord—Packing agreement expressed to be subject to conditions set out in schedule to agreement—Exception clause in schedule—Landlord not "in any circumstances" to be responsible for damage caused by water to any goods—Tenant's goods damaged by escape of water from cistern in water closet—Water closet in landlord's possession—Whether landlord liable for damage.

By an agreement in writing dated Dec. 1, 1954, the defendants let to the plaintiff four offices on the third floor of premises which they owned, a wareroom on the second floor and a wareroom on the third floor. They retained in their possession a water closet on the fourth floor. Under the terms of the agreement, the defendants agreed to make-up and pack the plaintiff's goods, at rates agreed on between the parties, "subject to the terms and conditions set out in the schedule" to the agreement; and the plaintiff agreed to employ the defendants exclusively in making-up and packing all goods bought by or belonging to him, or in which he might be interested, or which might come under his control in connexion with his business as carried on on the premises. Paragraph 2 of the schedule provided that the defendants "shall not in any circumstances be responsible for damage caused by . . . water . . . insects vermin or fungi to any goods whether in the possession of the [defendants] or not . . .". Between Apr. 3 and 5, 1958, water escaped from a cistern in the water closet owing to the negligence of the defendants or their servants, and caused damage to the plaintiff's goods in the part of the premises let to him. In an action by the plaintiff for damages for negligence, the defendants claimed that they were protected from liability by para. 2 of the schedule to the agreement.

Held: the defendants were liable to the plaintiff in damages, because the schedule to the agreement between the parties related only to the contract in regard to the making-up and packing of the plaintiff's goods, and, therefore, the exception from liability under para. 2 of the schedule was restricted to goods that came into the possession of the landlord or his sub-contractors pursuant to the contract (see p. 383, letter G, post).

Decision of JONES, J. ([1960] 1 All E.R. 481) reversed on another ground.

[As to agreements excluding or limiting liability, see 28 HALSBURY'S LAWS (3rd Edn.) 86, para. 91, and 8 HALSBURY'S LAWS (3rd Edn.) 84, para. 144.]

Appeal.

This was an appeal by the plaintiff, Jack Akerib, from a decision of JONES, J., dated Dec. 18, 1959, and reported [1960] 1 All E.R. 481.

Under the terms of an agreement dated Dec. 1, 1954, the plaintiff was the tenant of rooms on the second and third floors of premises belonging to the defendants, Booth & Others, Ltd. Four of the rooms were offices and two were warerooms. The agreement further provided that all the plaintiff's goods in connexion with the business carried on by him on the premises should be packed by the defendants exclusively, and the defendants agreed to pack the goods at the rates from time to time agreed on between the parties, and subject to the terms and conditions set out in the schedule to the agreement. The defendants retained in their own possession a water closet on the fourth floor of the premises. Owing to the escape of water from a cistern in the water closet the plaintiff's goods, including office materials, were damaged. The plaintiff brought an action against the defendants for damages for negligence. The defendants relied on a paragraph in the schedule to the agreement which provided that they should not "in any circumstances be responsible for damage caused by . . . water . . . to any goods whether in the possession of the [defendants] or not . . .". It was contended on behalf of the plaintiff that the exemption clause did not protect the defendants from liability where the damage was a result of their own negligence. JONES, J., held that the defendants were not liable to the plaintiff in damages as the words of the exemption clause were wide enough to protect them from liability.

In the Court of Appeal the plaintiff took the point (which was mentioned, but not pressed, before JONES, J.) that the exception clause in the schedule to the agreement applied only to the contract between the parties in regard to the packing of the plaintiff's goods.

Harold Lightman, Q.C., and *C. N. Glidewell* for the plaintiff.
W. D. T. Hodgson for the defendants.

DEVLIN, L.J.: This is an appeal from a judgment of JONES, J., at Manchester Assizes, and it has the unusual feature that no complaint at all is made about the judgment, which is accepted as being right in all that it deals with. What is said is that a point was taken in the court below on behalf of the plaintiff which is not dealt with in the judgment, and on which, he says, he is entitled to succeed. It is clear that the point cannot have been taken with any great emphasis, because it plainly made no impact on the learned judge's mind, though he dealt in detail with the other point which the plaintiff argued, and on which the plaintiff now accepts that he was wrong. It is, however, agreed that the point on which the plaintiff bases his appeal was, at any rate, mentioned in the court below, though it was almost immediately overshadowed by the other point; and, therefore, it is open to the plaintiff to take it in this court, though we may have to consider what the appropriate order is as to costs when that comes to be dealt with.

The dispute arises out of a lease which was granted by the defendants, as landlords, to the plaintiff, as the tenant. The lease is in a form which, we are told, is not unusual in Lancashire. The defendants carry on the business of packing goods and acting as a forwarding agent, and, apparently, it is not unusual in Lancashire for persons who carry on a business of that sort to become the owners of large premises, and then to let out parts of those premises on the terms that the tenants have all their packing and forwarding done by the landlords. The defendants let to the plaintiff four offices and one wareroom on the third floor of their premises, and one wareroom on the second floor, and included in the lease provisions binding the plaintiff to give the whole of his packing and forwarding business to them.

Clause 2 (c) of the lease provides that the landlord agrees

> ". . . to make up and/or pack the tenant's goods [I need not go into the definition of that] subject to the terms and conditions set out in the schedule hereto."

In the tenant's covenants, cl. 3 (t) provides that the tenant is at all times to perform and observe the terms and conditions set out in the schedule. Then in cl. 4 it is provided:

> " The terms of this tenancy are based upon the undertaking of the tenant (hereby expressly given) to employ the landlord exclusively in the making-up and/or packing (including the supply of all materials therefor) of all goods bought by or belonging to the tenant or in which the tenant may be interested or which may come under his control in connexion with the business of the tenant as carried on upon the premises . . .".

There is then a schedule to give effect to these covenants; presumably the schedule was intended to set out in detail the terms on which the goods should be packed and forwarded, but, in fact, it appears to consist almost entirely of exceptions to the landlord's liabilities, and other terms in his favour.

A That is the document which was agreed between the parties, and, as a result of it, there was created between them three relationships. There was first the ordinary relationship of landlord and tenant. Then there was the relationship of adjoining occupiers, because the essence of the matter was that the defendants should keep some rooms in the premises in which they were to do the packing of the plaintiff's goods, and in fact they kept some premises on the fourth floor, so B that the two parties were adjoining occupiers. Then, thirdly, there was the relationship of customer and packer or forwarding agent to which the schedule relates. That being the legal position, between Apr. 3 and Apr. 5, 1958, as the result of a defective cistern on the defendants' premises, water escaped and got into the plaintiff's premises, where it damaged a substantial quantity of the plaintiff's goods. These goods consisted not only of goods which might be packed or made-up by the defendants, but also of office materials such as stationery. C It is agreed that this damage was done by the negligence of the defendants or their agents; and, if there is liability, £1,750 is agreed as the proper compensation.

The only ground on which the defendants dispute liability is by reliance on one of the exceptions in their favour contained in the schedule. The first part of para. 2 of the schedule reads:

D

> "The landlord shall not in any circumstances be responsible for damage caused by fire water (including sprinkler leakage and damp) storm tempest insects vermin or fungi to any goods whether in the possession of the landlord or not . . .".

The point which was pressed before the learned judge below was that, on the E true construction of this exception, it did not cover the defendants against damage which was done as a consequence of their own negligent acts. The learned judge, in a careful judgment, reviewed the relevant authorities on that point, and came to the conclusion that the exception protected the defendants against their own negligence, and that conclusion, as I have said, is not now disputed by the plaintiff.

F The point which was argued before us on behalf of the plaintiff is a different one. It is that para. 2 of the schedule should be given a limited construction, having regard to the scope of the contract between the parties. Its terms are very wide. It applies to "any goods" without any restriction on them. Nevertheless, the principle is well settled that, however wide the language the parties may use, a clause—particularly if it is an exceptions clause—must always be G construed in relation to the subject-matter with which the parties are dealing. It is like the ejusdem generis rule but applied to a wider field. The words here used are "any goods", but the principle, like the ejusdem generis rule, is that "any goods" does not necessarily mean "any goods whatsoever", but may mean (and this is what has to be ascertained) a class or genus of goods which the parties had in mind as covered by the contract. I entertain no doubt that, H if the contract for packing and forwarding goods stood by itself, "any goods" would be construed as meaning those goods which had become subject to that arrangement and not all goods belonging to the plaintiff. The question is whether the same conclusion should be reached when the schedule is part of a larger contract. Should it be treated as if the goods were limited to those which came into the possession of the defendants as a result of the relationship I of customer and packer, or should it protect the defendants in respect, not only of the relationship of customer and packer, but also that of landlord and tenant and of adjoining occupier? It is a short point; and the construction of this clause which commends itself to me is that it should be limited to protecting the defendants in their dealings as packers.

There are two things about para. 2 of the schedule on which counsel for the plaintiff relied, and which fortify me in that conclusion. The first is that clearly para. 2 has no application at all to the relationship of landlord and tenant. A landlord is not liable in any circumstances for damage to goods in the tenant's premises, whether the damage is caused by fire, water or anything else. There is no need for a clause to exempt a landlord from that sort of liability. An adjoining occupier needs such exemption, but there are two points which suggest that the clause is not directed to that. The first is that damage which is done by an escape of water from the premises of an adjoining occupier is just as likely to damage the premises of the second occupier as it is to damage the goods thereon. The exception in para. 2 of the schedule relates only to goods; it would not protect the landlord in respect of damage done to the tenant's premises. It would be surprising for the exception to be limited in that way if it was intended to apply to the relationship of adjoining occupiers. The second point is that the sort of perils which are listed in para. 2 of the schedule include perils which are appropriate to the relationship between customer and packer, or warehousemen, but which are not appropriate to the relationship of adjoining occupiers. The exception in respect of insects, vermin or fungi in particular is one which one frequently finds inserted to protect carriers or warehousemen, but it would be a most unusual exception to find if a contract were being drawn up to protect one occupier against claims made by another.

On the other hand, there is a point on which the defendants have naturally relied, and that is that para. 2 of the schedule, although it gives no definition of " any goods ", follows it with the words " whether in the possession of the landlord or not ". If the only alternative which could be suggested to possession by the landlord was possession by the tenant, and the clause, therefore, covered goods in the possession of the tenant, it would have to be applied to goods on the tenant's premises as well as to goods in the possession of the landlord as packer. But counsel for the plaintiff was able to suggest another interpretation, and that is that the words " or not " are intended to cover the possibility that goods might be in the possession of sub-contractors employed by the landlord to carry out his part of the contract. That is a reasonable alternative construction. We are not, therefore, forced by the language which the parties have used to assume that they must have contemplated damage to goods caused by the defendants while those goods were actually on the plaintiff's premises.

I have taken these points as presented to us in argument, but I referred to them as fortifying my conclusion; and my conclusion is based mainly on the general rule that words, however wide, have to be construed in relation to the subject-matter about which they are used. In my judgment, this schedule relates only to the terms of the contract for making-up and packing and forwarding, and, accordingly, para. 2 of the schedule ought to be restricted to goods which come into possession of the landlord or his sub-contractors pursuant to work being done under that contract. For these reasons, I think that the appeal should succeed, and that judgment should be entered for the plaintiff for the sum agreed.

DANCKWERTS, L.J.: I agree. The contractual document in this case is a very peculiar document. It is so inartistically drawn as to be calculated to bring tears to the eyes of any competent equity draftsman. For instance, cl. 3 (t), which requires the tenant to " duly perform and observe the conditions set out in the schedule " in the document seems to me to be quite unsuitable; so far as I can see, there is nothing which the tenant has to do in the form of performance in the schedule at all. In a document of this class, which apparently was put forward by the defendants, if there is any doubt as to its meaning, it seems to me that the proper construction must be against the defendants; and I have come to the conclusion for the reasons which have been expressed by DEVLIN, L.J., that the provisions of para. 2 of the schedule must be confined to the relationship between the parties in so far as it affects the making-up and packing of the goods in question. I agree that the appeal should be allowed.

DAVIES, L.J.: I agree, and I would only add that I regret that this court has had to decide this appeal in favour of the plaintiff on a ground which quite plainly was not argued before the learned judge in the court below. Counsel for the defendants very fairly admitted that, although he was not in the case below, the point on which this appeal has now turned was, in fact, adumbrated before the learned judge. It is plain, however, from the learned judge's judgment that it was hardly mentioned, and that the whole of the case in the court below turned on the point which DEVLIN, L.J., has stated, that is, whether the words of the exception clause were wide enough to cover the negligence of the defendants or their servants or agents. That point has now gone. It is conceded that the words of the exception clause are wide enough to cover negligence, and this appeal has been argued on a quite different ground. That is a very unsatisfactory state of affairs. I entirely agree with the judgments which have been delivered.

Appeal allowed.

Solicitors: *Kinch & Richardson*, agents for *Linder, Myers & Pariser*, Manchester (for the plaintiff); *A. W. Mawer & Co.*, Manchester (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BEARMANS, LTD. AND ANOTHER *v.* METROPOLITAN POLICE DISTRICT RECEIVER.

[COURT OF APPEAL (Sellers and Devlin, L.JJ., and Slade, J.), December 8, 9, 1960.]

Document—Admissibility in evidence—Statement in document—"Person interested"—Watchman overpowered by shop-breakers—Statements to police and to employers' insurers' investigators—Action by employers and insurers against police authority for damages in respect of shop-breaking as "riot"—Evidence Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 28), *s.* 1 (3).

Whether a witness is "a person interested", so that his statement is rendered inadmissible in evidence by s. 1 (3)* of the Evidence Act, 1938, must be determined in every case by looking at the words of s. 1 (3) and applying them to the particular circumstances (cf. p. 388, letter D, and p. 393, letter I, post).

Four shop-breakers overpowered the watchman at a shop on a Sunday afternoon, and then stole a large sum of money and various goods from the shop. A few hours later the watchman made a written statement to the police describing what had happened to him, and ten days later he made a similar statement to investigators employed by his employers', the shop-owners', insurers. Subsequently the owners and the insurers commenced an action against the local police authority to recover compensation under the Riot (Damages) Act, 1886. At no time was any suggestion made that the watchman had been negligent or a party to the crime. The watchman died before the action came to trial. On an application by the shop-owners and the insurers that the two statements by the watchman be admitted in evidence under the Evidence Act, 1938, s. 1, the police authority contended that the watchman's reputation was at stake when he made the statements, and that he was therefore "a person interested" within the meaning of s. 1 (3)*.

Held: the watchman was not "a person interested" and so his statements were admissible.

Dicta in *Kelleher* v. *T. Wall & Sons, Ltd.* ([1958] 2 All E.R. 686), and *In the Estate of Hill* ([1948] 2 All E.R. 489) approved.

Dicta in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.*

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* Section 1 (3) is printed at p. 387, letter G, post.

([1941] 1 All E.R. 311) and *Barkway* v. *South Wales Transport Co., Ltd.* ([1948] 2 All E.R. 460), and *Evon & Evon* v. *Noble* ([1948] 2 All E.R. 987) criticised.

Per DEVLIN, L.J.: no witness ought to be held to be " a person interested " on a ground which would not be taken into consideration as affecting the weight of his evidence if he were actually called in court (see p. 393, letter I, post).

Per SLADE, J.: for s. 1 (3) to apply a real likelihood of bias must be shown (see p. 394, letter D, post).

Appeal dismissed.

[As to when the maker of a statement is " a person interested ", see 15 HALSBURY'S LAWS (3rd Edn.) 318, para. 578; and for cases on the subject, see 22 DIGEST (Repl.) 245, *2419-2425*.

For the Evidence Act, 1938, s. 1 (3), see 9 HALSBURY'S STATUTES (2nd Edn.) 627.]

Cases referred to:

Atlantic, The, Baltyk, The, (1946), 62 T.L.R. 461; 2nd Digest Supp.

Barkway v. *South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460; [1949] 1 K.B. 54; [1948] L.J.R. 1921; *revsd. on other grounds*, H.L., [1950] 1 All E.R. 392; [1950] A.C. 185; 22 Digest (Repl.) 245, *2418*.

Evon & Evon v. *Noble*, [1948] 2 All E.R. 987; [1949] 1 K.B. 222; [1949] L.J.R. 835; 22 Digest (Repl.) 245, *2425*.

Hill, In the Estate of, Braham v. *Haslewood*, [1948] 2 All E.R. 489; [1948] P. 341; [1948] L.J.R. 1634; 22 Digest (Repl.) 245, *2423*.

Jarman v. *Lambert & Cooke* (*Contractors*), *Ltd.*, [1951] 2 All E.R. 255; [1951] 2 K.B. 937; 22 Digest (Repl.) 244, *2413*.

Kelleher v. *T. Wall & Sons, Ltd.*, [1958] 2 All E.R. 686; [1958] 2 Q.B. 346; [1958] 3 W.L.R. 236; 3rd Digest Supp.

Plomien Fuel Economiser Co., Ltd. v. *National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248; 110 L.J.Ch. 180; 165 L.T. 119; 22 Digest (Repl.) 245, *2419*.

R. v. *Camborne JJ., Ex p. Pearce*, [1954] 2 All E.R. 850; [1955] 1 Q.B. 41; 118 J.P. 488; [1954] 3 W.L.R. 415; 3rd Digest Supp.

Interlocutory Appeal.

The defendant, the Receiver for the Metropolitan Police District, appealed from the decision of Master JACOB, given on Sept. 27, 1960, in a reserved written judgment (reported at p. 395, post, on the issue decided on this appeal), that two statements by James Milne, a watchman employed by the first plaintiffs, Bearmans, Ltd., were admissible in evidence in the proceedings. The facts appear in the judgment of SELLERS, L.J.

Stephen Chapman, Q.C., and *David Hirst* for the defendant.

F. H. Lawton, Q.C., and *Hugh Griffiths* for the plaintiffs.

SELLERS, L.J.: This case has earned distinction by the erudite, clear, careful and well-nigh complete judgment of Master JACOB. It is no doubt an admirable vade mecum, with the authorities compendiously dealt with, for anyone who is interested in the various issues which have arisen in this case from the very commencement of it as a matter referred for the hearing of a preliminary point right down to its final conclusion; but whether this case was worthy of the learning and labour bestowed on it is another matter. No doubt it was a tribute to the arguments of learned counsel, which seem to have covered much depth before the learned master.

Before this court learned counsel for the defendant invited us to bring order amongst the various authorities which have prevailed since the passing of the Evidence Act, 1938, but for myself I do not find that task at all attractive or one which it is incumbent on, or desirable for, this court to undertake. The

A matter arises on plain words from an Act and the cases, whilst they serve as a guide, do not call for a general review so as to interpret in different words what is said in the precise words of the section. Therefore I am satisfied to decide this case on one only of the three grounds which were argued before the master.

B The matter came before the court on the pleadings in an action between two plaintiffs, Bearmans, Ltd., and an insurance company, the London and Lancashire Insurance Co., Ltd., and the Receiver for the Metropolitan Police District. The claim is a novel one in such experience as I have had on the Bench and at the Bar, but it may well be that it has ample justification. The first plaintiffs were the owners of a department store in Leytonstone; the second plaintiffs were insurers who paid the first plaintiffs under an insurance policy; and the defendant is the Receiver for the Metropolitan Police District. The claim C arises out of an incident which is set out in the second paragraph of the statement of claim, which embodies material from two documents which have been in controversy in this case. It is alleged that in the afternoon, about 2 p.m., on Sunday, Jan. 12, 1958, four persons together wrongfully entered the department store, overpowered, bound and gagged one Milne, the watchman employed by the first plaintiffs, and by threats put him in fear of bodily harm. They D then broke open the strong-room in the store by means of explosives and stole bank notes, cheques and coins. In other parts of the premises they stole watches and other articles. By reason of those facts the first plaintiffs allege that they suffered a total loss of £8,000 odd. The second plaintiffs had paid some £5,000 for that theft; and for their respective losses these plaintiffs sought to recover damages under the Riot (Damages) Act, 1886. In order to fulfil the require- E ments of that Act there had to be something in the nature of a riot by three or more persons. The defence is a denial of damage. The defendant admits that the plaintiffs made a claim, and relies (1) on certain portions of the Riot (Damages) Act, 1886, in order at any rate to mitigate, if not totally to destroy, any liability which might otherwise arise.

F Substantially, the only evidence which the plaintiffs have to support their claim is the evidence of the watchman, James Milne, who was attacked in the way that has been described. He made two statements, one to the police in the evening some three or four hours after this event on Sunday, Jan. 12, and another on Jan. 22, to Mr. A. J. Hart, a representative of a firm of loss adjusters who were investigating the facts and who had in mind that there was a possibility of a claim over by the insurers and by the first plaintiffs against the Receiver for G the Metropolitan Police District under the Act to which I have referred. A question arose whether those two statements made by James Milne were admissible in evidence under the Evidence Act, 1938, because it was conceded by the plaintiffs that, unless they were evidence under that Act, they could not be brought in evidence at all. Some time after these proceedings were launched, by the time they were getting ready for trial, unfortunately James Milne died. H He could not, therefore, be called as a witness, and everything turned on whether the account which he gave in those two statements could be given in evidence, and made available for the judge to consider whether he could accept what was there stated or not.

I In the judgment the master sets out fully the conclusions which he derived from the evidence which had been given before him, and on that evidence he came to the conclusion that these two statements could clearly be admitted in evidence. It is from that conclusion that this appeal has been brought. The submission has been made that, on the Evidence Act, 1938, itself, and in the light of the cases which have been decided since, the learned master was wrong in reaching that conclusion. On this issue I would be prepared to say that the

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(1) The defendants relied on the provision of s. 2 (1) of the Riot (Damages) Act, 1886, that " in fixing the amount of such compensation regard shall be had to the conduct of the [claimant] . . . as respects the precautions taken by him . . .".

A full and clear judgment of the master is quite sufficient to satisfy me that his findings and his reasons conclude this appeal against the defendant, but it may be desirable that I should add a little to what was said there, in deference to the argument that has been addressed to us.

Section 1 of the Evidence Act, 1938, provides:

B
> "(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied . . . (i) if the maker of the statement . . . (a) had personal knowledge of the matters dealt with by the statement . . ."

C The first condition, which I have just read, is fulfilled here; I need not read the proviso to s. 1 (1). I turn to s. 1 (2), (4) and (5):

> "(2) In any civil proceedings, the court may at any stage of the proceedings . . . order that such a statement . . . shall be admissible as evidence . . . (a) notwithstanding that the maker of the statement is available but is
D not called as a witness; (b) notwithstanding that the original document is not produced . . .
>
> "(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in
E writing as one for the accuracy of which he is responsible.
>
> "(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certi-
F ficate purporting to be the certificate of a registered medical practitioner and where the proceedings are with a jury, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted."

The requirements of those various provisions have admittedly been met.
G But reliance has been placed on sub-s. (3) of s. 1, which is as follows:

> "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

H There is only one other quotation from the Act that I need make because it arises on the argument. Section 2 (1) provides:

> "In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or
I not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts."

Subsection (1) of s. 2 is only relevant because some of the considerations which arise there have to some extent been invoked in the argument under s. 1 (3). They are relevant, after a document has been admitted, in considering what is its value and whether any value at all can be placed on it when it is called in question as evidence in the trial.

A Before this court three questions were raised. It was contended on behalf of the plaintiffs, on this preliminary question which had been ordered to be tried before Master JACOB, that James Milne (that is the watchman) was not "a person interested" within the meaning of s. 1 (3). Secondly, that "proceedings" in the subsection must, in its context, be limited to "civil" proceedings and that no such proceedings were "anticipated" at the relevant time. B Thirdly, that "anticipated" in the subsection must, in its context, be limited to anticipation only by the maker of the statement and that James Milne did not anticipate any civil proceedings at any relevant time. I am prepared to decide this case on the first point; the more difficult questions which arise under the second and third points do not, I think, call for consideration in this present appeal.

C In opening the case learned counsel for the defendant, the appellant, cited to the court every authority on this first question of "a person interested" which has arisen since the Act of 1938 was passed. They show a not altogether uniform view about how the essential provisions of s. 1 (3) should be considered. If I felt that it would be helpful to interpret this subsection by substituting words from the cases or my own words in this court for those of the Act, it might have D been profitable to go through all those cases and see if any such solution could be found; but the more I think of this matter the more I feel satisfied that, whilst the cases can be looked at as a guide, it is desirable in every case that the words of the section should be looked at and interpreted in the light of the particular circumstances. They are about as clear and concise as they can be for consideration, although I recognise that argument can be advanced to E indicate that there is uncertainty—at any rate in a given set of facts—with regard to this or with regard to that.

At the outset, in 1941 MORTON, J., had to consider the Act of 1938 in relation to a tester employed by a company to test certain apparatus, the action (2) being one in regard to passing-off. In the course of his judgment the learned judge found that the witness in question, a Mr. Petrie, the tester, was "a person F interested" at a time when proceedings were pending or anticipated, and he gave the reason why—because he had a special interest in the task which he had to perform and in the light of the circumstances of that case. However, the learned judge also said (3):

> "In the case of a limited company, it would seem clear that every shareholder is a person interested in the success of proceedings brought by the company . . .";

G and he also raised the question (but did not decide it) whether any employee of a company might also be said to be "a person interested". With regard to the employee, at a much later date in this court ASQUITH, L.J., in *Barkway* v. *South Wales Transport Co., Ltd.* (4), dealing there with a man, a tyre-tester, in a somewhat comparable position to the tester in the case before MORTON, J. (2), H found, looking at this provision of the Evidence Act, 1938, that the tyre-tester would be regarded as an interested party because he was a man who had special skill and whose work would be called in question. The learned lord justice added (5), ". . . and, apart from that, he was interested as an employee in his employers winning the case". Those two observations show that in certain circumstances a shareholder, or in other circumstances an ordinary employee, I of a company would be an "interested person" under this section; but other cases that have been decided have distinguished those statements and have not applied them, and in my view that is right. There may be cases where shareholders might clearly be regarded as interested persons but there must be many (and I do not seek to give illustrations) where that would be quite a wrong view to take, and where being a mere shareholder would not involve any interest of any sort which would make a person an " interested person " if proceedings were pending or anticipated in a dispute with the company. Indeed BIRKETT, J., had a case (6) soon after *Barkway* v. *South Wales Transport Co., Ltd.* (7) where he did not follow that part of the statement of ASQUITH, L.J., nor apply it to the facts of the case before him.

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(2) *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248. (3) [1941] 1 All E.R. at p. 314; [1941] Ch. at p. 251.
(4) [1948] 2 All E.R. 460; [1949] 1 K.B. 54.
(5) [1948] 2 All E.R. at p. 473; [1949] 1 K.B. at p. 60.

I do not propose to review all these authorities, which have been covered in great detail in the judgment which is the subject of appeal, or the observations of the master, with which I agree (8). BUCKNILL, L.J., in the case of a collision between two ships—*The Atlantic, The Baltyk* (9)—made a nice and, I think, an appropriate differentiation. There the statements which were in question were statements in three different categories—a statement by the master of the vessel in collision, statements by two engineers, and one by a look-out man. The lord justice, sitting in the Admiralty Court, admitted the statements of the engineer or engineers and the look-out man, but not that of the master. He there, considering this subsection and applying it, differentiated between the interest of a master, who had the control of the ship and might be made personally liable if he was sued—at any rate who had an undoubted interest in maintaining his position and his reputation as a master—and the interests of the makers of the other statements. In another such case (10), reference was made to s. 470 (1) of the Merchant Shipping Act, 1894, which would have applied to the engineers concerned in that case as well as to the master, in the sense that their certificates might be impugned, and BIRKETT, J., there decided that the matter might affect their interest.

In this case there is a dispute as to facts which the statements might tend to establish—that is one necessary finding which is not in dispute here—and when it is conceded, as it can be, that proceedings were pending or anticipated (which is a much more arguable position) then the question is whether the person was " interested ". Assuming that this was to be regarded as a case where proceedings were pending or anticipated, nevertheless I think it is not possible to find that the deponent, James Milne, was " a person interested ".

The argument most advanced on behalf of the defendant was based on the submission that although James Milne was only a watchman, aged seventy-five, nevertheless he had some reputation to maintain and would be likely, therefore, to be interested in maintaining, and in retaining, his good name. As the learned master said, that also to my mind is a very far-fetched argument and it does not commend itself to me any more than it did to the master. Assuming that at the time (and it is an assumption which I am prepared to make for the purpose of this decision) James Milne had in his mind, when he made the first statement to the police at six o'clock on the very day of this incident, that there would be in due time, if they could be apprehended, a prosecution against the men who had attacked him, who had broken into the store and who had blown up the safe, how can it then be said that he was " a person interested " ? He was interested in the sense that, no doubt, he would have liked to see the malefactors who had assaulted him brought to justice, but that cannot be within the meaning of these words; indeed, it was not so suggested. What was suggested was this, that he might have felt that he himself would be under some cloud or suspicion with regard to this matter; and that was pressed on this court as being quite sufficient. Right up to the time the matter came for hearing before the master there had not been a vestige of a suggestion that there was anything against James Milne, the watchman, at all, or that there could be. There was nothing against him at the time when the statement was taken by Mr. Hart on Jan. 22. A The statement was nothing to do with criminal proceedings but was relating to this very civil matter which has developed. At no time was there any suggestion from anybody that he would be implicated in any way on the side of the wrongdoers, but it is said that he must have, or might well have had, that in his own mind. That I do challenge. If this man was innocent, and everything points to it, I cannot think that an innocent man would be apprehensive that somebody B might think that he was guilty.

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(6) *Evon & Evon* v. *Noble*, [1948] 2 All E.R. 987; [1949] 1 K.B. 222.

(7) [1948] 2 All E.R. 460; [1949] 1 K.B. 54.

(8) The relevant passages from the judgment of Master JACOB are printed at p. 395, letter G, et seq., post.

(9) (1946), 62 T.L.R. 461.

(10) *Bain* v. *Moss Hutchison Line, Ltd.*, [1948] 2 All E.R. at p. 296; [1949] 1 K.B. at p. 54.

Taking it shortly, I, too, approach this case on the authorities and on the facts which emerge here as the matter was approached by BARRY, J., in a case which comes somewhere midway in time amongst these various authorities which were cited—not hedging about the definition of the section with any particular cases one way or the other but looking at it in the broad way in which C BARRY, J., did in light of the circumstances which he had in front of him. I refer to *Kelleher* v. *T. Wall & Sons, Ltd.* (11). After hearing the argument the learned judge dealt with it in this way (12):

> ". . . it rests with me to consider, and to consider only, whether on the authorities it can be properly said that at the time when this statement was made, Mr. Atkins was 'a person interested'. I think that it is clear, as was D said by MORTON, J., in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (13) that 'a person interested' means a person who cannot in a true sense be regarded as an independent person. A number of authorities has been cited to me. I do not propose to occupy time by considering them in detail. I am satisfied that some qualification must be placed on the very broad proposition stated by ASQUITH, L.J., in *Barkway* E v. *South Wales Transport Co., Ltd.* (14). In that case, speaking of the maker of the statement, the learned lord justice used these words (15): 'His reputation as a tyre-tester was involved, and, apart from that, he was interested as an employee in his employers winning the case'. The lord justice cited as an authority for the latter part of that proposition *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (13), to which I have F already referred. Having regard to sub-s. (3) of s. 1 of the Act of 1938, I do not think that ASQUITH, L.J.'s words can properly be read as laying down any general proposition that because the maker of the statement is in the employment of one or other of the parties to an action, that fact in itself must necessarily render any statement which he made inadmissible on the ground that he must necessarily be 'a person interested'. With respect, G I agree with what was said by WALLINGTON, J., in *In the Estate of Hill, Braham* v. *Haslewood* (16). WALLINGTON, J., used these words (17): 'It follows . . . that in every case to decide the question of admissibility the facts must be ascertained both as to the person whose statement it is sought to put in evidence, as to the character and subject-matter of the 'proceeding' and as to the relation of the person to the subject-matter of the proceeding'." H

BARNARD, J., applying in a matrimonial cause (18) the same test as WALLINGTON, J., which was better accepted by BARRY, J., as stated above, had to consider whether a mother-in-law was to be regarded as "a person interested". He said that he thought not—that that relationship, giving rise to sentiment and feeling, did not necessarily make a person "interested". But, of course, it may well be that a relation in a certain type of action who is greatly concerned with the I reputation of a member of the family may be " a person interested ". Financial interest, happily, is not the only thing which promotes conduct and concern in our life. There again one cannot lay down any general rule: it must depend on the facts.

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(11) [1958] 2 All E.R. 686; [1958] 2 Q.B. 346.
(12) [1958] 2 All E.R. at p. 687; [1958] 2 Q.B. at p. 351.
(13) [1941] 1 All E.R. at p. 314; [1941] Ch. at p. 251.
(14) [1948] 2 All E.R. 460; [1949] 1 K.B. 54.
(15) [1948] 2 All E.R. at p. 473; [1949] 1 K.B. at p. 60.
(16) [1948] 2 All E.R. 489; [1948] P. 341.
(17) [1948] 2 All E.R. at p. 490; [1948] P. at p. 344.
(18) *Holton* v. *Holton*, [1946] 2 All E.R. 534.

I hope that I have not said anything in any way to make the relevant law more involved. I have sought to simplify it by relating the facts of this case to the provisions in s. 1 (3), without substituting other words for the words of the Evidence Act, 1938, itself. I so entirely agree with the conclusions and the reasoning of Master JACOB (19) on this first question that I am prepared to accept them, and I would dismiss this appeal on those grounds.

DEVLIN, L.J.: I entertain no doubt at all that the judgment of Master JACOB (19) is right. If the authorities cited in this court are stretched to snapping-point, they still cannot cover the submission which counsel for the defendant has made to us in this case. The furthest that they go is to say that where a person's reputation may be involved in the outcome of a case, that person is " interested " in the result of the proceeding within the meaning of the Evidence Act, 1938. But something definite must be suggested to the court. In this case counsel for the defendant really has been reduced to arguing that if he had the opportunity of cross-examining the dead man it might be that acute cross-examination could reveal some apprehension in his mind that might have coloured his statement.

That is sufficient to dispose of the issue in this case; but because the very careful judgment of the learned master goes through all the authorities and because we have been through them again in detail in the course of the argument, it is perhaps not improper that I should express, respectfully, my surprise that some of them go as far as they do.

Section 1 (3) of the Act of 1938 to be construed has been read by my Lord, and it depends on the meaning of the word " interested ". This is not one of those cases in which one can simply endeavour to ascertain the natural and popular meaning of a word and trouble no further once that is ascertained. The word " interest " is not a word which has any well-defined meaning, and anybody who was asked what it meant would at once want to know the context in which it was used before he could venture an opinion. It may mean a direct financial interest on the one hand, or on the other hand it may mean nothing more than the ordinary human interest which everybody has in the outcome of proceedings in which he is likely to be a witness. Just as in ordinary speech one would require to know the context, so in construing the word in an Act of Parliament it is essential—more necessary in this case than in most—to look at the scope and purpose of the Act; and I think that if one does that one will be led to the conclusion that sub-s. (3) is to be given a narrow rather than a broad meaning.

There are three things in the other provisions of the Act of 1938 which point to that. The first of them is that this subsection is dealing only with the admissibility of evidence and not with the weight. That is a matter that was pointed out by SIR RAYMOND EVERSHED, M.R., in *Jarman* v. *Lambert & Cooke (Contractors), Ltd.* (20), in the light of s. 2 (1). The marginal note to s. 2 is: " Weight to be attached to evidence "; and sub-s. (1) provides that regard shall be had, among other things, ". . . to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts ". Clearly, therefore, the Evidence Act, 1938, contemplates that a statement in which the maker had an incentive to conceal or misrepresent facts may pass the test of sub-s. (3). I do not think that the two subsections are to be put in complete contrast so that it can be said that every statement that has any weight ought to be admitted under sub-s. (3). I do not think that it can be said that the test in

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(19) The relevant passages in the judgment of Master JACOB are set out at p. 395, letter G, et seq., post.

(20) [1951] 2 All E.R. at p. 257; [1951] 2 K.B. at p. 940.

sub-s. (3) is as ruthless as the ordinary test of inadmissibility, namely, that it is A
presumed to be worth nothing at all and to have no weight that can be attached to it. I do not think that the subsections are in contrast in that way. It is reasonable to think that one reason for s. 2 (1) is so that the judge will still take care to give no more than its proper weight to any statement that has been admitted under sub-s. (3)—perhaps before all the circumstances were fully known. Again there may be cases (junior counsel for the defendant gave an B
example of one of them in his submission) in which a statement is properly admitted under sub-s. (3) and yet the maker of it has an incentive to conceal or misrepresent facts. The two subsections do show that the Act is drawing a distinction—a broad distinction—between admissibility and weight; and that weight is primarily for the judge at the trial and you have not to enter into a nice calculation when considering whether the statement should be admitted C
under sub-s. (3). That is the first point.

The second point (and this is a point to which the learned master has usefully called attention) is that the test which is applied under sub-s. (3) is the same test (and it allows no room for discretion) that has to be applied whether the maker of the statement is or is not called as a witness in the proceedings. Master JACOB very usefully drew attention to that and pointed out an error that runs D
through some of the cases in which it seems to be assumed that no cross-examination of the maker of the statement will be possible. In fact the main object of the Act of 1938 is to admit contemporaneous documents that are made by a witness who is actually called. It is only by way of a proviso that s. 1 goes on to say that the condition that the maker of the statement shall be actually called need not be satisfied in certain circumstances. The test is the same in both E
cases. Perhaps that is a pity. I think that most judges would be much more careful about admitting a statement made by a witness who is not going to be called than they would be in admitting a document that is produced by a witness who is actually in the box and about which he can be cross-examined. But there it is—the test is the same; and if one were to apply, for example, the requirement as it was formulated in *Evon & Evon* v. *Noble* (21), that a person F
who is not " interested " is to be somebody who must be " completely detached, judicial, and impartial " and independent, it is plain that one is dealing with a very rare type of witness indeed. I cannot imagine that an objection to the ordinary witness producing a report that he made at the time concerning matters about which he is speaking orally—a report which may be much more valuable to the court, because made at the time and reduced into writing, than the oral G
evidence which he is giving months or years thereafter—would be upheld unless the witness could satisfy the court that he was completely detached, judicial, impartial and independent.

The third point to bear in mind is that the test has to be applied on the assumption that the case is going to be heard by a judge alone. That seems to me to be very important, because it is said rightly that the Evidence Act, 1938, represents H
a relaxation of the ordinary rules of evidence. The justification that is generally advanced for many of these rules is that they were made at a time when all issues of fact were determined by jury. It is extremely difficult for a jury to give the same attention to considerations of weight that a judge does. It comes easily to a judge to say—" I must be careful about accepting this because after all the witness is not speaking on oath; he has not been cross-examined; I do not know I
the circumstances in which the statement was taken " and so forth. Those considerations do not come so easily to a jury; and because of the difficulty that a jury has in distinguishing between various grades of weight, the common law thought it wiser to exclude much evidence, such as hearsay, altogether. I cannot see why these considerations should any longer apply to matters that are being determined by a judge alone.

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(21) [1948] 2 All E.R. at p. 989; [1949] 1 K.B. at p. 225.

I say that the test to be applied should be on the basis that the case is to be determined by a judge alone because sub-s. (5) of s. 1 expressly provides that

> "... where the proceedings are with a jury, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted."

That allows ample scope for a statement to be excluded if it is felt that a jury might, however well directed, attach undue weight to it. As I say, no such consideration would apply to a judge. The Act, after all, was passed in order to aid in the administration of justice; and I think most judges would say that if a choice fell between dismissing a plaintiff without a remedy because unfortunately a vital witness had died and looking at the statement for what it was worth, he would much rather look at the statement for what it was worth and determine the matter accordingly. I should, therefore, respectfully agree with and desire to adopt the dictum of DENNING, L.J., in *Jarman* v. *Lambert & Cooke (Contractors), Ltd.* (22) (to which case I have already referred), in which he says that it is desirable that the Act should be given a liberal interpretation.

I should like to make some reference to the decision of MORTON, J., in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (23). Because it was the first of the decisions on the meaning of this subsection and because of the great weight that must inevitably attach to anything said by MORTON, J., it has been taken as something of a standard to be followed in the succeeding cases. It may be that some or all of what MORTON, J., there said has been approved in this court, and if it be so then I am subject to authority. However, if not compelled by authority to hold otherwise, I should say, with great respect, that the test suggested by MORTON, J., is too wide. He says (24):

> "It seems to me that a useful test, though perhaps not the only test, is whether it was better for Petrie that the plaintiff company should succeed in the present action or whether it was a matter of indifference to him?"

He goes on to give examples (and indeed one of them is the basis for his decision) as to what is meant by something being "better" for the witness. Of Mr. Petrie, he said (25) that a man

> "... whose employment consists of testing the Plomien fuel economiser must be benefited the more the plaintiff company prospers and the more the fuel economisers are sold by that company and are tested by him ... The amount of his work is increased, and I suppose that it is reasonable to infer that his importance to the company is increased, and possibly in time, if not immediately, his remuneration might be increased."

He goes on to give another example (not the one on which the case turned) of a way in which it might be better for the witness when he said (25):

> "In the case of a limited company, it would seem clear that every shareholder is a person interested in the success of proceedings brought by the company ..."

I have ventured far enough in offering any criticism of what MORTON, J., has said. I shall not venture to lay down any test in substitution for it. As my Lord has said, it depends on the words of the Act of 1938, which really cannot be much improved on. However, I would suggest this negative approach: that no witness ought to be held to be "a person interested" on a ground which would not be taken into consideration as affecting the weight of his evidence if he were actually called in court. It is unlikely that any counsel would submit

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(22) [1951] 2 All E.R. at p. 261; [1951] 2 K.B. at p. 947.
(23) [1941] 1 All E.R. 311; [1941] Ch. 248.
(24) [1941] 1 All E.R. at p. 313; [1941] Ch. at p. 250.
(25) [1941] 1 All E.R. at p. 314; [1941] Ch. at p. 251.

A to a judge that a witness ought to have less weight attached to his evidence because he was a small shareholder in a large company and the company was one of the parties to the case. That sort of thing is not even held to disqualify a judge from judging the action, let alone a witness from giving evidence. Likewise, I cannot think that if a judge is told that a servant of the company might have a prospect of having his wages increased sooner or later if the action succeeded—not just because the action succeeded but because the success of the B action contributed to the prosperity of the company—that is likely to affect his assessment of the value of the evidence.

I agree that the appeal should be dismissed.

SLADE, J.: I agree. When, in civil proceedings, it is sought to adduce in evidence a document containing a statement which complies with the require- C ments of s. 1 (1) of the Evidence Act, 1938, the judge is generally called on to decide whether the document is rendered inadmissible by reason of the provisions of s. 1 (3). I do not think that I can give any assistance in construing that subsection; but I would like to suggest a test for applying it. The subsection seems to me to involve a similar inquiry to that which arises in the so-called " bias " cases. It is now well settled that, to disqualify a person from D acting in a judicial or quasi-judicial capacity on the ground of interest, other than pecuniary or proprietary interest, a " real likelihood of bias " must be shown (see *R.* v. *Camborne JJ., Ex p. Pearce* (26)). I suggest that a similar test might well be applied in deciding whether a document complying with the provisions of sub-s. (1) is disqualified by " interest " within the meaning of sub-s. (3).

E The question that I would ask myself in the present case is this: Was the part taken by James Milne in the events of Jan. 12, 1958, at Bearmans departmental store, such as to suggest the existence of a real likelihood that he had some motive to misrepresent the facts? If the answer were " Yes ", I think that his statements would be inadmissible. If the answer were " No ", then, since his statements would admittedly comply with the requirements of F sub-s. (1), I think they would be admissible. I answer the question in this case " No ", and I agree, therefore, with my Lords, and with the learned master, that both statements are admissible.

I should like in conclusion to acknowledge the great care which the master took in the judgment which he prepared and of which we have had the advantage.

Counsel for the defendant applied for leave to appeal to the House of Lords. G

SELLERS, L.J.: The master has directed himself properly. This court has approved his direction; and it is a question of what are the facts in relation to that direction. In so far as it is a matter of fact, and I think that it very largely is, there are concurrent findings. We think that the facts do not really permit you to raise the points of law as you wish to raise them. We do not give leave. H

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Crawley, Arnold, Ellis & Ellis* (for the defendant); *Berrymans* (for the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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NOTE.

The following is an extract from the judgment of Master JACOB, on Sept. 27, 1960, on the question whether the night watchman, James Milne, was " a person interested " within s. 1 (3) of the Evidence Act, 1938.

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(26) [1954] 2 All E.R. 850; [1955] 1 Q.B. 41.

Cases referred to:

Atlantic, The, Baltyk, The, (1946), 62 T.L.R. 461; 2nd Digest Supp.

Bain v. *Moss Hutchison Line, Ltd.*, [1948] 2 All E.R. 294; [1949] 1 K.B. 51; [1948] L.J.R. 1918; 22 Digest (Repl.) 245, *2421*.

Barkway v. *South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460; [1949] 1 K.B. 54; [1948] L.J.R. 1921; *revsd. on other grounds*, H.L., [1950] 1 All E.R. 392; [1950] A.C. 185; 22 Digest (Repl.) 245, *2418*.

Cartwright v. *W. Richardson & Co., Ltd.*, [1955] 1 All E.R. 742; [1955] 1 W.L.R. 340; 3rd Digest Supp.

Evon & Evon v. *Noble*, [1948] 2 All E.R. 987; [1949] 1 K.B. 222; [1949] L.J.R. 835; 22 Digest (Repl.) 245, *2425*.

Friend v. *Wallman*, [1946] 2 All E.R. 237; [1946] K.B. 493; 115 L.J.K.B. 489; 175 L.T. 147; 22 Digest (Repl.) 245, *2426*.

Galler v. *Galler*, [1955] 1 All E.R. 792; [1955] 1 W.L.R. 400; 3rd Digest Supp.

Hill, In the Estate of, Braham v. *Haslewood*, [1948] 2 All E.R. 489; [1948] P. 341; [1948] L.J.R. 1634; 22 Digest (Repl.) 245, *2423*.

Holton v. *Holton*, [1946] 2 All E.R. 534; 176 L.T. 186; 22 Digest (Repl.) 245, *2420*.

Infields, Ltd. v. *Rosen*, [1939] 1 All E.R. 121; 108 L.J.Ch. 163; 22 Digest (Repl.) 243, *2408*.

Jarman v. *Lambert & Cooke (Contractors), Ltd.*, [1951] 2 All E.R. 255; [1951] 2 K.B. 937; 22 Digest (Repl.) 244, *2413*.

Kelleher v. *T. Wall & Sons, Ltd.*, [1958] 2 All E.R. 686; [1958] 2 Q.B. 346; [1958] 3 W.L.R. 236; 3rd Digest Supp.

Manser v. *London Passenger Transport Board*, [1948] W.N. 206; 22 Digest (Repl.) 245, *2424*.

Ozzard-Low v. *Ozzard-Low & Wonham*, [1953] 2 All E.R. 550; [1953] P. 272; [1953] 3 W.L.R. 374; 3rd Digest Supp.

Plomien Fuel Economiser Co., Ltd. v. *National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248; 110 L.J.Ch. 180; 165 L.T. 119; 22 Digest (Repl.) 245, *2419*.

Powe, Re, Powe v. *Barclays Bank, Ltd.*, [1955] 3 All E.R. 448; [1956] P. 110; [1955] 3 W.L.R. 767; 3rd Digest Supp.

F. H. Lawton, Q.C., and *Hugh Griffiths* for the plaintiffs.

Neville Faulks, Q.C., and *P. G. S. Hurst* for the defendant.

MASTER JACOB, having reviewed the evidence and reached findings of fact, continued: The first question which arises is whether or not James Milne was " a person interested " within the meaning of s. 1 (3) of the Evidence Act, 1938. The Act does not define the meaning of the word " interested ", and the cases so far decided under this subsection, while clearly laying down that an interest of a particular character or quality does or does not come within the subsection, do not seek to cover all the circumstances in which such an interest may or may not be said to exist. The question has to be considered in each particular case, and in relation to each particular statement tendered as evidence under the Act, in the light of the particular circumstances of the case relating to that statement. The authorities, however, do clearly establish, in my view, that, to be " a person interested " within the meaning of the subsection, the maker of the statement must be personally interested in the result of the proceedings. In *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (1), which was the first case in which these words were considered, MORTON, J., said (2):

> " In my view, ' a person interested ' within the meaning of this section must, in the context, mean a person interested in the result of the proceedings ' pending or anticipated '. It seems to me that a useful test, though

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(1) [1941] 1 All E.R. 311; [1941] Ch. 248.

(2) [1941] 1 All E.R. at p. 313; [1941] Ch. at p. 250.

> perhaps not the only test, is whether it was better for Petrie [the maker of the statement tendered as evidence] that the plaintiff company should succeed in the present action or whether it was a matter of indifference to him."

In *Friend* v. *Wallman* (3), SOMERVELL, L.J., delivering the judgment of the Court of Appeal, said: " 'Interested' clearly means personally interested in the result of the proceedings ". See also per WALLINGTON, J., in *In the Estate of Hill, Braham* v. *Haslewood* (4), and per ASQUITH, L.J., in *Barkway* v. *South Wales Transport Co., Ltd.* (5).

On this point, therefore, the decisive question which I have to ask myself is whether or not at the time of making the two statements A and B (6) and in the circumstances of this particular case, James Milne was personally interested in the result of the proceedings. For this purpose, an interest which is no more than that of a mere witness (e.g., a bystander witnessing an accident, as in *Friend* v. *Wallman* (7), and see particularly the intervention of SOMERVELL, L.J., in the argument (8)), or which is no more than that of an emotional, spiritual or sympathetic character, as, for example, that of the mother of a petitioner in divorce proceedings (as in *Holton* v. *Holton* (9), and see per WALLINGTON, J., in *In the Estate of Hill* (10)), is not sufficient in itself to make a person " interested " within the subsection. Moreover, the mere fact that the maker of the statement tendered is in the employment of a party to the action does not by itself make him " a person interested " in proceedings within the subsection: see *Kelleher* v. *T. Wall & Sons, Ltd.* (11).

On the other hand, if the maker of the statement has, or can properly be considered as having, any financial or pecuniary interest, whether direct or indirect, or whether to be gained or lost, in the outcome of the proceedings, he is " a person interested " within the subsection: see *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (12); although a merely contingent prospect of financial gain is not enough: see *Re Powe, Powe* v. *Barclays Bank, Ltd.* (13). Indeed, counsel for the plaintiffs sought to argue that it is only an interest of this character that could render the maker of a statement " a person interested " within the subsection. He submitted that, when construing the subsection, the court should carefully examine the words used and give to them their ordinary and natural meaning in the context in which they are used, and that, in the case of any doubt about the meaning of any word, the court should construe the word against the background of the law of evidence immediately before the passing of the Act. He pointed out that the word " interest " was not unknown to the law of evidence before the Act of 1938, as for example, in relation to the admissibility of declarations against interest made by deceased persons, and he contended that the same meaning should be given to the word " interested " in s. 1 (3) of the Act of 1938 as is given to the word at common law in relation to such declarations, namely, that the interest involved must be pecuniary or proprietary: see PHIPSON ON EVIDENCE (9th Edn.), at p. 292. Indeed, he could have pointed out further that the word " interest " was first used in an Act dealing with the law of evidence as long ago as 1843, when by s. 1 of the Evidence Act, 1843, the incapacity of interested witnesses from giving evidence in civil cases was removed. While, of course, the old law and the old decisions may afford assistance as to the meaning of the word "interested" in s. 1 (3) of the Evidence Act, 1938 (see per Sachs, J., in *Re Powe* (14)), it has to be remembered, as was pointed out by Professor G. D. Nokes in a contribution to 21 Modern Law Review (1958), at p. 669, that, in relation to the rules of evidence at common law, there were four types of interest which were not necessarily identical. See also Phipson on Evidence (9th Edn.), at p. 286. I think, therefore, that the old law as to the meaning of the word "interest" is not a safe or sure guide. There is no reason why, looking at the word "interested" in s. 1 (3) of the Act of 1938, its meaning should be limited to an interest of a financial, pecuniary or proprietary character. As counsel for the defendant pointed out, interest can be of a general nature. I therefore cannot agree with the submissions of counsel for the plaintiffs. At any rate, so far as I am concerned, the point is concluded by a number of decisions which clearly lay it down that the maker of a statement may be "a person interested" within the subsection, though he may have no financial, pecuniary or proprietary interest in the proceedings: see per Wallington, J., in *In the Estate of Hill* (15), *Bain* v. *Moss Hutchison Line, Ltd.* (16), *Evon & Evon* v. *Noble* (17), *Cartwright* v. *W. Richardson & Co., Ltd.* (18) and *Kelleher* v. *T. Wall & Sons, Ltd.* (19).

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(3) [1946] 2 All E.R. at p. 240; [1946] K.B. at p. 500.

(4) [1948] 2 All E.R. at pp. 489, 490; [1948] P. at pp. 342, 344.

(5) [1948] 2 All E.R. at p. 473; [1949] 1 K.B. at p. 60.

(6) Statement A was the statement in writing made and signed by James Milne on Jan. 22, 1958, and statement B was the written statement made and signed by him on Jan. 12, 1958 (see p. 386, letter F, ante).

(7) [1946] 2 All E.R. 237; [1946] K.B. 493.

(8) [1946] K.B. at p. 497.

(9) [1946] 2 All E.R. 534.

(10) [1948] 2 All E.R. at p. 491; [1948] P. at p. 345.

(11) [1958] 2 All E.R. at pp. 687, 688; [1958] 2 Q.B. at pp. 351, 352.

(12) [1941] 1 All E.R. 311; [1941] Ch. 248.

(13) [1955] 3 All E.R. 448; [1956] P. 110.

Applying the above decisions to the present case, I do not think that James Milne was "a person interested" in the result of these proceedings at the time when he made statements A and B or, indeed, at any time. He was, I think, no more than a mere witness of the events which he related in these statements. He did not take part in these events, except as an involuntary victim. He had no financial, pecuniary or proprietary interest of any kind in the outcome of these proceedings. Counsel for the defendant did at one time faintly suggest that, as James Milne's wages were not very high, he might have hoped for some betterment if the plaintiffs succeeded, but counsel quite properly did not pursue this point and I find no evidence to support it. I do not think that James Milne had any possible advantage to gain by making these statements. If he had heard about this action, I think that it would have been quite likely and, indeed, natural that he would have hoped and wished that his employers should succeed, and he would have been sorry if they lost, though he may have wondered how the insurers came into this action and may not have cared quite as much about their fate. Apart from such hope and sympathy, I think that, applying the test laid down by Morton, J., in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (20), the success or failure of the plaintiffs in this action was a matter of complete indifference to James Milne.

One other way in which the maker of a statement, other than a party, may be "a person interested" in the outcome of the litigation arises when the result of the action may render him personally liable for the events being litigated, not because he would be directly bound by the judgment in the action, for, of course, he would not be, but because such judgment would tend to establish his liability. Thus, in *The Atlantic, The Baltyk* (21), which was an action arising out of a collision involving the two defendant ships, statements made by the master, two engineers and the look-out man of the Atlantic were tendered under the Evidence Act, 1938. Bucknill, L.J. (sitting as an additional judge) admitted the statements of the engineers and the look-out man on the ground that they were not interested persons, but he rejected the statement of the master, on the ground that, as master of the ship and in charge of her navigation before the collision, he might be personally liable for damage to the plaintiff ship (the

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(14) [1955] 3 All E.R. at p. 450; [1956] P. at p. 114.

(15) [1948] 2 All E.R. at p. 491; [1948] P. at p. 345.

(16) [1948] 2 All E.R. 294; [1949] 1 K.B. 51.

(17) [1948] 2 All E.R. 987; [1949] 1 K.B. 222.

(18) [1955] 1 All E.R. 742.

(19) [1958] 2 All E.R. 686; [1958] 2 Q.B. 346.

(20) [1941] 1 All E.R. at p. 313; [1941] Ch. at p. 250.

(21) (1946), 62 T.L.R. 461.

Sutlej) caused by his negligence, if established. It is, I think, on the basis of this principle that the decision in *Bain* v. *Moss Hutchison Line, Ltd.* (22) should be regarded. In that case, the claim arose out of the death of the purser of a ship who was trapped in his cabin next to the saloon in which a fire broke out and who died as a consequence of the fire. The allegations made by the plaintiff blamed those in charge of the ship for failure to provide proper equipment, alarms and drills in case of fire on board. At the trial, statements made by the master and the second and third officers were tendered under the Evidence Act, 1938, but BIRKETT, J., rejected not only the statement of the master, as in *The Atlantic, The Baltyk* (23), but the statements of the two officers as well. The learned judge referred in his judgment to a number of cases, including *The Atlantic, The Baltyk* (23), and then referred to s. 470 of the Merchant Shipping Act, 1894, under which the certificate of a master, mate or engineer may be cancelled or suspended if it should be found by a court held under that Act that serious damage to any ship or loss of life has been caused by his wrongful act or default or that he was incompetent or has been guilty of any gross act of misconduct. With that Act and those provisions clearly in mind, the learned judge held that, although the master and the two officers had no financial or pecuniary interest in the direct sense at all, they were all personally interested in the result of the action " because ", as he said (24), " of its nature and because of the allegations made ". It is difficult at first sight to see the reason for the distinction between the admission of the statements of the engineers and the look-out man in *The Atlantic, The Baltyk* (23) and the rejection of the statements of the two officers in *Bain's* case (22), but I think that the cases are to be reconciled on the ground that in *Bain's* case (22) the learned judge's view must have been that the two officers might have incurred a personal liability for the events which were the subject of the action.

The same principle, I think, governs the decision by the same learned judge in *Evon & Evon* v. *Noble* (25), where the pleadings are more fully reported. In that case, a nursemaid was left in charge of children, one of whom was injured while playing with a rubber tube from a carboy of acid in a shed at the rear of a chemist's shop. The defendant alleged that the child was a trespasser. At the trial, a statement made by the nursemaid, who could not then be found, was tendered under the Evidence Act, 1938. BIRKETT, J., rejected it on the ground, as he said (26), that she

> " . . . was a ' person interested ' in that she had been left in charge of this child. The child's safety was her peculiar care, and in that sense her reputation was involved in the result of the action."

It is plain that the result of the action might have made her personally liable for negligence in failing to look after the injured child with due and proper care and attention, and, on this basis, the decision is in line with the principle on which the master's statement in *The Atlantic, The Baltyk* (23) was rejected.

Can it be said in the present case that there was at any time any risk that James Milne might be rendered personally liable for the loss or damage arising out of the robbery on Jan. 12, 1958? I find it impossible so to hold. The pleadings in this action do not raise any issue about Bearmans, Ltd. or James Milne being a party or accessory to the riot, which could have been raised under s. 2 (1) of the Riot (Damages) Act, 1886, to extinguish or diminish the amount of compensation, and counsel for the defendant quite properly said that he had no instructions to raise any such issue or to make any such allegations, and that he did not do so. In so far as the defendant alleges, under s. 2 (1) of the Riot

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(22) [1948] 2 All E.R. 294; [1949] 1 K.B. 51.

(23) (1946). 62 T.L.R. 461.

(24) [1948] 2 All E.R. at p. 296; [1949] 1 K.B. at p. 54.

(25) [1948] 2 All E.R. 987; [1949] 1 K.B. 222.

(26) [1948] 2 All E.R. at p. 990; [1949] 1 K.B. at p. 226.

(Damages) Act, 1886, that Bearmans, Ltd. failed to take precautions, the further and better particulars of this allegation delivered by the defendant make it plain that such failure is alleged only on the part of Bearmans, Ltd. themselves and that no allegation is made of any negligence or want of care on the part of James Milne. I think, therefore, that the result of this action could in no way establish any personal liability on the part of James Milne, and such a question would not arise even for the consideration of the trial judge.

One further way in which the maker of a statement, other than a party, may be "a person interested" within s. 1 (3) of the Act of 1938 is where the skill, competence or conduct of the maker in relation to the events being litigated, or his association with such events, could arise for investigation in the action, and the result of the action would, or even might, reflect, whether favourably or unfavourably, on him. This principle is, I think, to be deduced from the authorities and the reason is that in such circumstances the maker of the statement has a personal interest in the outcome of the litigation. Thus, in *Barkway* v. *South Wales Transport Co., Ltd.* (27), which was an action concerning the bursting of a tyre, the tyre-tester was held to be a person interested in the result of the action, on the ground, as ASQUITH, L.J., said (28), that his reputation as a tyre-tester was involved. Again, in *Cartwright* v. *W. Richardson & Co., Ltd.* (29), which was an action by a chargehand who was injured while he was engaged in lowering a heavy tank into a pit by means of a winch, it was held that the assistant brakesman on the winch was so closely associated with the work being carried out that he was "a person interested" in the result of the action. So, again, in *Kelleher* v. *T. Wall & Sons, Ltd.* (30), which was an action by a chargehand who was injured while working in the production shop of a factory, the supervisor of the production shop, who was responsible to some extent for the system of work adopted and the general run of production in it, was held to be so closely associated with the management of that department as to be "a person interested" in the result of the action. See also *Manser* v. *London Passenger Transport Board* (31), which, incidentally, is cited in PHIPSON ON EVIDENCE (9th Edn.), at p. 287, for the opposite of that which it decides. If this principle is right, it is difficult to see, if I may say so with great respect, on what ground the statement of the woman charged in the pleadings with misconduct, but not amounting to adultery, was admitted in *Galler* v. *Galler* (32).

Counsel for the plaintiffs, in his argument, sought to limit the above principle only to the case where the pleadings in the action raised an issue as to the skill, competence or conduct of the maker of the statement or his association with the events being litigated. I do not think that the authorities support this contention, and I do not agree with it. An interest of this character may exist in the maker of a statement, without any mention of him being made in the pleadings. If the maker of a statement is implicated in the events being litigated, he is a person interested in the outcome of the litigation. In each case, the court has to ascertain and examine the circumstances mentioned by WALLINGTON, J., in *In the Estate of Hill* (33), and in the light of those circumstances to decide whether the maker of the statement tendered has an interest of this character, regard of course being had to the issues and allegations made in the pleadings.

In the present case, the court will, at the trial, have to investigate, among other things, the circumstances of the robbery and the precautions which Bearmans, Ltd. took or should have taken to prevent the robbery or to minimise their loss. As far as concerns James Milne's part in the robbery, I have already described this as that of an involuntary victim. It could be described also as that of an unwilling participant, or as that of an enforced spectator to the extent, at any rate, that he was allowed to see what was going on. His role was at any rate entirely passive. While, of course, the relevant time to look at for deciding whether he was "a person interested" is the time at which he made statements A and B, I think that I am entitled to look at the events which have taken place subsequently, since they may help to throw some light on the question whether he had any interest in the result of proceedings at the relevant time: see per SIR RAYMOND EVERSHED, M.R., in *Jarman* v. *Lambert & Cooke (Contractors), Ltd.* (34). No one has suggested either in the present case or at any time since the robbery took place that James Milne had anything to do with the robbery or that he could have done or omitted to do anything to prevent its taking place or continuing. The police never came back to question him about the robbery or his part in it, or about the statement which he had made to them. On the evidence before me, no one has ever blamed him for the robbery or complained of his skill, competence or conduct in relation to the robbery; on the contrary, after the robbery he went back and continued to work for Bearmans, Ltd. as a watchman until he died. In all the circumstances, I do not see how the skill or competence or conduct of James Milne or his association with the robbery can in any way arise for investigation at the trial or how the result of the action can in any way reflect on him, and I find that he had no interest of this kind or character in the result of the action.

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(27) [1948] 2 All E.R. 460; [1949] 1 K.B. 54.

(28) [1948] 2 All E.R. at p. 473; [1949] 1 K.B. at p. 60.

(29) [1955] 1 All E.R. 742.

(30) [1958] 2 All E.R. 686; [1958] 2 Q.B. 346.

(31) [1948] W.N. 206.

(32) [1955] 1 All E.R. 792.

(33) [1948] 2 All E.R. at p. 490; [1948] P. at p. 344.

The main ground, however, on which counsel for the defendant contended before me that James Milne was "a person interested" under s. 1 (3) was that he was not an independent person. In an attractive argument developed with much force and persuasiveness, counsel submitted that, in the circumstances of this case, the reputation of James Milne as a watchman was at stake and that, therefore, he could not be regarded in the ordinary sense of the term as an independent person. Counsel argued that, although he had made no allegations against James Milne in the pleadings, for he could not properly do so without instructions, and there were none, nevertheless James Milne could have been attacked in cross-examination, which was a course not now open to the defendant. It could, for example, said counsel, have been suggested to James Milne in cross-examination that he was asleep at his post, that he was idle, careless, did not do his job properly, that he was not diligent or competent, or, at worst, that the robbery was, as it is called, an "inside job", that he was a party to the crime and in league with the robbers. Counsel pointed out, and Mr. Hadlow (the immediate superior of James Milne) agreed with him, that it was very important for James Milne to clear his reputation so that no one should suggest anything dreadful about him; although counsel made it clear beyond peradventure that he was in fact making no accusation of this kind against James Milne. He graphically urged, however, that to have the trial of this action without James Milne being there to be cross-examined would be like enacting "Hamlet" without the Prince of Denmark. He insisted that, especially as the defendant could not put forward a different version of the account of the robbery from that given by James Milne, he could not conduct his case without going into James Milne's character and reputation with a view to discrediting him in cross-examination, so that the trial judge should not accept, or even should reject, his evidence.

This submission appears at first sight to be somewhat similar to the principle which I have dealt with, namely, that a person may have an interest in the result of proceedings if his skill, competence or conduct in relation to the events being litigated, or his association with them, is called in question. In the course of the arguments of counsel, these two approaches were inclined to run across each other, but I think that they are quite separate and distinct points and that they require to be dealt with separately. At any rate, it was this submission which counsel for the defendant developed in the forefront of his argument.

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(34) [1951] 2 All E.R. at p. 258; [1951] 2 K.B. at p. 942.

Counsel cited a number of authorities in support of two propositions which are themselves related, namely, (a) that "a person interested", within s. 1 (3), means a person who is not independent; and (b) that the maker of a statement is "a person interested" within the subsection if his reputation is at stake. In support of the first of these propositions he cited, first, the observations of MORTON, J., in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (35), where the learned judge said:

> "... I think that the general intention of the section is that, if a statement is put in as evidence, to which, of course, no cross-examination can be directed, it should be either a statement made at a time when proceedings are not pending or anticipated involving a dispute as to any fact which the statement might tend to establish or a statement made by what I may perhaps conveniently describe as an independent person."

Counsel next cited the observations of BIRKETT, J., in *Evon & Evon* v. *Noble* (36), where, after quoting the passage which I have just read from the judgment of MORTON, J., in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (35), the learned judge said (36):

> "That reasoning commends itself to me, because one of the great advantages of the trials of actions in our courts is cross-examination. If a party in a dispute is to have a statement put in by the other side to which no cross-examination can be directed, obviously that party labours under a great disability, and, therefore ... it must always be kept in mind that there can be no cross-examination on a statement so admitted, and it is imperative that the statement must be made by an independent person. I suppose that that really means a person who has no temptation to depart from the truth on one side or the other—a person not swayed by personal interest, but completely detached, judicial, and impartial."

Finally, counsel for the defendant cited these observations of BARRY, J., in *Kelleher* v. *T. Wall & Sons, Ltd.* (37):

> "I think that it is clear, as was said by MORTON, J., in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (35), that 'a person interested' means a person who cannot in a true sense be regarded as an independent person."

In *In the Estate of Hill* (38) WALLINGTON, J., said that by the words "independent person" he understood MORTON, J., to mean a person who is not interested in the result of the proceedings; and that is how, I think, BIRKETT, J., himself understood these words in *Bain* v. *Moss Hutchison Line, Ltd.* (39). If this is right, as I respectfully think that it is, it follows that the two phrases "independent person" and "person interested" have, in fact, precisely the same meaning, except that one has a positive and the other a negative aspect, namely, a person who is or is not personally interested in the result of proceedings, and, therefore, these two phrases can be used as substitutes or alternatives one for the other, subject to the addition of the appropriate negative. Indeed, this identity of meaning of these two phrases must be right, for otherwise, if "independent person" has a different meaning, its use in describing "a person interested" under s. 1 (3) would be contrary to the decision of the Court of Appeal in *Friend* v. *Wallman* (40). It should be emphasised that MORTON, J., used this phrase only as a convenient description, and that he did not mean to give it a separate and independent life of its own with a meaning different from the meaning of

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(35) [1941] 1 All E.R. at p. 314; [1941] Ch. at p. 251.
(36) [1948] 2 All E.R. at p. 989; [1949] 1 K.B. at p. 225.
(37) [1958] 2 All E.R. at p. 687; [1958] 2 Q.B. at p. 351.
(38) [1948] 2 All E.R. at p. 490; [1948] P. at p. 344.
(39) [1948] 2 All E.R. at p. 296; [1949] 1 K.B. at p. 53.
(40) [1946] 2 All E.R. 237; [1946] K.B. 493.

A the words "person interested", which he himself had just decided meant an interest in the result of the proceedings. I think also that BARRY, J., in *Kelleher v. T. Wall & Sons, Ltd.* (41) used these words in this sense only, as is shown by his reference to "in a true sense . . . an independent person". It is worthy of mention that, in his earlier judgment in *Cartwright* v. *W. Richardson & Co., Ltd.* (42), BARRY, J., did not use the term "independent person" at all.

B On the other hand, the use of the substitute term "independent person" for "a person interested" does not advance the matter much further, but, on the contrary, may possibly create unnecessary difficulties. It postulates a different concept and gives a different starting point to the problem to be solved which may well lead along an unexpected trail to an unforeseen conclusion. The observations of BIRKETT, J., in *Evon & Evon* v. *Noble* (43) provide such an example. C But, with great respect, those observations overlook two significant facts which destroy their reasoning. The first fact overlooked is that, contrary to the assumption made in those observations, as well as in the observations of MORTON, J., in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (44), it is a condition precedent for the admissibility of a statement under s. 1 (1) of the Evidence Act, 1938, that the maker of the statement should be called as a witness in the proceedings so that he can be, and will ordinarily be, D subject to cross-examination. It is only in the particular events laid down by the proviso to s. 1 (1) that the requirement that the maker of the statement should be called as a witness need not be satisfied, and in the particular circumstances laid down by s. 1 (2) the court may admit a statement in evidence notwithstanding that the maker of the statement is available but is not called as a witness: see *Infields, Ltd.* v. *Rosen* (45) and *Ozzard-Low* v. *Ozzard-Low & Wonham* (46). E The inability to cross-examine the maker of a statement tendered under s. 1 of the Evidence Act, 1938, does not, therefore, go to the question of admissibility but goes only to the question of weight.

The second fact overlooked in the observations of BIRKETT, J., in *Evon & Evon* v. *Noble* (43) is that by s. 2 (1) of the Evidence Act, 1938, it is provided that, in estimating the weight to be attached to a statement rendered admissible F as evidence under the Act, the court is to have particular regard

> ". . . to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts."

It follows that the Act clearly envisages that a statement may be admissible as evidence although its maker had some incentive to conceal or misrepresent facts, G in which event the evidence may be of little or no weight. In *Jarman's* case (47) SIR RAYMOND EVERSHED, M.R., said:

> "Section 2 (1) shows that the legislature must clearly have contemplated that under the Act documents might come to be admitted, and might be properly admissible, which did not have that impartiality to which LORD H ELDON, L.C., alluded [and, I could add, to which BIRKETT, J., alluded] and, therefore, it was emphatic in stating that admission was one thing, but the weight to be attached to the document when admitted was another."

To say, however, that, in order that a statement may be admitted under s. 1 of the Act, its maker must be an "independent person" in the sense that he must be detached, judicial and impartial, is to confuse the question of the I weight of the evidence with the conditions relating to its admissibility, and to impose a condition for the admissibility of a statement which is not required by the Act. I, therefore, hold that the words an "independent person" referred to in the authorities cited by counsel for the defendant mean a person who is not personally interested in the result of the proceedings, and for the reasons which I have given I find that James Milne was in this sense of the term an independent person.

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(41) [1958] 2 All E.R. at pp. 687, 688; [1958] 2 Q.B. at pp. 351, 352.
(42) [1955] 1 All E.R. 742.
(43) [1948] 2 All E.R. at p. 989; [1949] 1 K.B. at p. 225.
(44) [1941] 1 All E.R. at p. 314; [1941] Ch. at p. 251.
(45) [1939] 1 All E.R. 121.
(46) [1953] 2 All E.R. 550; [1953] P. 272.
(47) [1951] 2 All E.R. at p. 257; [1951] 2 K.B. at p. 940.

In support of the proposition that the maker of the statement is a person interested within s. 1 (3) if his reputation is at stake, counsel for the defendant relied on the observations of ASQUITH, L.J., in *Barkway* v. *South Wales Transport Co., Ltd.* (48) and of BIRKETT, J., in *Evon & Evon* v. *Noble* (49), to both of which I have already referred. In both those cases what was at stake was the reputation of the maker of the statement in the sense of his being directly responsible for the events being litigated. It is not the mere involvement of his reputation that makes a person interested in the result of the litigation. This is made clear by the decision of SACHS, J., in *Re Powe* (50). In that case a solicitor was responsible for the preparation and execution of a will which was later contested, and it was held that a statement made by the solicitor at the time of the making of the will should not be rejected on the ground that his reputation as a solicitor might be involved. I have already expressed my view of the part played by James Milne in the events of the present case. I think that it is a far-fetched notion in the circumstances of this case to suggest that his reputation as a watchman was at stake at all, still less that it was at stake at the time when he made either statement A or statement B. These statements were made in answer to questions put by two very experienced persons, and from their form and contents it is clear that James Milne was not at any time attempting to explain or excuse or justify his conduct or behaviour as a watchman. There is nothing in the statements to reflect on his position as a watchman, and still less on his reputation as such. He was a man seventy-five years old, who was not tied to the job of watchman, for he worked as a cleaner and porter, and he may not have been tied to any job at all. I do not believe that in making these two statements he had any idea in his head that he ought to say or withhold anything so as to keep his job or to get another job as a watchman or as anything else. I have little doubt that he was jealous of his good name, for, as the proverb says, a good name is better than riches. No doubt, counsel for the defendant might have—I do not say that he necessarily would have—cross-examined James Milne on the lines which, he suggested, were open to him, although he might have got rather short and sharp answers. On the state of the pleadings and the issues raised in the action, such cross-examination could only have been justified on the ground that the questions were directed to credit. But, as counsel for the plaintiffs forcibly pointed out, every person who goes into the witness-box may be cross-examined as to credit, and in that sense his reputation is at stake. However remote his interest in the result of the proceedings, if the judge does not accept his evidence, either on the ground that he is mistaken or confused or has a faulty memory, and still more if the judge does not believe him, his reputation may suffer. I, therefore, do not think that the reputation of James Milne as a watchman, or in any way, was at stake at all, otherwise than as a mere witness. Accordingly, for the reasons which I have given, I hold that James Milne was not "a person interested" under s. 1 (3) of the Evidence Act, 1938, at the time when he made either statement A or statement B, or, indeed, at any time.

Solicitors: *Berrymans* (for the plaintiffs); *Crawley, Arnold, Ellis & Ellis* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(48) [1948] 2 All E.R. at p. 473; [1949] 1 K.B. at p. 60.
(49) [1948] 2 All E.R. at p. 990; [1949] 1 K.B. at p. 226.
(50) [1955] 3 All E.R. 448; [1956] P. 110.

OVERSEAS TANKSHIP (U.K.), LTD. *v.* MORTS DOCK & ENGINEERING CO., LTD.

[Privy Council (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Morris of Borth-y-Gest), October 26, 27, 31, November 1, 2, 3, 7, 8, 9, 1960, January 18, 1961.]

Negligence—Cause of action—Foreseeability—Criterion for culpability and for compensation the same—Whether damage could reasonably have been foreseen.

Privy Council—Australia—New South Wales—Negligence—Cause of action—Foreseeability—Wharf damaged by fire caused through carelessness of charterers' servants in allowing bunkering oil to spill from ship into water—Whether damage could reasonably have been foreseen.

In the law of negligence the test whether the consequences were reasonably foreseeable is a criterion alike of culpability and of compensation; and the dichotomy whereby culpability (viz., breach of duty to take reasonable care) was regarded as depending on the foreseeability of consequences but compensation (viz., the remoteness of damage) depended on whether the negligent act or omission was the "direct" cause of the damage, whether foreseeable or not, was a false dichotomy (see p. 415, letters F and G, p. 412, letter G, and p. 414, letter H, post).

Dictum of Lord Russell of Killowen in *Hay* (*or Bourhill*) v. *Young* ([1942] 2 All E.R. at p. 401) and dictum of Bovill, C.J., in *Sharp* v. *Powell* ((1872), L.R. 7 C.P. at p. 258) approved.

Re Polemis and Furness, Withy & Co., Ltd. ([1921] All E.R. Rep. 40) and dicta of Lord Sumner in *Weld-Blundell* v. *Stephens* ([1920] A.C. at p. 984) and of Asquith, L.J., in *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.* ([1951] 1 All E.R. at pp. 690, 691) disapproved.

By the carelessness of the appellants' servants furnace oil from a ship was spilt into a bay. The oil spread over the water to the respondents' wharf, which was some six hundred feet distant and at which the respondents were carrying out repairing work to a ship, including the welding of metal. Molten metal from the respondents' wharf fell on floating cotton waste which, smouldering, ignited the furnace oil on the water. The respondents' wharf sustained substantial damage by fire. The oil itself, unignited, also caused slight damage to the respondents' wharf, but no claim to compensation was made for this damage*. In an action by the respondents for damages for negligence it was found as a fact that the appellants did not know and could not reasonably have been expected to know that the furnace oil was capable of being set alight when spread on water.

Held: the test of liability for the damage done by fire was the foreseeability of the injury by fire (see p. 415, letter G, post) and, as a reasonable man would not, on the facts of this case, have foreseen such injury, the appellants were not liable in negligence for the damage, although their servants' carelessness was the direct cause of the damage.

Per Curiam: it is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule (see p. 413, letter E, post).

Appeal allowed.

[As to effective cause, see 28 Halsbury's Laws (3rd Edn.) 27, para. 25; and for cases on the subject, see 36 Digest (Repl.) 34-39, *158-185*.

As to remoteness of damage in negligence, see 11 Halsbury's Laws (3rd Edn.) 278, para. 459.]

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* See, as regards this matter, p. 407, letters D and E, post.

Cases referred to:

Aldham v. *United Dairies (London), Ltd.*, [1939] 4 All E.R. 522; [1940] 1 K.B. 507; 109 L.J.K.B. 323; 162 L.T. 71; 2nd Digest Supp.

Blyth v. *Birmingham Waterworks Co.*, (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 156 E.R. 1047; 36 Digest (Repl.) 5, *1*.

Clark v. *Chambers*, (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 36 Digest (Repl.) 31, *135*.

Cory & Son, Ltd. v. *France, Fenwick & Co., Ltd.*, [1911] 1 K.B. 114; 80 L.J.K.B. 341; 103 L.T. 649; 11 Asp. M.L.C. 499; 34 Digest 496, *4094*.

Edison, The, [1933] All E.R. Rep. 144; 149 L.T. 49; sub nom. *Liesbosch Dredger* v. *Edison, S.S.*, [1933] A.C. 449; 102 L.J.P. 73; 18 Asp. M.L.C. 380; 17 Digest (Repl.) 93, *103*.

Glasgow Corpn. v. *Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 36 Digest (Repl.) 58, *317*.

Greenland v. *Chaplin*, (1850), 5 Exch. 243; 19 L.J.Ex. 293; 15 L.T.O.S. 185; 155 E.R. 104; 36 Digest (Repl.) 33, *155*.

Hadley v. *Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

Hay (or Bourhill) v. *Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 36 Digest (Repl.) 16, *66*.

King v. *Phillips*, [1953] 1 All E.R. 617; [1953] 1 Q.B. 429; [1953] 2 W.L.R. 526; 17 Digest (Repl.) 123, *339*.

London, H.M.S., [1914] P. 72; 83 L.J.P. 74; 109 L.T. 960; 12 Asp. M.L.C. 405; 17 Digest (Repl.) 116, *283*.

Lynch v. *Knight*, (1861), 9 H.L. Cas. 577; 5 L.T. 291; 11 E.R. 854; 32 Digest 171, *2093*.

M'Alister (or Donoghue) v. *Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*.

Minister of Pensions v. *Chennell*, [1946] 2 All E.R. 719; [1947] K.B. 250; [1947] L.J.R. 700; 176 L.T. 164; 17 Digest (Repl.) 486, *307*.

Palsgref v. *Long Island Ry.*, (1928), 248 New York Appeals 339.

Polemis and Furness, Withy & Co., Ltd., Re, [1921] All E.R. Rep. 40; [1921] 3 K.B. 560; sub nom. *Polemis* v. *Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 15 Asp. M.L.C. 398; 36 Digest (Repl.) 38, *185*.

Rigby v. *Hewitt*, (1850), 5 Exch. 240; 19 L.J.Ex. 291; 155 E.R. 103; sub nom. *Rigley* v. *Hewitt*, 15 L.T.O.S. 185; 36 Digest (Repl.) 33, *151*.

Roe v. *Ministry of Health, Woolley* v. *Ministry of Health*, [1954] 2 All E.R. 131; [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; 3rd Digest Supp.

Rylands v. *Fletcher*, (1868), L.R. 3 H L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, *334*.

Sharp v. *Powell*, (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 36 Digest (Repl.) 36, *173*.

Smith v. *London & South Western Ry. Co.*, (1870), L.R. 6 C.P. 14; 40 L.J.C.P. 21; 23 L.T. 678; 36 Digest (Repl.) 37, *184*.

Thorogood v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van Den Berghs & Jurgens*, [1951] 2 K.B. 537; 2nd Digest Supp.

Victoria Laundry (Windsor), Ltd. v. *Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 17 Digest (Repl.) 92, *100*.

Weld-Blundell v. *Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 Digest (Repl.) 201, *1064*.

Woods v. *Duncan, Duncan* v. *Hambrook, Duncan* v. *Cammell Laird & Co., Ltd.*, [1946] 1 All E.R. 420, n.; [1946] A.C. 401; [1947] L.J.R. 120; 174 L.T. 286; 36 Digest (Repl.) 52, *286*.

Appeal.

Appeal by Overseas Tankship (U.K.), Ltd. from an order of the Full Court of

the Supreme Court of New South Wales (Owen, Maguire and Manning, JJ.), A
dated Dec. 3, 1959, affirming a judgment of Kinsella, J., in the Supreme Court of New South Wales in Admiralty, dated Apr. 23, 1959, whereby judgment was entered for the respondents, Morts Dock & Engineering Co., Ltd. for damages to be assessed. The judgment of the full court was delivered by Manning, J. The facts are set out in the judgment of the Board.

Ashton Roskill, Q.C., C. L. D. Meares, Q.C. (of the Australian Bar), and *M. R. E. Kerr* for the appellants. B

R. L. Taylor, Q.C., and *R. J. Bainton* (both of the Australian Bar) for the respondents.

VISCOUNT SIMONDS: This appeal is brought from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal by C
the appellants, Overseas Tankship (U.K.), Ltd., from a judgment of Kinsella, J., exercising the Admiralty jurisdiction of that court in an action in which the appellants were defendants and the respondents, Morts Dock & Engineering Co., Ltd., were plaintiffs. In the action, the respondents sought to recover from the appellants compensation for the damage which its property, known as the Sheerlegs Wharf in Sydney Harbour and the equipment thereon, had D
suffered by reason of fire which broke out on Nov. 1, 1951. For this damage they claimed that the appellants were, in law, responsible.

The relevant facts can be comparatively shortly stated, inasmuch as not one of the findings of fact in the exhaustive judgment of the learned trial judge has been challenged. The respondents at the relevant time carried on the business of ship-building, ship-repairing and general engineering at Morts Bay, Balmain, E
in the Port of Sydney. They owned and used for their business the Sheerlegs Wharf, a timber wharf about four hundred feet in length and forty feet wide, where there was a quantity of tools and equipment. In October and November, 1951, a vessel known as the Corrimal was moored alongside the wharf and was being refitted by the respondents. Her mast was lying on the wharf and a number of the respondents' employees were working both on it and on the vessel F
itself, using for this purpose electric and oxy-acetylene welding equipment. At the same time, the appellants were charterers by demise of the s.s. Wagon Mound, an oil-burning vessel which was moored at the Caltex Wharf on the northern shore of the harbour at a distance of about six hundred feet from the Sheerlegs Wharf. She was there from about 9 a.m. on Oct. 29, until 11 a.m. on Oct. 30, 1951, for the purpose of discharging gasolene products and taking in G
bunkering oil. During the early hours of Oct. 30, 1951, a large quantity of bunkering oil was, through the carelessness of the appellants' servants, allowed o spill into the bay, and, by 10.30 on the morning of that day, it had spread over a considerable part of the bay, being thickly concentrated in some places and particularly along the foreshore near the respondents' property. The appellants made no attempt to disperse the oil. The Wagon Mound unberthed H
and set sail very shortly after. When the respondents' works manager became aware of the condition of things in the vicinity of the wharf, he instructed their workmen that no welding or burning was to be carried on until further orders. He inquired of the manager of the Caltex Oil Co., at whose wharf the Wagon Mound was then still berthed, whether they could safely continue their operations on the wharf or on the Corrimal. The results of this inquiry, coupled with his I
own belief as to the inflammability of furnace oil in the open, led him to think hat the respondents could safely carry on their operations. He gave instructions accordingly, but directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil. For the remainder f Oct. 30 and until about 2 p.m. on Nov. 1, work was carried on as usual, the ondition and congestion of the oil remaining substantially unaltered. But t about that time the oil under or near the wharf was ignited and a fire, fed nitially by the oil, spread rapidly and burned with great intensity. The wharf

and the Corrimal caught fire and considerable damage was done to the wharf and the equipment on it.

The outbreak of fire was due, as the learned judge found, to the fact that there was floating in the oil underneath the wharf a piece of débris on which lay some smouldering cotton waste or rag which had been set on fire by molten metal falling from the wharf; that the cotton waste or rag burst into flames; that the flames from the cotton waste set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil and that, after the floating oil became ignited, the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf. He also made the all-important finding, which must be set out in his own words:

> " The raison d'être of furnace oil is, of course, that it shall burn, but I find the [appellants] did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water."

This finding was reached after a wealth of evidence which included that of a distinguished scientist, Professor Hunter. It receives strong confirmation from the fact that, at the trial, the respondents strenuously maintained that the appellants had discharged petrol into the bay on no other ground than that, as the spillage was set alight, it could not be furnace oil. An attempt was made before their Lordships' Board to limit in some way the finding of fact, but it is clear that it was intended to cover precisely the event that happened. One other finding must be mentioned.⁁ The learned judge held that, apart from damage by fire, the respondents had suffered some damage (1) from the spillage of oil in that it had got on their slipways and congealed on them and interfered with their use of the slips. He said:

> " The evidence of this damage is slight and no claim for compensation is made in respect of it. Nevertheless it does establish some damage, which may be insignificant in comparison with the magnitude of the damage by fire, but which nevertheless is damage which beyond question was a direct result of the escape of the oil."

It is on this footing that their Lordships will consider the question whether the appellants are liable for the fire damage. That consideration must begin with an expression of indebtedness to MANNING, J., for his penetrating analysis of the problems that today beset the question of liability for negligence. In 1913, in *H.M.S. London* (2), a case to which further reference will be made, SIR SAMUEL EVANS, P., said (3):

> " The doctrine of legal causation, in reference both to the creation of liability and to the measurement of damages, has been much discussed by judges and commentators in this country and in America. Vast numbers of learned and acute judgments and disquisitions have been delivered and written upon the subject. It is difficult to reconcile the decisions; and the views of prominent commentators and jurists differ in important respects. It would not be possible or feasible in this judgment to examine them in anything approaching detail."

In the near half-century that has passed since the learned President spoke those

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(1) KINSELLA, J., dealt with the relevance of his finding as follows: " I have already stated my finding that the oil fouled the [respondents'] slipways and caused interruption to their operations and that *those consequences were foreseeable to any reasonable person.* Counsel for [the appellants] has urged that [the respondents] are not entitled to rely on this damage, inasmuch as no claim is pressed in respect of it. I do not agree . . . The [respondents'] failure to press a claim for this damage is not an admission that it was not actionable damage . . . It follows, since foreseeable damage was caused to the [respondents], that the [appellants'] careless act became impressed with the legal quality of negligence and the case therefore is covered by the principles of *Re Polemis* and not those laid down in *Hay (or Bourhill)* v. *Young.*"

(2) [1914] P. 72.

(3) [1914] P. at p. 76.

4/2, 7

words, the task has not become easier, but it is possible to point to certain landmarks and to indicate certain tendencies which, as their Lordships hope, may serve in some measure to simplify the law. A

It is inevitable that first consideration should be given to *Re Polemis and Furness, Withy & Co., Ltd.* (4), which will henceforward be referred to as *Polemis*. For it was avowedly in deference to that decision and to decisions of the Court of Appeal that followed it that the full court was constrained to decide the present case in favour of the respondents. B In doing so, MANNING, J., after a full examination of that case, said:

> "To say that the problems, doubts and difficulties which I have expressed above render it difficult for me to apply the decision in *Re Polemis* (4) with any degree of confidence to a particular set of facts would be a grave understatement. C I can only express the hope that, if not in this case, then in some other case in the near future, the subject will be pronounced upon by the House of Lords or the Privy Council in terms which, even if beyond my capacity fully to understand, will facilitate for those placed as I am, its everyday application to current problems."

This cri de coeur would, in any case, be irresistible, but in the years that have D passed since its decision, *Polemis* (4) has been so much discussed and qualified that it cannot claim, as counsel for the respondents urged for it, the status of a decision of such long standing that it should not be reviewed.

What, then, did *Polemis* (4) decide? Their Lordships do not propose to spend time in examining whether the issue there lay in breach of contract or in tort. E That might be relevant for a tribunal for which the decision was a binding authority; for their Lordships it is not. It may, however, be observed that in the proceedings there was some confusion. The case arose out of a charterparty and went to arbitration under a term of it, and the first contention of the charterers was that they were protected from liability by the exception of fire in the charterparty. But it is clear from the pleadings and other documents, copies of which were supplied from the Record Office, that alternative claims F for breach of contract and negligence were advanced, and it is clear, too, that, before SANKEY, J., and the Court of Appeal, the case proceeded as one in which, independently of contractual obligations, the claim was for damages for negligence. It was on this footing that the Court of Appeal held that the charterers were responsible for all the consequences of their negligent act, even though those consequences could not reasonably have been anticipated. G The negligent act was nothing more than the carelessness of stevedores (for whom the charterers were assumed to be responsible) in allowing a sling or rope by which it was hoisted to come into contact with certain boards, causing one of them to fall into the hold. The falling board hit some substances in the hold and caused a spark; the spark ignited petrol vapour in the hold; there was a rush of flames and the ship was destroyed. H The Special Case submitted by the arbitrators found that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. They did not indicate what damage might have been so anticipated.

There can be no doubt that the decision of the Court of Appeal in *Polemis* (4) plainly asserts that, if the defendant is guilty of negligence, he is responsible I for all the consequences, whether reasonably foreseeable or not. The generality of the proposition is, perhaps, qualified by the fact that each of the lords justices refers to the outbreak of fire as the direct result of the negligent act. There is thus introduced the conception that the negligent actor is not responsible for consequences which are not "direct", whatever that may mean. It has to be asked, then, why this conclusion should have been reached. The answer appears to be that it was reached on a consideration of certain authorities, comparatively few in number, that were cited to the court. Of these, three are generally regarded as having influenced the decision. The earliest in point of date was *Smith* v. *London & South Western Ry. Co.* (5). In that case, it was said that

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(4) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.

> ". . . when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not"

see per Channell, B. (6). Similar observations were made by other members of the court. Three things may be noted about this case: the first, that, for the sweeping proposition laid down, no authority was cited; the second, that the point to which the court directed its mind was not unforeseeable damage of a different kind from that which was foreseen, but more extensive damage of the same kind; and the third that so little was the mind of the court directed to the problem which has now to be solved that no one of the seven judges who took part in the decision thought it necessary to qualify in any way the consequences for which the defendants were to be held responsible. It would, perhaps, not be improper to say that the law of negligence as an independent tort was then of recent growth, and that its implications had not been fully examined. The second case was *H.M.S. London* (7) which has already been referred to. There the statement in *Smith's* case (5) was followed by Sir Samuel Evans, P., citing Blackburn, J. (6):

> ". . . what the defendants might reasonably anticipate is . . . only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."

This proposition which provides a different criterion for determining liability and compensation goes to the root of the matter and will be discussed later. It was repeated by Lord Sumner in the third case which was relied on in *Polemis* (8), namely, *Weld-Blundell* v. *Stephens* (9). In that case, the majority of their Lordships, of whom Lord Sumner was one, held, affirming a decision of the Court of Appeal, that the plaintiff's liability for damages in certain libel actions did not result from an admitted breach by the defendant of the duty that he admittedly owed to him. Lord Dunedin (another of the majority) decided the case on the ground that there was there no evidence which entitled the jury to give the affirmative answer that they did to the question as put to them that the actions of libel and damages recovered were the "natural and probable consequence" of the proved negligence of the defendant. Lord Wrenbury (the third of the majority) summed up his view of the case by saying (10):

> "I am quite unable to follow the proposition that the damages given in the libel actions are in any way damages resulting from anything which Stephens did in breach of duty."

Lord Sumner, whose speech their Lordships, like others before them, have not found in all respects easy to follow said (11):

> "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation."

But this observation followed a passage in which his Lordship, directing his mind to the problem of causation, had asked what were "natural, probable and necessary" consequences and had expressed the view that "direct cause" was the best expression. Adopting that test, he rejected the plaintiff's claim as too remote. The question of foreseeability became irrelevant and the passage cited from his speech was unnecessary to his decision. Their Lordships are constrained to say that this dictum (for such it was) perpetuated an error which has introduced much confusion into the law.

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(5) (1870), L.R. 6 C.P. 14.

(6) (1870), L.R. 6 C.P. at p. 21.

(7) [1914] P. 72.

(8) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.

(9) [1920] A.C. at p. 983.

(10) [1920] A.C. at p. 999.

(11) [1920] A.C. at p. 984.

Before going forward to the cases which followed *Polemis* (12), their Lordships think it desirable to look back to older authorities which appear to them to deserve consideration. In two cases, *Rigby* v. *Hewitt* (13) and *Greenland* v. *Chaplin* (14), POLLOCK, C.B., affirmed (15) (stating it to be his own view only and not that of the court) that he entertained

> "... considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated."

It was not necessary to argue this question and it was not argued.

Next, one of many cases may be cited which show how shadowy is the line between so-called culpability and compensation. In *Sharp* v. *Powell* (16), the defendant's servant, in breach of the Metropolitan Police Act, 1839, washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway and froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped on the ice and broke its leg. The defendant was held not to be liable. The judgment of BOVILL, C.J., is particularly valuable and interesting. He said (17):

> "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action."

Here all the elements are blended "natural" or "ordinary consequences", "foreseeability", "proximate cause". What is not suggested is that the wrongdoer is liable for the consequences of his wrongdoing whether reasonably foreseeable or not, or that there is one criterion for culpability, another for compensation. It would, indeed, appear to their Lordships that, unless the learned chief justice was making a distinction between "one who commits a wrongful act" and one who commits an act of negligence, the case is not reconcilable with *Polemis* (18). In that case, it was not dealt with except in a citation from *Weld-Blundell* v. *Stephens* (19).

Mention should also be made of *Cory & Son, Ltd.* v. *France, Fenwick & Co., Ltd.* (20). In that case, VAUGHAN WILLIAMS, L.J., citing the passage from the judgment of POLLOCK, C.B., in *Greenland* v. *Chaplin* (15) which has already been read, said (21):

> "I do not myself suppose that, although, when these propositions were originally laid down, they were not intended as positive judgments, but as

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(12) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.
(13) (1850), 5 Exch. 240.
(14) (1850), 5 Exch. 243.
(15) (1850), 5 Exch. at p. 248.
(16) (1872), L.R. 7 C.P. 253.
(17) (1872), L.R. 7 C.P. at p. 258.
(18) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.
(19) [1920] A.C. 956.
(20) [1911] 1 K.B. 114.
(21) [1911] 1 K.B. at p. 122.

A opinions of the learned judge, there would be any doubt nowadays as to their accuracy."

And KENNEDY, L.J., said of the same passage (22) " with that view of the law nobody would venture to quarrel ". Some doubt was expressed in *Polemis* (23) whether the citation of which these learned judges so emphatically approved was correct. That is irrelevant. They approved that which they cited and their B approval has high authority. It is probable in any case that it had not occurred to them that there was any such dichotomy, as was suggested in *Polemis* (23). Nor, clearly, had it at an earlier date occurred to LORD WENSLEYDALE in *Lynch* v. *Knight* (24), nor to COCKBURN, C.J., in *Clark* v. *Chambers* (25). The impression that may well be left on the reader of the scores of cases in which liability for C negligence has been discussed is that the courts were feeling their way to a coherent body of doctrine, and were at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.

Before turning to the cases that succeeded it, it is right to glance at yet another aspect of the decision in *Polemis* (23). Their Lordships, as they have said, assume that the court purported to propound the law in regard to tort. But up to that date it had been universally accepted that the law in regard to D damages for breach of contract and for tort was, generally speaking, and particularly in regard to the tort of negligence, the same. Yet *Hadley* v. *Baxendale* (26) was not cited in argument nor referred to in the judgments in *Polemis* (23). This is the more surprising when it is remembered that, in that case, as in many another case, the claim was laid alternatively in breach of contract and in negligence. If the claim for breach of contract had been pursued, the charterers E could not have been held liable for consequences not reasonably foreseeable. It is not strange that SIR FREDERICK POLLOCK said that BLACKBURN and WILLES, JJ., would have been shocked beyond measure by the decision that the charterers were liable in tort: see POLLOCK ON TORTS (15th Edn.), p. 29. Their Lordships refer to this aspect of the matter not because they wish to assert that in all respects today the measure of damages is in all cases the same in tort and in F breach of contract, but because it emphasises how far *Polemis* (23) was out of the current of contemporary thought. The acceptance of the rule in *Polemis* (23) as applicable to all cases of tort would directly conflict with the view theretofore generally held.

If the line of relevant authority had stopped with *Polemis* (23), their Lordships might, whatever their own views as to its unreason, have felt some G hesitation about overruling it. But it is far otherwise. It is true that, both in England and in many parts of the Commonwealth, that decision has from time to time been followed; but in Scotland it has been rejected with determination. It has never been subject to the express scrutiny of either the House of Lords or the Privy Council, though there have been comments on it in those supreme tribunals. Even in the inferior courts, judges have, sometimes perhaps H unwittingly, declared themselves in a sense adverse to its principle. Thus ASQUITH, L.J., himself, who in *Thorogood* v. *Van den Berghs & Jurgens, Ltd.* (27), had loyally followed *Polemis* (23), in *Victoria Laundry* (*Windsor*), *Ltd.* v. *Newman Industries, Ltd.* (28), holding that a complete indemnity for breach of contract was too harsh a rule, decided that

> I " . . . the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach."

It is true that, in that case, the learned lord justice was dealing with damages for breach of contract. But there is nothing in the case to suggest, nor any reason to suppose, that he regarded the measure of damage as different in tort and breach of contract. The words "tort" and "tortious" have, perhaps, a somewhat sinister sound but, particularly where the tort is not deliberate but is an act of negligence, it does not seem that there is any more moral obliquity in it than in a perhaps deliberate breach of contract, or that the negligent actor should suffer a severer penalty. In *Minister of Pensions* v. *Chennell* (29), DENNING, J., said:

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(22) [1911] 1 K.B. at p. 133. (23) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.
(24) (1861), 9 H.L. Cas. 577. (25) (1878), 3 Q.B.D. 327. (26) (1854), 9 Exch. 341.
(27) [1951] 1 All E.R. 682; [1951] 2 K.B. 537.
(28) [1949] 1 All E.R. at p. 1002; [1949] 2 K.B. at p. 539.

> "Foreseeability is, as a rule, vital in cases of contract and also in cases of negligence, whether it be foreseeability in respect of the person injured as in *Palsgref* v. *Long Island Ry.* (30) (discussed by Professor Goodhart in his ESSAYS, p. 129), *M'Alister* (*or Donoghue*) v. *Stevenson* (31), and *Hay* (*or Bourhill*) v. *Young* (32), or in respect of intervening causes as in *Aldham* v. *United Dairies* (*London*), *Ltd.* (33) and *Woods* v. *Duncan* (34). It is doubtful whether *Re Polemis* (35) can survive these decisions. If it does, it is only in respect of neglect of duty to the plaintiff which is the immediate or precipitating cause of damage of an unforeseeable kind."

Their Lordships would, with respect, observe that such a survival rests on an obscure and precarious condition.

Instances might be multiplied of deviation from the rule in *Polemis* (35), but their Lordships think it sufficient to refer to certain later cases in the House of Lords and then to attempt to state what they conceive to be the true principle. In *Glasgow Corpn.* v. *Muir* (36), LORD THANKERTON said that it had long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man, while LORD MACMILLAN said (37) that it was

> " . . . still left to the judge to decide what in the circumstances of the particular case the reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen."

Here there is no suggestion of one criterion for determining culpability (or liability) and another for determining compensation. In *Hay* (*or Bourhill*) v. *Young* (38), the double criterion is more directly denied. There, LORD RUSSELL OF KILLOWEN said:

> "In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double rôle. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damages, i.e., to the question of compensation not to culpability; but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to that of compensation."

This appears to be in flat contradiction to the rule in *Polemis* (35) and to the dictum of LORD SUMNER in *Weld-Blundell* v. *Stephens* (39). From the tragic case of *Woods* v. *Duncan, Duncan* v. *Hambrook, Duncan* v. *Cammell Laird & Co., Ltd.* (34), the facts of which are too complicated to be stated at length, some help may be obtained. There, VISCOUNT SIMON analysed the conditions of establishing liability for negligence and stated them (40) to be (i) that the defendant failed to exercise due care, (ii) that he owed to the injured man the duty to exercise due care, and (iii) that his failure to do so was the " cause " of the injury in the proper sense of the term. He held that the first and third conditions were satisfied, but, inasmuch as the damage was due to an extraordinary and unforeseeable combination of circumstances, the second condition was not satisfied. Be it observed that, to him, it was one and the same thing whether the unforeseeability of damage was relevant to liability or compensation. To LORD RUSSELL OF KILLOWEN in the same case (41) the test of liability was whether the defendants (Cammell Laird & Co., Ltd.) could reasonably be expected to foresee that the choking of a test-cock (itself undoubtedly a careless act) might endanger the lives of those on board. LORD MACMILLAN asked (42) whether it could be said that they, the defendants, ought to have foreseen as reasonable people that, if they failed to detect and rectify the clogging of the hole in the door, the result might be that which followed; and later, identifying, as it were, reasonable foreseeability with causation, he said (42) " The chain of causation, to borrow an apposite phrase, would appear to be composed of missing links."

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(29) [1946] 2 All E.R. at p. 721; [1947] K.B. at p. 253.
(30) (1928), 248 New York Appeals 339.
(31) [1932] All E.R. Rep. 1; [1932] A.C. 562.
(32) [1942] 2 All E.R. 396; [1943] A.C. 92.
(33) [1939] 4 All E.R. 522; [1940] 1 K.B. 507.
(34) [1946] A.C. 401.
(35) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.
(36) [1943] 2 All E.R. at p. 47; [1943] A.C. at p. 454.
(37) [1943] 2 All E.R. at p. 48; [1943] A.C. at p. 457.
(38) [1942] 2 All E.R. at p. 401; [1943] A.C. at p. 101.
(39) [1920] A.C. at p. 984.

Enough has been said to show that the authority of *Polemis* (43) has been severely shaken, though lip-service has from time to time been paid to it. In their Lordships' opinion, it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that, in some cases at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be " direct ". It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour. This concept, applied to the slowly developing law of negligence. has led to a great variety of expressions which can, as it appears to their Lordships, be harmonised with little difficulty with the single exception of the so-called rule in *Polemis* (43). For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them), the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged, by the standard of the reasonable man, that he ought to have foreseen them. Thus it is that, over and over again, it has happened that, in different judgments in the same case and sometimes in a single judgment, liability for a consequence has been imposed on the ground that it was reasonably foreseeable, or alternatively on the ground that it was natural or necessary or probable. The two grounds have been treated as conterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in *Polemis* (43). For, if some limitation must be imposed on the consequences for which the negligent actor is to be held responsible—and all are agreed that some limitation there must be—why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the " direct " consequence) be substituted which leads to nowhere but the never-ending and insoluble problems of causation. " The lawyer " said Sir Frederick Pollock

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(40) [1946] A.C. at p. 419. (41) [1946] A.C. at p. 426. (42) [1946] A.C. at p. 431.
(43) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.

> " cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."

Yet this is just what he has most unfortunately done and must continue to do if the rule in *Polemis* (44) is to prevail. A conspicuous example occurs when the actor seeks to escape liability on the ground that the " chain of causation " is broken by a " nova causa " or " novus actus interveniens."

The validity of a rule or principle can sometimes be tested by observing it in operation. Let the rule in *Polemis* (44) be tested in this way. In *The Edison* (45), the appellants, whose vessel had been fouled by the respondents, claimed damages under various heads. The respondents were admittedly at fault; therefore, said the appellants, invoking the rule in *Polemis* (44), they were responsible for all damage whether reasonably foreseeable or not. Here was the opportunity to deny the rule or to place it secure on its pedestal. But the House of Lords took neither course; on the contrary, it distinguished *Polemis* (44) on the ground that, in that case, the injuries suffered were the " immediate physical consequences " of the negligent act. It is not easy to understand why a distinction should be drawn between " immediate physical " and other consequences, nor where the line is to be drawn. It was, perhaps, this difficulty which led DENNING, L.J., in *Roe* v. *Ministry of Health* (46) to say that foreseeability is only disregarded when the negligence is the immediate or *precipitating* cause of the damage. This new word may well have been thought as good a word as another for revealing or disguising the fact that he sought loyally to enforce an unworkable rule. In the same connexion may be mentioned the conclusion to which the full court finally came in the present case. Applying the rule in *Polemis* (44) and holding, therefore, that the unforeseeability of the damage by fire afforded no defence, they went on to consider the remaining question. Was it a " direct " consequence? On this, MANNING, J., said:

> " Notwithstanding that, if regard is had separately to each individual occurrence in the chain of events that led to this fire, each occurrence was improbable and, in one sense, improbability was heaped upon improbability, I cannot escape from the conclusion that if the ordinary man in the street had been asked, as a matter of common sense, without any detailed analysis of the circumstances, to state the cause of the fire at Morts Dock, he would unhesitatingly have assigned such cause to spillage of oil by the appellants' employees."

Perhaps he would, and probably he would have added " I never should have thought it possible." But, with great respect to the full court, this is surely irrelevant, or, if it is relevant, only serves to show that the *Polemis* rule (44) works in a very strange way. After the event even a fool is wise. Yet it is not the hindsight of a fool, but it is the foresight of the reasonable man which alone can determine responsibility. The *Polemis* rule (44), by substituting " direct " for " reasonably foreseeable " consequence, leads to a conclusion equally illogical and unjust.

At an early stage in this judgment, their Lordships intimated that they would deal with the proposition which can best be stated by reference to the well-known dictum of LORD SUMNER (47): " This, however, goes to culpability, not to compensation." It is with the greatest respect to that very learned judge and to those who have echoed his words that their Lordships find themselves bound to state their view that this proposition is fundamentally false.

It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. Suppose an action brought by A for damage caused by the carelessness (a neutral word) of B, for example a fire caused by the careless spillage of oil. It may, of course, become relevant to know what duty B owed to A, but the only liability that is in question is the liability for damage by fire. It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other. If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened—the damage in suit? And, if that damage is unforeseeable so as to displace liability at large, how can the liability be restored so as to make compensation payable? But, it is said, a different position arises if B's careless act has been shown to be negligent and has caused some foreseeable damage to A. Their Lordships have already observed that to hold B liable for consequences, however unforeseeable, of a careless act, if, but only if, he is at the same time liable for some other damage, however trivial, appears to be neither logical nor just. This becomes more clear if it is supposed that similar unforeseeable damage is suffered by A and C, but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary. For the same fallacy is at the root of the proposition. It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he had trespassed on Blackacre. Again, suppose a claim by A for damage by fire by the careless act of B. Of what relevance is it to that claim that he has another claim arising out of the same careless act? It would surely not prejudice his claim if that other claim failed; it cannot assist it if it succeeds. Each of them rests on its own bottom and will fail if it can be established that the damage could not reasonably be foreseen. We have come back to the plain common sense stated by LORD RUSSELL OF KILLOWEN in *Hay* (*or Bourhill*) v. *Young* (48). As DENNING, L.J., said in *King* v. *Phillips* (49) " . . . there can be no doubt since *Hay* (*or Bourhill*) v. *Young* (48) that the test of *liability for shock* is foreseeability of *injury by shock*." Their Lordships substitute the word " fire " for " shock " and indorse this statement of the law.

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(44) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.
(45) [1933] All E.R. Rep. 144; [1933] A.C. 449.
(46) [1954] 2 All E.R. at p. 138; [1954] 2 Q.B. at p. 85.
(47) [1920] A.C. at p. 984.

Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is " direct." In doing so, they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by LORD ATKIN in *M'Alister* (*or Donoghue*) v. *Stevenson* (50):

> " The liability for negligence, whether you style it such or treat it as in other systems as a species of ' culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay."

It is a departure from this sovereign principle if liability is made to depend solely on the damage being the " direct " or " natural " consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? A But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural", equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done; cf. *Woods* v. *Duncan* (51). Thus foreseeability becomes the effective test. In reasserting this principle, their Lordships conceive that B they do not depart from, but follow and develop, the law of negligence as laid down by ALDERSON, B., in *Blyth* v. *Birmingham Waterworks Co.* (52).

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(48) [1942] 2 All E.R. 396; [1943] A.C. 92.
(49) [1953] 1 All E.R. at p. 623; [1953] 1 Q.B. at p. 441.
(50) [1932] All E.R. Rep. at p. 11; [1932] A.C. at p. 580.

It is proper to add that their Lordships have not found it necessary to consider the so-called rule of "strict liability" exemplified in *Rylands* v. *Fletcher* (53) and the cases that have followed or distinguished it. Nothing that they have said is intended to reflect on that rule. C

One aspect of this case remains to be dealt with. The respondents claim, in the alternative, that the appellants are liable in nuisance (54) if not in negligence. On this issue, their Lordships are of opinion that it would not be proper for them to come to any conclusion on the material before them and without the benefit of the considered view of the Supreme Court. On the other hand, having regard to the course which the case has taken, they do not think that the respon- D dents should be finally shut out from the opportunity of advancing this plea, if they think fit. They therefore propose that, on the issue of nuisance alone, the case should be remitted to the full court to be dealt with as may be thought proper.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the respondents' action so far as it related to damage caused by the E negligence of the appellants be dismissed with costs but that the action so far as it related to damage caused by nuisance should be remitted to the full court to be dealt with as that court may think fit. The respondents must pay the costs of the appellants of this appeal and in the courts below.

Appeal allowed.

Solicitors: *William A. Crump & Son* (for the appellants); *Light & Fulton* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(51) [1946] A.C. at p. 442. (52) (1856), 11 Exch. 781. (53) (1868), L.R. 3 H.L. 330.

(54) The statement of claim did not expressly allege nuisance but only negligence; before the trial judge, KINSELLA, J., however, the respondents sought latterly to press a claim in nuisance. The learned judge said that it was open to them to develop their case in nuisance as well as in negligence, basing it on the same facts as they had pleaded; but that, since *Re Polemis* was binding on him, it was unnecessary to decide the point or to decide whether the respondents were entitled to succeed in nuisance.

ARCHBOLDS (FREIGHTAGE), LTD. *v.* S. SPANGLETT, LTD. (RANDALL Third Party).

[COURT OF APPEAL (Sellers, Pearce and Devlin, L.JJ.), November 4, 7, 8, December 15, 1960.]

Contract—Illegality—Illegal performance by one party—Right of innocent party to sue on contract—Carriage of goods by road in specified vehicle—"A" licence necessary—Vehicle having "C" licence only—Known to carrier but not to consignor—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 53), *s.* 1 (1).

Road Traffic—Licence—Goods vehicle—Contract for carriage of goods—Unlicensed vehicle—Whether impliedly prohibited by statute—Lack of necessary "A" licence known to carrier, not to consignor—Right of innocent consignor to sue on contract—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 53), *s.* 1 (1).

D If a contract is expressly or by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract; and for this purpose both parties are presumed to know the law (see p. 422, letter A, post).

E In March, 1957, the plaintiffs employed the defendants for reward to carry, and they carried, a third party's goods by road. The motor vehicle in which the goods were carried had a "C" licence, not an "A" licence. The defendants knew this fact, but the plaintiffs neither knew it nor should have known it. As a result of the defendants' negligence the goods were stolen in the course of transit. In an action by the plaintiffs for damages the defendants contended that the contract was illegal by reason of s. 1 (1) of the Road and Rail Traffic Act, 1933, which prohibited the use of a goods F vehicle on a road except under licence, and of the fact that the "C" licence, as distinct from an "A" licence, did not permit the defendants to carry other persons' goods on the vehicle for reward. The court assumed that the contract was for carriage in the particular vehicle which in fact the defendants used.

G **Held:** the plaintiffs were not debarred by the illegality of the defendants' use of their vehicle from recovering damages for the breach of the contract of carriage for the following reasons—

H (i) the contract of carriage was not forbidden by statute, since, although a contract for the use of an unlicensed vehicle on a road might have been impliedly prohibited by s. 1 (1) of the Road and Rail Traffic Act, 1933, a contract for the carriage of goods by road was collateral to the licensing control established by Part 1 of that Act and was not impliedly prohibited by the statute.

Re Mahmoud & Ispahani ([1921] All E.R. Rep. 217) and *Dennis & Co., Ltd.* v. *Munn* ([1949] 1 All E.R. 616) distinguished.

St. John Shipping Corpn. v. *Joseph Rank, Ltd.* ([1956] 3 All E.R. 683) applied.

I (ii) the defendants, being ignorant of the fact that there was only a "C" licence for the vehicle, were innocent parties to the contract of carriage, which was not ex facie illegal.

Appeal dismissed.

[**Editorial Note.** The plaintiffs could not assert a cause of action without relying on the contract of carriage, so that there was no alternative means of recovering the value of the property lost by basing the claim on bailment or showing negligence or conversion (see p. 421, letter I, post).

For an example of a case where there could be recovery against a third party for breach of warranty without establishing illegal performance of a contract between the plaintiff and defendant, see *Marles* v. *Philip Trant & Sons, Ltd.* ([1953] 1 All E.R. 651 at pp. 655, 656).

Section 1 (1) of the Road and Rail Traffic Act, 1933, has been repealed by the Road Traffic Act, 1960, s. 267 and Sch. 18, and is replaced by s. 164 (1) of the Act of 1960.

As to actions on contracts involving illegality, see 8 HALSBURY'S LAWS (3rd Edn.) 148, para. 257; and for cases on the subject, see 12 DIGEST (Repl.) 300 et seq.

As to the nature of an action against a carrier, see 4 HALSBURY'S LAWS (3rd Edn.) 197, para. 483.

As to the prohibition against use of a goods vehicle unlicensed, see 31 HALSBURY'S LAWS (2nd Edn.) 797, para. 1252.

For the Road and Rail Traffic Act, 1933, s. 1, see 24 HALSBURY'S STATUTES (2nd Edn.) 675.]

Cases referred to:

Bloxsome v. *Williams*, (1824), 3 B. & C. 232; 1 C. & P. 294, 336; 2 L.J.O.S.K.B. 224; 107 E.R. 720; 12 Digest (Repl.) 325, *2507*.

Bowmakers, Ltd. v. *Barnet Instruments, Ltd.*, [1944] 2 All E.R. 579; [1945] K.B. 65; 114 L.J.K.B. 41; 172 L.T. 1; 12 Digest (Repl.) 310, *2391*.

Carter v. *Mace*, [1949] 2 All E.R. 714; 113 J.P. 527; 8 Digest (Repl.) 260, *1669*.

Davies, Turner & Co., Ltd. v. *Brodie*, [1954] 3 All E.R. 283; 118 J.P. 532; [1954] 1 W.L.R. 1364; 3rd Digest Supp.

Dennis & Co., Ltd. v. *Munn*, [1949] 1 All E.R. 616; [1949] 2 K.B. 327; [1949] L.J.R. 857; 2nd Digest Supp.

Mahmoud & Ispahani, Re, [1921] All E.R. Rep. 217; [1921] 2 K.B. 716; 90 L.J.K.B. 821; 125 L.T. 161; 12 Digest (Repl.) 303, *2333*.

Nash v. *Stevenson Transport, Ltd.*, [1936] 1 All E.R. 906; [1936] 2 K.B. 128; 105 L.J.K.B. 527; 154 L.T. 420; 8 Digest (Repl.) 260, *1668*.

National Coal Board v. *Gamble*, [1958] 3 All E.R. 203; [1959] 1 Q.B. 11; 122 J.P. 453; [1958] 3 W.L.R. 434; 3rd Digest Supp.

Pearce v. *Brooks*, (1866), L.R. 1 Exch. 213; 35 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Digest (Repl.) 294, *2264*.

St. John Shipping Corpn. v. *Joseph Rank, Ltd.*, [1956] 3 All E.R. 683; [1957] 1 Q.B. 267; [1956] 3 W.L.R. 870; 3rd Digest Supp.

Strongman (1945), Ltd. v. *Sincock*, [1955] 3 All E.R. 90; [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; 3rd Digest Supp.

Vita Food Products, Incorporated v. *Unus Shipping Co., Ltd.*, [1939] 1 All E.R. 513; [1939] A.C. 277; 108 L.J.P.C. 40; 160 L.T. 579; 19 Asp. M.L.C. 257; 11 Digest (Repl.) 421, *719*.

Waugh v. *Morris*, (1873), L.R. 8 Q.B. 202; 42 L.J.Q.B. 57; 28 L.T. 265; 1 Asp. M.L.C. 573; 12 Digest (Repl.) 264, *2041*.

Appeal.

The defendants appealed against the decision of SLADE, J., dated Oct. 30, 1959, that they were liable to the defendants for £3,674 18s. 3d. damages for loss due to the defendants' negligence as carriers of goods for the plaintiffs. The facts accepted by the Court of Appeal are set out in the judgment of PEARCE, L.J. The plaintiffs, by their statement of claim, based their claim for damages both on breach of contract and on negligence.

David Karmel, Q.C., and *M. Waters* for the defendants.

J. C. Leonard and *H. K. Woolf* for the plaintiffs.

Cur. adv. vult.

Dec. 15. The following judgments were read.

SELLERS, L.J.: When the argument on this appeal was concluded I was inclined to view the facts differently from those accepted by SLADE, J., who tried the case. [HIS LORDSHIP then stated the view of the facts to which he had been inclined, and continued:] However, I feel no regret in the circumstances of this case that both my brethren, whose judgments I have had the advantage of reading, are in accord with SLADE, J., at least to the extent that the plaintiffs did not know that the vehicle on which the goods were placed for carriage held only a "C" licence, nor did they deliberately shut their eyes to the matter. There are, therefore, concurrent findings of fact with which I do not feel justified in disagreeing and that leaves the case open for argument.

The facts which the court accepts are those stated by PEARCE, L.J., and on those facts I am in agreement with the views of my brethren that the contract so entered into was not prohibited by statute and was not ex facie illegal and I do not wish to add to the reason and authority by which my brethren conclude this case in favour of the plaintiffs.

I would dismiss the appeal.

PEARCE, L.J.: Judgment was given for the plaintiffs for £3,674 18s. 3d. damages in respect of the loss of a consignment of whisky which was stolen from the defendants owing to their negligence while they were transporting it as carriers for the plaintiffs from Leeds to the London docks. Various matters raised in the defence were decided in the plaintiffs' favour. The issue on this appeal is whether the judge should have held that the plaintiffs could not recover damages because the contract of carriage was illegal.

The facts material to this issue are these. The defendants are furniture manufacturers in London and own five vans for use in their business. Those vans have "C" licences under the Road and Rail Traffic Act, 1933, which enable them to carry the defendants' own goods but do not allow them to carry for reward the goods of others. The plaintiffs are carriers with offices at London and Leeds and also have a clearing house to assist with sub-contracting contracts of carriage. Their vehicles have "A" licences which enable them to carry the goods of others for reward. When some other carrier is returning home with an empty van having made a delivery, he may ask the plaintiffs if they have a load available for him; and if they have one available, it is obviously an economy for them to sub-contract that load to him instead of sending their own van with the risk of its having to return empty.

At the time of the Suez crisis there was a shortage of petrol and the Minister of Transport enlarged the scope of "C" licences to permit licensees to carry the goods of others which would normally be carried under "C" licences. This limited extension was presumably designed to leave the trade of "A" licence-holders unaffected. Although it was not strictly proved, it was assumed that the whisky in question was not whisky that would normally be carried under a "C" licence. Therefore it could not legally be carried for reward on any of the defendants' vans. The plaintiffs' London office as a result of a telephone conversation with some unidentified person who spoke from the defendants' office believed that the defendants' vehicles had "A" licences and were entitled to carry general goods. They therefore employed the defendants to carry for them a part load of goods on the defendants' van which was taking some of the defendants' own furniture from London to the Leeds area. On Mar. 27, 1956, Mr. Randall, the defendants' driver, having delivered those goods, spoke on the telephone to Mr. Field, the traffic manager at the plaintiffs' office in Leeds in order to see if he could obtain a load for his empty van back from Leeds to London. Mr. Randall said who he was, that he was from the defendants and that he had just carried goods from the plaintiffs' London office to Leeds and "if possible would like a return load". He then said: "Have you anything for a covered van?" Mr. Field replied that he had three and three-quarter tons. He left the telephone to make certain that the load was suitable for a covered van, returned to the telephone and told Mr. Randall to come to the plaintiffs' Leeds office. Mr. Field made no inquiry about Mr. Randall's licence because, to use his own words, "I knew he had been loaded by our London office". A Mr. Randall came to the office, the van was loaded with the three and three-quarter tons, which was in fact two hundred cases of whisky, and set off for the London docks. The whisky was stolen owing to Mr. Randall's negligence.

On the issue of illegality the judge said this:

> "This case is one which falls within the class of case where the contract is B not ab initio illegal, or indeed illegal at all vis-à-vis the plaintiffs in this action. In the contract of carriage, no stipulation was made as to what form the carriage should take. It was open to the defendants to carry the goods in any vehicle they liked so far as the plaintiffs were concerned. It is, of course, true that Mr. Field would contemplate that as it was a return load, it would in fact be taken back by Mr. Randall in the vehicle in which C he brought the goods to Leeds on the outward journey, but Mr. Field never even saw the vehicle. No one whose knowledge could possibly be imputed to these plaintiffs ever did see the vehicle, and I have already found as a fact that they did not know that the vehicle in which Mr. Randall intended to take the goods to the Royal Albert Docks had in fact only a 'C' licence. In so far, therefore, as it is a question of fact, I find the fact, and in so far as D it is a question of law, I hold as a matter of law, that this contract was not of itself illegal, and that any illegality arose only in the method of its performance by the defendant company. I therefore find that the plea of illegality fails."

Mr. Karmel, in a concise and powerful argument for the defendants, contends that the learned judge should have found as a fact that the plaintiffs knew or E that they ought to have known that the defendants' van had only a "C" licence and therefore could not legally carry the whisky. He also argues that even assuming that the plaintiffs were imposed on (as the judge found) and did not know of the "C" licence and were not negligent in failing to find out, yet the plaintiffs must fail because the contract of carriage was in fact unlawful, since it was a contract for carriage in that particular van (Mr. Randall's van) which F could not be performed legally. The judge is in error, he contends, in saying: "It was open to the defendants to carry the goods in any vehicle they liked so far as the plaintiffs were concerned". On the question of the plaintiffs' knowledge the matters which were urged before us were urged before the trial judge, but he heard the witnesses and he decided otherwise. He said:

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> "What is clear is that the most wilful piece of deception was practised on the plaintiffs by the defendants to persuade them to be allowed to carry this load, and to carry this load as I know now it was carried, on a 'C' licence vehicle. That is material only to the issue of illegality which is raised on the pleadings in this case."

Later the judge said: H

> "As to the words 'as the plaintiffs well knew', I asked counsel for the defendants, and he conceded that there was no evidence at all that the plaintiffs well knew, and I find as a fact that the plaintiffs did not know. I think that the high-water mark of what can be imputed to the plaintiffs or any servants of theirs—and of this there is no evidence—is that during I the loading of the cases of whisky at the plaintiffs' Leeds warehouse, somewhere about a mile or some distance away from their offices, there was the vehicle as large as life, stamped all over as what I may call a furniture van, and anyone who had taken the trouble to look would have seen a 'C' licence on its windscreen. There is no evidence that anyone did look or that the people whose sole task, having been instructed by their foreman, who authorised the loading, was to load the cases on to the lorry, directed their minds for one moment to the question of whether it was a 'C' licence

> vehicle or a furniture van or a Carter Paterson van, or anything of the kind. As I say, I find as a fact that the plaintiffs did not know."

Again, he says:

> "No one whose knowledge could possibly be imputed to these plaintiffs ever did see the vehicle, and I have already found as a fact that they did not know that the vehicle in which Mr. Randall intended to take the goods to the Royal Albert Docks had in fact only a 'C' licence."

He also held that any suggestion that Mr. Field ought to have inquired what licence was held by Mr. Randall's vehicle was completely answered by the fact that Mr. Field knew that Mr. Randall had made the journey to Leeds with a load put on the lorry by the plaintiffs' London office. The judge dealt very fully and carefully with the evidence, he heard the witnesses and he came to conclusions on their credibility. It is in just such a case as this, cases that turn on bona fides and knowledge and half-knowledge, that the trial judge has so great an advantage over a court that relies on the colourless, impersonal and sometimes misleading transcript. There were cogent arguments based on cross-examination of the witnesses that the plaintiffs must have known or suspected the true facts about the licence of Mr. Randall's vehicle, but in spite of them he came to the conclusion that the plaintiffs were imposed on and did not know, and he acquitted them of any bad faith in the matter. I am not prepared to disturb that finding. In so many cases of deception it is hard even for the persons deceived to imagine in retrospect how they could have made such a mistake, yet the fact remains that people are misled into foolish errors. In my judgment we should not be justified in making any finding that the plaintiffs knew or that they should have known that Mr. Randall's van had only a "C" licence.

It having been proved, therefore, that the plaintiffs were imposed on and believed that the goods could be lawfully carried on Mr. Randall's van, are they disentitled to sue? Counsel for the defendants argues that the goods had to be carried in Mr. Randall's van alone and no other, and that the judge was wrong in holding that this contract of carriage was a general one to be performed by the defendants in any way that they might choose. Counsel for the plaintiffs argues on the other hand that this contract like many others was made with a particular method of performance in mind but was not restricted to that particular method of performance, and that haulage contracts are not so personal to the carrier that they cannot be vicariously performed. The point is not easy. I incline to the view held by the judge, but I do not find it necessary to express a concluded view on it.

Let us assume (although I am far from satisfied on this point) that the learned judge was in error in holding that the haulage contract could have been performed by the defendants in any way they liked (that is to say, lawfully as well as unlawfully). Let us assume first that it was a contract for carriage in Mr. Randall's van only and secondly that it was not by the nature of the contract one which could be performed vicariously. It must then inevitably be carried out unlawfully if (but only if) one adds the fact that Mr. Randall's van had a "C" licence and therefore could not lawfully carry the goods in question; but that fact, though known to the defendants, was unknown to the plaintiffs.

This is not a case where the plaintiffs can assert a cause of action without relying on the contract. Mr. Leonard put forward an ingenious alternative argument for the plaintiffs based on the plaintiffs' rights against the defendants as voluntary bailees of the plaintiffs' property (see *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.* (1)), so that he might claim in negligence or conversion without having any recourse to the contract or exposing to the court as part of his cause of action its alleged illegality; but I do not think that he can make good that argument. His cause of action comes from the contract, and if the contract is such that the court must refuse its aid, the plaintiffs cannot recover their damages.

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(1) [1944] 2 All E.R. 579; [1945] K.B. 65.

If a contract is expressly or by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract; and for this purpose both parties are presumed to know the law.

The first question, therefore, is whether this contract of carriage was forbidden by statute. The two cases on which the defendants mainly rely are *Re Mahmoud & Ispahani* (2) and *Dennis & Co., Ltd.* v. *Munn* (3). In both those cases the plaintiffs were unable to enforce their rights under contracts forbidden by statute. In the former case the Seeds, Oils, and Fats Order, 1919, art. 1 (a), provided:

> "... a person shall not ... buy or sell ... [certain] articles ... except under and in accordance with the terms of a licence ..."

In the latter case the Defence (General) Regulations, 1939, reg. 56A (1) said:

> "Subject to the provisions of this regulation the execution ... of any operation specified ... shall be unlawful ..."

except in so far as authorised. In neither case could the plaintiff bring his contract within the exception that alone would have made its subject-matter lawful, namely, by showing the existence of a licence. Therefore, the core of both contracts was the mischief expressly forbidden by the statutory order and the statutory regulation respectively. In *Re Mahmoud* (2) the object of the order was to prevent (except under licence) a person buying and a person selling and both parties were liable to penalties. A contract for sale between those persons was therefore expressly forbidden. In *Dennis's* case (3) the object of the regulation was to prevent (except under licence) owners from performing building operations and builders from carrying out the work for them. Both parties were liable to penalties and a contract between these persons for carrying out an unlawful operation would be forbidden by implication.

The case before us is somewhat different. The carriage of the plaintiffs' whisky was not as such prohibited; the statute merely regulated the means by which carriers should carry goods. Therefore this contract was not expressly forbidden by the statute. Was it then forbidden by implication? The Road and Rail Traffic Act, 1933, s. 1 (1), says:

> " . . . no person shall use a goods vehicle on a road for the carriage of goods . . . except under a licence ",

and provides that such use shall be an offence. Did the statute thereby intend to forbid by implication all contracts whose performance must on all the facts (whether known or not) result in a contravention of that section? The plaintiffs' part of the contract could not constitute an illegal use of the vehicle by them since they were not " using " the vehicle. If they were aware of the true facts they would, of course, be guilty of aiding and abetting the defendants, but if they acted in good faith they would not be guilty of any offence under the statute (*Davies, Turner & Co., Ltd.* v. *Brodie* (4); and see *Carter* v. *Mace* (5)). In this case, therefore, the plaintiffs were not committing any offence.

In *St. John Shipping Corpn.* v. *Joseph Rank, Ltd.* (6) DEVLIN, J., held that the plaintiffs were entitled to recover although there had been an infringement of a statute in the performance of a contract, but in that case the contract was legal when made. Though not directly applicable to the present case, it contains an observation (with which I entirely agree) on the point which arises here. He said (7):

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(2) [1921] All E.R. Rep. 217; [1921] 2 K.B. 716.
(3) [1949] 1 All E.R. 616; [1949] 2 K.B. 327.
(4) [1954] 3 All E.R. 283.
(5) [1949] 2 All E.R. 714.
(6) [1956] 3 All E.R. 683; [1957] 1 Q.B. 267.

> " For example, a person is forbidden by statute from using an unlicensed vehicle on the highway. If one asks oneself whether there is in such an enactment an implied prohibition of all contracts for the use of unlicensed vehicles, the answer may well be that there is, and that contracts of hire would be unenforceable. But if one asks oneself whether there is an implied prohibition of contracts for the carriage of goods by unlicensed vehicles . . . the answer may well be different. The answer may be that collateral contracts of this sort are not within the ambit of the statute."

In my judgment that distinction is valid.

The object of the Rail and Road Traffic Act, 1933, was not (in this connexion) to interfere with the owner of goods or his facilities for transport, but to control those who provided the transport with a view to promoting its efficiency. Transport of goods was not made illegal but the various licence-holders were prohibited from encroaching on one another's territory, the intention of the Act being to provide an orderly and comprehensive service. Penalties were provided for those licence-holders who went outside the bounds of their allotted sphere. These penalties apply to those using the vehicle but not to the goods owner. Though the latter could be convicted of aiding and abetting any breach, the restrictions were not aimed at him. Thus a contract of carriage was, in the sense used by DEVLIN, J. (7) " collateral " and it was not impliedly forbidden by the statute.

This view is supported by common sense and convenience. If the other view were held it would have far-reaching effects. For instance, if a carrier induces me (who am in fact ignorant of any illegality) to entrust goods to him and negligently destroys them, he would only have to show that (though unknown to me) his licence had expired or did not properly cover the transportation or that he was uninsured and I should then be without a remedy against him. Or again, if I ride in a taxicab and the driver leaves me stranded in some deserted spot, he would only have to show that he was (though unknown to me) unlicensed or uninsured, and I should be without remedy. This appears to me an undesirable extension of the implications of a statute.

In *Vita Food Products, Incorporated* v. *Unus Shipping Co., Ltd.* (8) LORD WRIGHT said:

> " Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) to discriminate between guilt and innocence. If, however, the court makes no such implication, it still leaves itself with the general power, based on public policy, to hold those contracts unenforceable which are ex facie unlawful, and also to refuse its aid to guilty parties in respect of contracts which to the knowledge of both can only be performed by a contravention of the statute (see *Nash* v. *Stevenson Transport, Ltd.* (9)) or which though apparently lawful are intended to be performed illegally or for an illegal purpose (for example, *Pearce* v. *Brooks* (10)). It is for the defendants to show that contracts by the owner for the carriage of goods are within the ambit of the implied prohibition of the Road and Rail Traffic Act, 1933. In my judgment they have not done so.

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(7) [1956] 3 All E.R. at p. 690; [1957] 1 Q.B. at p. 287.
(8) [1939] 1 All E.R. at p. 523; [1939] A.C. at p. 293.
(9) [1936] 1 All E.R. 906; [1936] 2 K.B. 128.
(10) (1866), L.R. 1 Exch. 213.

The next question is whether this contract, though not forbidden by statute, was ex facie illegal. Must any reasonable person on hearing the terms of the contract (with presumed knowledge of the law) realise that it was illegal? There is nothing illegal in its terms. Further knowledge, namely, knowledge of the fact that Mr. Randall's van was not properly licensed, would show that it could only be performed by contravention of the statute, but that does not make the contract ex facie illegal.

However, if both parties had that knowledge the contract would be unenforceable as being a contract which to their knowledge could not be carried out without a violation of the law (see per BLACKBURN, J., in *Waugh* v. *Morris* (10)) but where one party is ignorant of the fact that will make the performance illegal, is it established that the innocent party cannot obtain relief against the guilty party? The case has been argued with skill and care on both sides, and yet no case has been cited to us establishing the proposition that where a contract is on the face of it legal and is not forbidden by statute, but must in fact produce illegality by reason of a circumstance known to one party only, it should be held illegal so as to debar the innocent party from relief. In the absence of such a case I do not feel compelled to so unsatisfactory a conclusion, which would injure the innocent, benefit the guilty, and put a premium on deceit. Such a conclusion (in cases like this where a contract is not forbidden by statute) can only derive from public policy. For the reasons given by LORD WRIGHT, which I have read (11), an extension of the law in this direction would be more harmful than beneficial. No question of moral turpitude arises here. The alleged illegality is, so far as the plaintiffs were concerned, the permitting of their goods to be carried by the wrong carrier, namely, a carrier who, unknown to them, was not allowed by his licence to carry that particular class of goods. The plaintiffs were never in delicto since they did not know the vital fact that would make the performance of the contract illegal.

In my view, therefore, public policy does not constrain us to refuse our aid to the plaintiffs and they are, therefore, entitled to succeed. I would dismiss the appeal.

DEVLIN, L.J.: The effect of illegality on a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely on his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio, and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.

The defendants do not seek to bring this case under either of the first two heads. They cannot themselves enforce the contract because they intended to perform it unlawfully with a van that they knew was not properly licensed for the purpose: but that does not prevent the plaintiffs, who had no such intent and were not privy to it, from enforcing the contract. Nor can it be said that the plaintiffs committed any illegal act. To load a vehicle is not to use it on the road, which is what is forbidden; no doubt loading would be enough to constitute aiding and abetting if the plaintiffs knew of the defendants' purpose (*National Coal Board* v. *Gamble* (12)) but they did not.

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(10) (1873), L.R. 8 Q.B. at p. 208.

(11) See p. 423, letter G, ante.

(12) [1958] 3 All E.R. 203; [1959] 1 Q.B. 11.

So what the defendants say is that the contract is prohibited by the Road and Rail Traffic Act, 1933, s. 1. In order to see whether the contract falls within the prohibition it is necessary to ascertain the exact terms of the contract and the exact terms of the prohibition. For reasons which I shall explain later, I shall begin by ascertaining the latter. Section 1 of the Act provides that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward except under a licence. Section 2 provides for various classes of licences, " A ", " B " and " C ". It is agreed that the carriage of the goods which were the subject-matter of this contract required an " A " licence. The fact that the van had a " C " licence does not, therefore, help one way or the other; and it is admitted that the defendants' use of this van for the carriage of these goods was prohibited. As I have noted, the plaintiffs are not to be treated as using the van because they supplied the load. Section 1 (3) provides that the driver of the vehicle or, if he is an agent or servant, his principal, shall be deemed to be the person by whom the vehicle is being used.

The statute does not expressly prohibit the making of any contract. The question is, therefore, whether a prohibition arises as a matter of necessary implication. It follows from the decision of this court in *Nash* v. *Stevenson Transport, Ltd.* (13) that a contract for the use of unlicensed vehicles is prohibited. In that case the plaintiff held " A " licences which the defendant wanted to purchase. But the Act of 1933 provides that licences may not be transferred or assigned, and it was therefore agreed that the defendant should run the vehicles in the plaintiff's name so that they might obtain the benefit of his licences. It was held by the court that that was an illegal agreement because the defendant was the person who was using the vehicles and the plaintiff the person who was licensed to use them; thus the user was not the licensee. In the present case there was no contract for the use of the vehicle.

On the other hand it does not follow that because it is an offence for one party to enter into a contract, the contract itself is void. In *Re Mahmoud & Ispahani* (14) SCRUTTON, L.J., said:

> " In *Bloxsome* v. *Williams* (15) the defendant, a horse dealer, was prohibited from trading on Sunday, but there was nothing illegal in another person making a contract with a horse dealer, except that, if he knew that the person with whom he was dealing was a horse dealer and was guilty of breaking the law, he might be aiding and abetting him to break the law. But merely to make a contract with a horse dealer, without knowing he was a horse dealer, was not illegal."

The general considerations which arise on this question were examined at length in *St. John Shipping Corpn.* v. *Joseph Rank, Ltd.* (16) and PEARCE, L.J., has set them out so clearly in his judgment in this case that I need add little to them. Fundamentally they are the same as those that arise on the construction of every statute; one must have regard to the language used and to the scope and purpose of the statute. I think that the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed on him, and thus undo the penal effect of the statute.

I conclude therefore that this contract was not illegal for the reason that the statute does not prohibit the making of a contract for the carriage of goods in unlicensed vehicles and this contract belongs to this class. I am able, therefore, to arrive at my judgment without an examination of the exact terms of the contract. It would have been natural to have begun by looking at the contract; I have not done so because it is doubtful whether the state of the pleadings permits a thorough examination. However, as counsel for the defendants' argument before us turned on its terms, I think that I should deal with them. The defendants contend that this was a contract of carriage by a specified vehicle, namely, the van SXY 902 then being driven by Mr. Randall. The plaintiffs agree that it was contemplated that the van SXY 902 should be used for the contract but dispute that the contract was so limited. The words used in the contract were " a covered van " and the plaintiffs submit, and the learned judge has so held, that " it was open to the defendants to carry the goods in any vehicle they liked ". I have reached no final conclusion on this point. Assuming, as for the purposes of this argument I do, that the statute prohibits every contract for the carriage of goods in an unlicensed vehicle, I do not think that the question whether this contract falls within the statute depends on whether it was limited to the use of the vehicle SXY 902. According to the defendants' argument, the significance of the point lies in the fact that they have to accept the burden of proving that there was no way in which they could have performed the contract legally. If only the one van could have been used under the contract, they claim to have discharged that burden; otherwise they concede that they cannot prove that they could not, if they had tried, have got hold of some other licensed van. In my judgment, this is not the decisive test.

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(13) [1936] 1 All E.R. 906; [1936] 2 K.B. 128.
(14) [1921] All E.R. Rep. at p. 222; [1921] 2 K.B. at p. 730.
(15) (1824), 3 B. & C. 232.
(16) [1956] 3 All E.R. at p. 688 onwards; [1957] 1 Q.B. at p. 285 onwards.

It is a familiar principle of law that if a contract can be performed in one of two ways, that is, legally or illegally, it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegally. That statement of the law is meaningful if the contract is one which is by its terms open to two modes of performance; otherwise it is meaningless. Almost any contract—certainly any contract for the carriage of goods by road—*can* be performed illegally; any contract of carriage by road can be performed illegally simply by exceeding the appropriate speed limit. The error in the defendants' argument is that they are looking at the facts which determine their capacity to perform and not at the terms of the contract. Suppose that the contract were for a vehicle with an " A " licence, or—what is substantially the same thing—for a specified vehicle warranted as holding an " A " licence. That would not be an illegal contract for it would be a contract for the use of a licensed vehicle and not an unlicensed one. If those were the express terms of the contract, it would not be made illegal because all the carrier's vehicles, or the specified vehicle as the case might be, had " C " licences. The most that that could show would be that the carrier might well be unable to perform his contract. Or suppose that the contract were for any " A " vehicle owned by the defendant and the defendant had a fleet of five " A " vehicles and five " C " vehicles. That would be a legal contract and it would not be made illegal because, at the time when it was made, it was physically impossible for the defendant to get any of his " A " vehicles to the loading place in time. If the contract is for a specified vehicle with an " A " licence, loading to begin within a week, it is not illegal because when the contract was made the vehicle had no " A " licence; one might be obtained in time and the court will not decide the question of legality by inquiring whether an " A " licence could or could not have been obtained for it within the week. So in this case it is irrelevant to say that the van SXY 902 had in fact not got an " A " licence and could not conceivably have got one in time. The error in the defendants' argument is that they assume that because the parties were contracting about a specified vehicle and because that specified vehicle had *in fact* (a fact known to one party and not to the other) only a " C " licence, therefore they were contracting about a vehicle with a " C " licence. It is the terms of the contract that matter; the surrounding facts are irrelevant, save in so far as, being known to both

A parties, they throw light on the meaning and effect of the contract. The question is not whether the vehicle was in fact properly licensed but whether it was expressly or by implication in the contract described or warranted as properly licensed. If it was so described or warranted, then the legal position is, not that the contract could only be performed by a violation of the law, but that unless it could be performed legally, it could not be performed at all. The fact that, B as in this case, it may be known to one of the parties at the time of making the contract that he cannot perform it legally and therefore that it will inevitably be broken, does not make the contract itself illegal. So the correct line of inquiry into the terms of the contract in this case should have been not whether it provided for performance by a specified vehicle or by any vehicle that the defendants chose to nominate, but whether the defendants warranted or agreed C that the vehicle which was to do the work, whether a specified vehicle or any other, was legally fit for the service which it had to undertake, that is, that it had an " A " licence.

There is much to be said for the argument that in a case of this sort there is, unless the circumstances exclude it, an implied warranty that the van is properly licensed for the service for which it is required. It would be unreasonable to D expect a man when he is getting into a taxicab to ask for an express warranty from the driver that his cab was licensed; the answer, if it took any intelligible form at all, would be to the effect that it would not be on the streets if it were not. The same applies to a person who delivers goods for carriage by a particular vehicle; he cannot be expected to examine the road licence to see if it is in order. The issue of warranty, however, was not raised in the pleadings or at the trial E and so it is preferable to decide this case on the broad ground which PEARCE, L.J., has adopted and with which, for the reasons I have given, I agree.

There are many pitfalls in this branch of the law. If, for example, Mr. Field had observed that the van had a " C " licence and said nothing, he might be said to have accepted a mode of performance different from that contracted for and so varied the contract and turned it into an illegal one: see *St. John Shipping* F *Corpn.* v. *Joseph Rank, Ltd.* (17) where that sort of point was considered, or, to take another example, if a statute prohibits the sale of goods to an alien, a warranty by the buyer that he is not an alien will not save the contract. That is because the terms of the prohibition expressly forbid a sale to an alien; consequently, the question to be asked in order to see whether the contract comes within the prohibition is whether the buyer is in fact an alien, not whether he G represented himself as one. *Re Mahmoud & Ispahani* (18) is that sort of case. The statute forbade the buying and selling of certain goods between unlicensed persons. The buyer falsely represented himself as having a licence. It is not said that he so warranted but, if he had, it could have made no difference. Once the fact was established that he was an unlicensed person the contract was brought within the category of those that were prohibited. *Strongman* H *(1945), Ltd.* v. *Sincock* (19) exemplifies another sort of difficulty. It was an action brought by a builder against a building owner to recover the price of building work done. The statute forbade the execution of building operations without a licence. The building owner expressly undertook to obtain the necessary licence and failed to do so; and it was held that the builder could not recover. The builder, I dare say, might have contended that, having regard I to the undertaking, the contract he made was for licensed operations and therefore legal; but unfortunately he had himself performed it illegally by building without a licence and he could not recover without relying on his illegal act because he was suing for money for work done. The undertaking might make the contract legal but not the operations. All these cases are distinguishable from the present one, where the contract is not within the prohibition and the plaintiffs themselves committed no illegal act and did not aid or abet the defendants. Apart from the pleading point, it might not matter if the last two cases were not distinguishable, since the plaintiffs could obtain damages for breach of the warranty as in *Strongman (1945), Ltd.* v. *Sincock* (20).

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(17) [1956] 3 All E.R. at pp. 687, 688; [1957] 1 Q.B. at pp. 283, 284.
(18) [1921] All E.R. Rep. 217; [1921] 2 K.B. 716.
(19) [1955] 3 All E.R. 90; [1955] 2 Q.B. 525.

Appeal dismissed.

Solicitors: *Hart-Leverton & Co.* (for the defendants); *Herbert Baron & Co.* (for the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

MORLEY *v.* MORLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Cairns, J.), November 10, 11, 14, 15, December 2, 1960.]

Divorce—Condonation—Condonation by wife—Resumption of sexual intercourse.

The parties were married in 1956. They and their respective families were engaged in the fairground business, the husband and his parents operating in the north of England, and, at the time of the marriage, the wife and her parents operating in the south. In April, 1960, the wife left the husband because of his ill-treatment and made complaints in the magistrates' court that the husband had been guilty of persistent cruelty towards her and had been guilty of wilful neglect to provide reasonable maintenance. On June 16, 1960, the complaints were adjourned to enable the parties to discuss a reconciliation and in fact the wife agreed to return to the husband on condition (i) that he never hit her again and (ii) that he travelled for his work in the south of England, away from his parents. The husband agreed and the wife rejoined him on June 27, 1960. The husband then refused to leave the north of England, but the wife did not accept this repudiation of condition (ii). The parties remained together until June 29, 1960, when the wife left the husband for the last time. Between June 27 and 29 the parties had had sexual intercourse together on two occasions, the wife being a willing party thereto. On the question of condonation by the wife,

Held: the wife had not condoned the husband's cruelty since the husband by his refusal to transfer his work to the south of England had repudiated the agreement for reconciliation made on June 16, 1960, and the acts of the wife in spending forty-eight hours with him (from June 27 to 29) and voluntarily having sexual intercourse with him were acts in an attempt to effect a reconciliation and did not constitute a reinstatement by her of the husband in his former marital position.

Baguley v. *Baguley* ((Oct. 10, 1957), "The Times") explained and distinguished.

Appeal dismissed.

[As to condonation by a wife, see 12 HALSBURY'S LAWS (3rd Edn.) 304, para. 603, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 395-405, *3254-3346*.]

Cases referred to:

Abercrombie v. *Abercrombie*, [1943] 2 All E.R. 465; 169 L.T. 340; 107 J.P. 200; 27 Digest (Repl.) 244, *1978*.

Baguley v. *Baguley* (Oct. 10, 1957), "The Times".

Crocker v. *Crocker*, [1921] P. 25; 90 L.J.P. 136; 124 L.T. 493; 27 Digest (Repl.) 397, *3273*.

Elwes v. *Elwes*, (1794), 1 Hag. Con. 269; 161 E.R. 549; 27 Digest (Repl.) 315, *2630*.

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(20) [1955] 3 All E.R. 90; [1955] 2 Q.B. 525

Fearn v. *Fearn*, [1948] 1 All E.R. 459; [1948] P. 241; [1948] L.J.R. 1043; 27 Digest (Repl.) 398. *3276*.

Henderson v. *Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 27 Digest (Repl.) 397, *3271*.

Keats v. *Keats & Montezuma*, (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 164 E.R. 754; 27 Digest (Repl.) 395, *3260*.

Mackrell v. *Mackrell*, [1948] 2 All E.R. 858; 27 Digest (Repl.) 398, *3278*.

Mummery v. *Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 27 Digest (Repl.) 401, *3301*.

Perry v. *Perry*, [1952] 1 All E.R. 1076; [1952] P. 203; 116 J.P. 258; 3rd Digest Supp.

Rose v. *Rose*, (1883), 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 27 Digest (Repl.) 433, *3616*.

Rowell v. *Rowell*, [1900] 1 Q.B. 9; 69 L.J.Q.B. 55; 81 L.T. 429; *subsequent proceedings*, (1903), 89 L.T. 288; 27 Digest (Repl.) 244, *1977*.

Snow v. *Snow*, (1842), 2 Notes of Cases, Supp. i; 6 Jur. 285; 27 Digest (Repl.) 404, *3339*.

Tilley v. *Tilley*, [1948] 2 All E.R. 1113; [1949] P. 240; [1949] L.J.R. 929; 27 Digest (Repl.) 405, *3346*.

Appeal.

This was an appeal by the husband against an order of the Bromley justices sitting at Bromley dated Sept. 15, 1960.

The parties were married in February, 1956. They were both in the fairground business, the husband in the north of England and the wife in the south. There were three children, a boy born in May, 1957, a girl born in June, 1958, and a boy born in June, 1959. On Apr. 9, 1960, the wife left the husband taking the two elder children with her. On Apr. 23, 1960, a summons was issued against the husband on the wife's complaints that he had been guilty of persistent cruelty to her and had wilfully neglected to provide reasonable maintenance for her and the two elder children. The first hearing of the complaints took place on June 1, 1960, when the case was adjourned. The hearing was resumed on June 16, 1960, but before the wife's cross-examination had been completed the case was further adjourned to enable the parties to discuss a reconciliation. The wife agreed to return to the husband on two conditions (i) that he would never hit the wife again and (ii) that he would work in future in the south of England. On June 27, 1960, the wife rejoined the husband in the north of England but on June 29, 1960, she returned south again, and the parties never resumed cohabitation. Between June 27 and 29, 1960, the parties had sexual intercourse together on two occasions. The case was resumed on Aug. 17, 1960, and it was suggested to the wife in further cross-examination that she had condoned the husband's cruelty. The case was concluded on Sept. 15, 1960; the justices found the complaints proved, made a separation order in the wife's favour, granted her the custody of the two elder children and ordered the husband to pay her £4 per week as maintenance for herself and 30s. per week as maintenance for each of the two elder children. The justices also made an order for the custody of the youngest child in favour of the husband under the Guardianship of Infants Acts, 1886 and 1925.

The husband now appealed. The sole question argued on appeal was whether or not the wife had condoned the husband's cruelty.

J. T. Molony, Q.C., *F. S. Laskey* and *K. M. Willcock* for the husband.

Anthony Cripps, Q.C., and *Mrs. B. Knightly* for the wife.

Cur. adv. vult.

Dec. 2. The following judgments were read.

LORD MERRIMAN, P.: Although the notice of appeal challenges the finding that the complaint in each case is proved, this was not

persisted in. With regard to the persistent cruelty, the justices accepted the A
wife's evidence against the denials of the husband, and in their reasons they
stated that they considered that it was a very serious case of persistent cruelty.
Owing to the fact that the finding was not challenged the notes of the evidence
on this issue were not read to us. Having read them for myself, I agree with the
justices' view of the case, on the assumption that they accepted, as they were
fully entitled to accept, the evidence of the wife, and I can well understand the B
reasons for the course taken by counsel. In fact, the sole question for our
decision was whether the wife had condoned the cruelty; if so, we were urged to
set aside the finding that the persistent cruelty had been proved and to strike
out the separation order. It was conceded that the maintenance order would be
supported by the unchallenged finding of wilful neglect. The resulting situation
is curious, for the wife had left the husband because of the ill-treatment on C
which she relied for her complaint of persistent cruelty. If this was condoned
the assumption would be that she had no justification for remaining apart from
her husband, and, therefore, would not be entitled to maintenance. We were,
however, not invited to interfere with the maintenance order, or the custody
order, or the order for the maintenance of the children of whom the wife was
awarded custody, though if the cruelty was condoned these parts of the order D
could only be supported by the finding of wilful neglect to maintain the wife
and the children.

The parties were married in February, 1956. The first child, a boy, was born
in May, 1957; the second, a girl, in June, 1958, and the third, a boy, in June,
1959. The parties are young, the husband being now aged twenty-five and the
wife twenty-seven years. Both spouses are engaged in the fairground industry, E
and at the time of the marriage the wife's parents were also engaged in that
industry, mainly in the south of England. Her father has since died, but her
mother still carries on the work with their caravan, and, since the spouses parted,
has been helped by the wife. The husband's parents also have a caravan
circulating in the north of England, where the husband's father is also interested
in certain fairgrounds. The husband has at all material times travelled in his F
own caravan on the same round as his parents, and it appears that he gets more
favourable terms for his caravan and its entertainments on fairgrounds in which
the father is interested.

In the early part of his evidence on Aug. 17, 1960, the husband said that he had
a regular job working at his father's fair; that he did not pay any expenses now
because he was with his father, adding: " It is his fair ". Much later on that G
day he said: " I cannot leave my people now because I am now in partnership ".
At the adjourned hearing on Sept. 15 his mother confirmed the statement that
he was a partner. In the absence of any finding on this point I say no more than
that this change in the husband's evidence may be open to doubt in relation to
what will be seen to be a crucial point in the case.

It is one of the wife's contentions in connexion with her complaint of cruelty H
that much of the trouble that has arisen between her and her husband is due to
the interference of his parents in their lives. In this connexion it is worth
noting that with regard to an incident at Hull in February, 1959, when she was
four months pregnant with the third child, the wife states that her husband
had hit her with his fist on the jaw and knocked her unconscious, and that,
when she came to, the husband's mother, who was administering whisky to her, I
was glaring at her with a face of hatred, whereupon she fainted again; and that
in connexion with the last incident on Apr. 9, 1960, which led immediately to the
parting, in the course of which the husband is said to have put his hands round
the wife's throat, hit her two or three times, punched her in the left eye with
a ring on his finger, bruised the eye and made her nose bleed, and at the same
time to have called her a prostitute, the husband, while denying the assault,
admitted that he had called the wife a prostitute, and that his sister had said
that she " had been dying for some time to have a go at her ". The wife left

the husband finally, after two earlier absences, on Apr. 9, 1960, and made her complaints on Apr. 23.

For the reasons already given, it is unnecessary to go into the details of the various acts of ill-treatment on which the complaint of persistent cruelty is based. It is not unimportant, however, to notice that several of these incidents have the common feature that they occurred during one or other of the wife's pregnancies, a circumstance which is generally regarded as an aggravation of any act of violence. It is, however, obvious that in a marriage which only subsisted effectively from February, 1956, to April, 1960, the periods during which the wife was not pregnant with one or other of the three children were necessarily comparatively short, and the necessity for tenderness and consideration on the part of the husband was proportionately increased. The wife returned to her mother after the incident of Apr. 9, taking with her the two elder children. She was obliged to leave the baby (Robert) in hospital. On the following Tuesday, as appears from the husband's letter dated May 19, 1960, the husband took the child out of hospital. He kept the child until the date of the guardianship order of Sept. 15, 1960, and still has the child with him.

On June 16, 1960, when the wife was still under cross-examination with regard to her charges of cruelty, an adjournment was granted at the request of the parties, who had intimated their willingness to discuss reconciliation. A discussion took place at the court house in the course of which the wife agreed to return to her husband on two conditions, to both of which the husband admitted that he had agreed. The conditions were, first, that the husband would never hit the wife again, and, secondly, that he would travel in future in the south of England, away from his parents. The wife then went back to her mother. The husband took her to the station, having given her, as he said, a week " to sort things out ". On the night of June 26/27 she travelled to Newcastle-upon-Tyne by night train, arriving at seven o'clock on the morning of June 27. It is on the events that occurred during that visit, which ended with the wife returning to her mother in the south on June 29, that the issue of condonation depends. As already stated, she had not seen the baby for over two months, and it is plain from her evidence that she went to Newcastle expecting to return in the caravan with her husband and the baby to the south of England, in accordance with the condition on which she had insisted. The husband did not meet the wife on her arrival at Newcastle station, but she drove by taxi to the fairground, about two miles away, where she found the husband in bed in the caravan with the baby.

It is agreed that at some time between 10.30 and 12.30 on that morning the caravan started on the journey from Newcastle to Goole. Goole is one of the towns habitually visited on the husband's circuit. Geographically, it is about a hundred miles south of Newcastle. At some time later in the morning—though the time was not precisely fixed and it is not clear whether or not the caravan had actually started for Goole—the husband informed the wife that he could not change his circuit to the south of England. It is quite clear that she did not accept this repudiation of the second condition on which she had agreed to a reconciliation. It is argued that, this being so, she ought straight away to have taken the train back to the south. In fact, she remained until June 29, and it is common ground that on two occasions the spouses had sexual intercourse. It is clear from the wife's evidence that during the whole of the forty-eight hours which she spent with the husband she never ceased to try to persuade him to stick to what she regarded as the vital condition that he should transfer his business to the south of England. In these circumstances it was natural for the wife not to treat the husband's repudiation as final, but to try to persuade him to stick to the terms of the reconciliation. It seems to me, too, that as a matter of practical politics she had nowhere else to go, if, as I assume, she still hoped to make the reconciliation effective. The sensible thing, plainly, was to proceed in the caravan with the husband, and the child whom she had not seen for so long, as she had expected to do when she came up to Newcastle. Leaving aside for the moment the admitted fact of the sexual intercourse during those forty-eight hours, it would, in my opinion, be unjust to regard the mere sharing of the caravan with her husband and the child in those circumstances as being conclusive evidence of her reinstatement of him as her husband.

In order to appreciate how the wife's evidence came out, it is necessary to remember, as already stated, that she was under cross-examination about her evidence regarding the cruelty when the court adjourned on June 16. No question of condonation had arisen then, but when the court sat again on Aug. 17, her cross-examination was resumed with an attempt to extract from her that there had been condonation meanwhile between June 27 and 29. She said that she had met her husband in court after the hearing of June 16; that he had asked if she would come back to him, and that she had said " Yes " if he would leave his parents, and that she had mentioned that she would only come back to him if he came to the south of England. She was then cross-examined about her visit to Newcastle, with the evident intention of showing that there had been condonation. She said that she had a discussion with him about leaving his parents; that later in the morning he explained that it was impossible for him to come down south; and said his business was up there; that he said that the Bingo stall would cost him £25 a week in the south and nothing in the north. She had disagreed. He also said that if he came down south he would not get good positions on the fairgrounds. She did agree to a certain extent that it was better for him to stay in the north. She said that she did go to Goole with him for two days; that she did have intercourse with him on two occasions, quite willingly; that she then came back down south, but did not agree to return to him; she had told him that she was not returning to him on quite a few occasions, but he would not take " no " for an answer, saying that if necessary he would come down south and drag her back. She added that they were more or less friendly when they parted on June 29. She denied that she said that she would think about going back to him; she had told him that she could not come back. She said that he had telephoned to her a week later, and she told him that she definitely was not going back, but denied that she had told him that she had changed her mind. She added: " I do love my husband. I won't return to him because we have had trouble all the time we have been married; only through in-laws ". She agreed that it would definitely be better for their three children if they lived together, and she thought her husband wanted her to live with him, adding: " but under his conditions ". In conclusion she said: " If he came down south it would depend how hard he worked if he made as much money ".

In further cross-examination she was evidently pressed with having had sexual intercourse after it was definitely settled that the husband was not leaving his parents. She replied: " It wasn't definitely settled he was leaving his parents. It was left in the balance. He was trying to talk me into staying and I was trying to talk him into leaving. He was not prepared to leave his family there and then because he had not got the equipment to leave with ". She also said that if they lived in the north they would be better off if they stayed with his family; they would be in the same position as they would be in the south " if we were separate. We would still have to work up our different positions ".

Re-examined, the wife said that on the morning of June 16, the husband had agreed that if she came back with him he would not hit her again, and he would come down south. She said that it was on these two conditions that she went up north, to come back with him and the baby south. The husband admitted these two conditions categorically. The wife added:

> ". . . after some time he informed me that he was not leaving his parents. I then said that in those circumstances I would be going back south as he had

not fulfilled the terms of my forgiveness. I had gone up north on the understanding that he would come south."

It may be that in a case of cruelty, where the facts are presumably known to the victim, there is not the same inconsistency as in the case of adultery between denial of the fact and alleged condonation of the fact denied. Nevertheless, it seems to me, to say the least, to be a curious sequel to what is said to have been a complete reconciliation, one of the conditions of which, it is admitted, was that the husband would never hit the wife again, that her evidence of ill-treatment was almost wholly disputed and she was held up, both in cross-examination and in the evidence of the husband and of his mother, as a liar or a play-actress. The husband referred more than once to the wife liking an audience for her scenes; and of one occasion when he said that she "reckoned to faint on the floor" and later on the bed, which may be the incident already referred to; he said that he "had to admire the performance she gave". If the point had been raised before the justices, which apparently it was not, we might have had to consider whether this conduct of the husband's case amounted to conjugal unkindness of a kind which would cancel the condonation, if any.

The real difficulty in this case arises from the decision of the Court of Appeal in *Baguley* v. *Baguley* (1). We have been provided with a copy of the transcript of the judgments, preserved in the Bar Library. I propose to quote extensively from this transcript, which appears to be the only copy in existence, because it affords the main support of the argument for the husband, and because the relevant passages from the summing-up of the Judge Ordinary (SIR CRESSWELL CRESSWELL) in *Keats* v. *Keats & Montezuma* (2) and from the speech of VISCOUNT SIMON, L.C., in *Henderson* v. *Henderson & Crellin* (3), are quoted in the judgments, which will obviate the necessity of my repeating these quotations at length. It appears from the judgment of HODSON, L.J., in *Baguley* v. *Baguley* (1) that the wife had on Mar. 4, 1955, presented a petition for divorce on the ground of cruelty. The husband denied cruelty, and in addition to his denial relied on a plea of condonation. Mr. Commissioner EDGEDALE, Q.C., found in favour of the husband with regard to certain of the charges which he classed as relatively trivial acts, but he found in favour of the wife as regards certain more serious acts, saying that he had formed a clear opinion that certain later assaults were unjustified acts of violence which did amount to cruelty.

The notice of appeal challenged the finding of cruelty, but, having regard to the course that the case took in the Court of Appeal, the only matter which was in fact investigated was the issue of condonation. HODSON, L.J., described the case as really a very simple one, so far as condonation was concerned. The parting had occurred in October, 1954, and both before and after the presentation of the wife's petition in March, 1955, the solicitors both for the wife and the husband had done everything that they possibly could to bring about a reconciliation and eventually there were meetings between the husband and wife. In a letter of July 25, 1955, the husband, who had already been seeing the wife in connexion with the children, said that following their conversation on the Saturday and Sunday last, it seemed possible that a reconciliation could be achieved with a certain amount of good will on both sides. He said that if the wife felt that a return to the house which had hitherto been the matrimonial home (33, Thornton Road, Cambridge) would be too embarrassing, he was willing to consider moving elsewhere to a location where the children's education could be adequately pursued with a minimum of disturbance, and he also could hope to make a sufficient income for their modest needs. He added that he thought that the next step was for them to meet again without the children and to try to establish some further points of agreement, saying that he felt hopeful that they could achieve some amicable and workable agreement. A

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(1) (Oct. 10, 1957), "The Times". (2) (1859), 1 Sw. & Tr. 334.

(3) [1944] 1 All E.R. 44; [1944] A.C. 49.

After an interval of about a month the parties met at the office of the wife's solicitors, and in the words of Hodson, L.J.:

> "... they agreed to come together again. A reconciliation was effected, on the terms that the parties would let bygones be bygones and would live together when the husband had got accommodation other than 33, Thornton Road; and it was further agreed that there should be no recrimination between them, and the wife forgave the husband for all that had happened in the past. There is no doubt, and indeed no dispute, that that is what happened on Sept. 8, 1955, at the solicitors' office." B

I would observe in passing that the expression to "let bygones be bygones" was treated by Jessel, M.R., in *Rose* v. *Rose* (4), as the mark of what he called for want of a better term, "final condonation"—see also Bucknill, L.J., in *Fearn* v. *Fearn* (5). C

Hodson, L.J., continued:

> "It appears from what I have said that the only question that was left was the place where these people were to live in the future. It was not unnatural for the wife to want to leave the place where she thought that there had been so much unhappiness in the past. Further, there was the complication that one particular neighbour (who gave evidence on behalf of the wife at the trial) would not very easily be able to visit the house in the future, and the husband concurred in the wife's suggestion that he should try to find something within his means elsewhere for the future where they could live together. I should say that the house where they lived at 33, Thornton Road was a rent-restricted house, and the rent was a low one; even with the rates added to the rent, the sum which they had to pay was under £100 a year, and it goes without saying that it would not be easy for the husband to find a suitable home for his wife and family at that price. But that was the arrangement—complete reconciliation, so far as it could be effected by word of mouth, and a provision that the future married life should be spent in another home." D E F

Shortly after this agreement, in the course of a visit for the day to the house of the husband's parents, when the husband and wife were doing the washing-up in the kitchen after a meal, a single act of sexual intercourse took place. A contraceptive, which the husband had brought, was used. There was no dispute about the willingness of the wife on this occasion, and there was no question of fraud. G

Hodson, L.J., continued:

> "Now the law as to condonation, I think, is clear, and was laid down in *Keats* v. *Keats & Montezuma* (6) as long ago as 1858. In that case the Judge Ordinary (Sir Cresswell Cresswell) said (7): 'In the reports of decisions in the ecclesiastical courts, there is no case precisely in point with the present one. In almost all of them, the great proof of condonation was the recommencement of matrimonial cohabitation, or some act done; and if the husband, knowing that his wife has been guilty of adultery, takes her to his bed again, he being clearly his own master in that particular, and quite able to choose for himself, if he is so regardless of the wrong done to him as to take her back again, it is always held that this is such a proof of condonation that it cannot be got over. With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going H I

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(4) (1883), 8 P.D. at p. 99. (5) [1948] 1 All E.R. at p. 463; [1948] P. at p. 252.
(6) (1859), 1 Sw. & Tr. 334. (7) (1859), 1 Sw. & Tr. at p. 347.

away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife '. That was part of the direction to a jury, which was considered by the full court presided over by LORD CHELMSFORD, L.C., later. His opinion was as follows (8): 'The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation. But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by a something which amounts to a reconciliation and of (sic) a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete ' ".

HODSON, L.J., continued later:

" That view of the law has remained undisturbed throughout the years. The House of Lords had the question under consideration—again the question of a husband condoning his wife's adultery—in *Henderson* v. *Henderson* (9). 'The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place, but where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect. The exception is that, if the intercourse was induced by a fraudulent mis-statement of fact by the wife, that circumstance will prevent the husband's actions from having the effect of condonation '. I omit the next few sentences and continue, in LORD SIMON's speech (9): 'It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations. In *Snow* v. *Snow* (10) [before the ecclesiastical court] DR. LUSHINGTON discusses at length whether, where a husband has been guilty of cruelty, a wife can ever maintain a suit where cohabitation was continued after the last act, and he concludes (11) that subsequent cohabitation is not universally a bar to the wife's suit, for the reasons above stated, but I know of nothing in the earlier decisions, either in the ecclesiastical courts or in the Divorce Court of this country, which supports the view that a husband who has intercourse which is not induced by the fraud of the wife after knowledge of the facts of his wife's adultery, should not thereby be regarded as condoning his wife's misconduct.'

" The authorities, therefore, have laid it down quite clearly that condonation involves reinstatement of the offending party, and that, in the case of a husband, who is master of his own acts, if he has intercourse with his wife knowing her offence he cannot afterwards say that he has not reinstated her. The authorities also show that that is not the rule in the case of a wife because the wife is not mistress of the situation. In the old days, when the law was laid down on this topic, the wife was less the mistress of the situation than she is today, because she could, normally, have no property. But the observations of the Judge Ordinary in *Keats*' case (12), which I have already read, I think ought to be applied to this case—' With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife '.

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(8) (1859), 1 Sw. & Tr. at p. 356.
(9) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 52.
(10) (1842), 2 Notes of Cases, Supp. i.
(11) (1842), 2 Notes of Cases, Supp. at pp. xvii, xviii.

" The question is whether there is proof of condonation or whether there is not. This is not a case in which the wife was not her own mistress, or had not the option of going away, or had no place to go to or no person to receive her, or no funds to support her. There was nothing to explain her submission to the embraces of her husband except her own will. The authorities, as I understand them, have consistently proceeded on the basis that the law of condonation is the same for the wife as for the husband in that sense—namely, that, if she has reinstated him by submitting voluntarily to his embraces without any extraneous circumstance weighing against the inference to be drawn from that submission, she must be held to have condoned the offence.

" There has been, no doubt, some talk about the desirability of the law of condonation being altered, in the sense that it might be thought to be desirable that some interval should elapse—some probationary period might be allowed to supervene—before it could be said that the party could not rely on complaints previous to that condonation. But that talk has not resulted in legislation; and the law as I understand it is as I have stated it—that once the reinstatement has taken place it cannot be said ' Oh, well, it was only a short reinstatement. In this case it was only one act of intercourse. It did not even take place in the matrimonial home, it took place in a living room in somebody else's house; therefore it can be treated as of no consequence '. This was not a submission to the embraces of someone of the opposite sex who had no ties with her. It was a submission of a woman to her husband, and, as SELLERS, L.J., shortly pointed out in the course of the argument more than once, it is repugnant to regard that act of submission as if it were some sort of casual commerce between two persons of opposite sexes, when in fact one knows that it is an act of intercourse of a wife with her husband—indeed, following upon conversations at which they had agreed to reconciliation.

" My conclusion upon this part of the case is that it is quite inevitable that the court should hold that, whatever may have happened in the past, there was a complete reconciliation and a complete condonation, in the sense that there was a reinstatement of the husband; and the proof of the reinstatement was the voluntary submission to the embraces of the husband in the circumstances which I have described."

MORRIS, L.J., after referring again to the speech of LORD SIMON in *Henderson* v. *Henderson* (13), disagreed with the view of the commissioner that the agreement between the parties was that there was to be no reconciliation and no restoration until a home other than the home in Thornton Road was found, saying that the commissioner's view was that the parties were not completely reconciled but that they agreed that they would be reconciled when the husband found a new house. The lord justice felt unable to take that view of the matter. It was true, he said, that the parties did not resume normal married life, but that was because

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(12) (1859), 1 Sw. & Tr. at p. 347.
(13) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 52.

A the plan was that they were to do that in some house other than 33, Thornton Road, Cambridge, and the husband experienced difficulties in finding a house. The lord justice did not think that there was any reason to suppose that the husband's endeavours and efforts to find a house were not thorough and painstaking, and he added:

> " If, then, it is necessary to consider whether there was forgiveness and also B whether such forgiveness was confirmed by some form of reinstatement, it is beyond dispute in the present case that there was forgiveness. That was clearly so found by the learned commissioner; and that finding is not challenged. Accompanying the forgiveness were promises that bygones should truly be bygones. Marking the forgiveness there was agreement that there would be no recrimination. The parties were to make a fresh start. C There was undoubtedly forgiveness. Then came the occasion when there was sexual intercourse. The learned commissioner took the view that that did not amount to the restoration of the husband to his position as a husband. That leads to the inquiry as to what should be the correct view and interpretation of that occasion."

D Like HODSON, L.J., MORRIS, L.J., said that it did not seem to him that there was any evidence that negatived the view that the wife was a completely willing party. It seemed to him that she was a free agent to agree to what took place, and like HODSON, L.J., he negatived the application of anything that had been said by the Judge Ordinary in the passage quoted from *Keats* v. *Keats* (14), and he concluded by saying:

> E " Having forgiven him (and the forgiveness is beyond all question) she reinstated him as her husband. Adopting the language of LORD SIMON (15), she forgave him and then confirmed her forgiveness by reinstating him. She accepted him again as her husband."

MORRIS, L.J., added that in his judgment, if the husband had been guilty of the matrimonial offence of cruelty she condoned it.

F SELLERS, L.J., thought that it was a clear case of condonation, which required not only that there should be forgiveness but also that there should be reinstatement. After commending the good offices of the solicitors, SELLERS, L.J., said that without going through the evidence in detail the upshot of it was that the wife was willing to return to her husband, concluding:

> G " She forgave him completely—on more than one occasion she so stated. But she made one reservation, and one reservation only, and that was that she did not wish to return to the home where (as she alleged) these offences had taken place—Thornton Road in Cambridge. Apart from that, her acceptance of her husband was, in terms and intention, complete. They left the solicitors' office, as I understand it, together, sitting in the back of a car— H which occasion, the husband said, seemed to establish their unity and happiness once again. I recognise that that would not be enough if the matter had stayed there."

SELLERS, L.J., then referred to the circumstances in which the sexual intercourse took place two days later and said that there was no indication at all that she entered into that relationship with her husband except with complete freedom I and every intention of so doing. He said:

> " I am not prepared to impute to her that at that time she was reserving in her mind some sort of attitude—' Although I am giving myself to you after twelve months' absence in the manner I did when I was with you as your wife, nevertheless I am not, of course, condoning what you did: I still have at the back of my mind this cruel treatment you have given me '.

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(14) (1859), 1 Sw. & Tr. at p. 347.
(15) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 52.

> I think that to hold that this was not condonation would be a reflection on the wife which I am not prepared to make. I think that the intercourse was clear and conclusive evidence of condonation in the circumstances of this case."

It was argued that the effect of the decision in *Baguley* v. *Baguley* (16) is that unless a wife can establish that one of the conditions outlined by the Judge Ordinary in *Keats* v. *Keats* (17) applies, her voluntary submission to sexual intercourse is as conclusive of condonation as the same circumstance would be against the husband. With the greatest respect to HODSON, L.J., I know of no authority except *Baguley* v. *Baguley* (16) itself which goes so far as this, nor was counsel able to provide us with any such authority. I have always understood that SIR CRESSWELL CRESSWELL was giving illustrations of the kind of reason for which wives in general were treated less strictly than husbands with regard to sexual intercourse as proof of condonation, but not that he was laying down the law that unless the wife in any particular case could show either that she was hardly her own mistress, or that she had not the option of going away, or that she had no place to go to, or no person to receive her, or no funds to support her, sexual intercourse would be as conclusive on her part as it would be in the case of a husband. See also LORD STERNDALE, M.R., in *Crocker* v. *Crocker* (18) where he says:

> "There is no doubt whatever that the exception taken to the learned judge's direction (19) was on the ground that the principle stated in it was not in any way dependent upon the actual facts of the particular case."

VISCOUNT SIMON, L.C., in the passage quoted in *Henderson* v. *Henderson* (20) speaks in general terms of instances where the wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations, and HODSON, L.J., himself refers in the same passage in his judgment to "any extraneous circumstance weighing against the inference".

It was admitted during the argument that the illustration given by SIR CRESSWELL CRESSWELL could not be taken as exhaustive. For example, another explanation that has been given for treating wives less strictly than husbands in this respect has been the biological fact that wives can, but husbands cannot, become pregnant, and the extreme prejudice which the wife must suffer thereby—see per DENNING, L.J., in *Tilley* v. *Tilley* (21) and in *Mackrell* v. *Mackrell* (22) approving BUCKNILL, L.J., in *Fearn* v. *Fearn* (23). Manifestly, if this is a valid ground of distinction it would be impossible to say in the case of a particular wife that unless she becomes pregnant she will be taken to have condoned, for that would be to introduce an element of contingency into condonation which, as was decided by the House of Lords in *Henderson* v. *Henderson* (24), is not permissible.

It was also argued that owing to the emancipation of women in modern times the conditions laid down by SIR CRESSWELL CRESSWELL can seldom occur nowadays. There is more than a hint of approval of this argument in the judgment of HODSON, L.J. Whatever may be said about the status of women in 1858, by 1944, when the unanimous judgment of the House of Lords was given in *Henderson* v. *Henderson* (24), it is a matter of history that the Married Women's Property Act had been passed in 1882, and that "Votes for Women" had long ceased to be a live controversy. In my opinion, whatever may be the true explanation of the distinction, the principle that, to quote VISCOUNT SIMON, L.C. (25),

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(16) (Oct. 10, 1957), "The Times".

(17) (1859), 1 Sw. & Tr. 334.

(18) [1921] P. at p. 34.

(19) In *Keats'* case, (1859), 1 Sw. & Tr. at p. 347.

(20) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 52.

(21) [1948] 2 All E.R. at p. 1123; [1949] P. at p. 260.

(22) [1948] 2 All E.R. at p. 861.

(23) [1948] 1 All E.R. at p. 464; [1948] P. at p. 254.

(24) [1944] 1 All E.R. 44; [1944] A.C. 49.

> ". . . the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse"

is too well settled to be changed except by legislation. Moreover, the cumulative effect of these two arguments, namely, first, that one, at least, of the conditions mentioned by SIR CRESSWELL CRESSWELL and stressed by HODSON, L.J., is essential to enable a wife to escape the conclusion of condonation by sexual intercourse, but, secondly, that it is difficult to say of any wife nowadays that she is hardly her own mistress, and so on, seems to reduce the principle itself almost to vanishing point.

However this may be, it is a recognised rule that judgments must be read in the light of the subject-matter of the case in which they were delivered. It is well settled—see *Crocker* v. *Crocker* (26), following *Keats* v. *Keats* (27)—that mere forgiveness, whether expressed orally or by letter, without restoration of the wife to her former position cannot amount to condonation. It is plain that the decision in *Baguley* v. *Baguley* (28) was based on the finding that there had been a complete agreement for reconciliation, so far as that could be effected by word of mouth, and that the sexual intercourse was treated as the "something" amounting to a reinstatement said by LORD CHELMSFORD, L.C., in *Keats* v. *Keats* (29) to be necessary to convert imperfect forgiveness by words into condonation, and was, therefore, conclusive in the circumstances of that case. In the present case there was no such agreement. It is true that the justices did not say expressly that they accepted the wife's account of her visit on June 27 to 29. But they have expressly accepted her evidence on the question of persistent cruelty, as against that of the husband and his mother, and I think that it is implicit in their finding that the acts of the wife, including sexual intercourse, were acts in an attempt to effect a reconciliation, that they accepted her version of the events of those days, and rejected the husband's suggestion that before leaving Goole she had accepted the cancellation of the condition about future travelling in the south, but had changed her mind before the telephone conversation a week later.

In *Baguley* v. *Baguley* (28) it is clear that the Court of Appeal did not regard the reservation about a new house as a condition of the agreement for reconciliation. Indeed, MORRIS, L.J., expressly dissented from the commissioner's view that it was a condition precedent. In the present case it was not disputed that the agreement for reconciliation was conditional on future travel being in the south. To my mind, it is plain that once the husband had repudiated this vital condition there was nothing resembling a concluded agreement for reconciliation in the present case. Therefore, the only way in which *Baguley* v. *Baguley* (28) could govern the present case would be to say that after her arrival at Newcastle and the husband's repudiation of the condition about future travelling in the south, the wife assented to a fresh agreement of reconciliation without that condition, and by reason of the sexual intercourse must be held conclusively to have confirmed the revised agreement. In my opinion there is no justification for any such conclusion.

In their reasons the justices expressly rely on the passage of DENNING, L.J., in *Mackrell* v. *Mackrell* (30) in which he said that the relationship of the parties

> ". . . must be restored, by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives. Then, and not till then, are the offences condoned."

It was obviously this passage that HODSON, L.J., was referring to when he disapprovingly spoke of

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(25) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 53.

(26) [1921] P. 25.

(27) (1859), 1 Sw. & Tr. 334.

(28) (Oct. 10, 1957), "The Times".

(29) (1859), 1 Sw. & Tr. at p. 356.

(30) [1948] 2 All E.R. at p. 860.

> "some talk about the desirability of the law of condonation being altered, in the sense that it might be thought desirable that some interval should elapse—some probationary period might be allowed to supervene—before it could be said that the party could not rely on the complaints previous to that condonation."

He may also have had in mind some observations about one or two acts of intercourse made by SIR RAYMOND EVERSHED, M.R., in *Perry* v. *Perry* (31). It must be recognised, however, that in that passage the Master of the Rolls was dealing with sexual intercourse in relation to a resumption of cohabitation as distinct from condonation. I do not think that it is necessary for the purposes of this judgment to attempt to deal with that conflict of opinion, even if I could usefully do so.

In my opinion, even if the validity of one of their reasons, inasmuch as they accepted the above statement of DENNING, L.J., in *Mackrell* v. *Mackrell* (32), is open to doubt, the justices came to a right conclusion. By r. 73 (7) of the Matrimonial Causes Rules, 1957, (33) the misdirection, if such it was, does not involve the success of the appeal unless in our opinion substantial wrong or miscarriage of justice has been occasioned thereby. This, in my opinion, is not so. I think that this appeal fails and should be dismissed.

CAIRNS, J.: This is an appeal from an order of the justices for the Bromley Division of Kent made on Sept. 15, 1960, whereby they made a separation and maintenance order in favour of the wife, on the grounds of the persistent cruelty of the husband and his wilful neglect to maintain her and two of their children. The husband was ordered to pay £4 a week maintenance for the wife and 30s. for each of the two elder children of the marriage, whose custody was given to the wife. The custody of the youngest child was given to the husband by a separate order under the Guardianship of Infants Acts, 1886 and 1925, and with this order this court is not of course concerned. The husband did not at the hearing of the appeal contest the maintenance order made on the ground of wilful neglect to maintain nor the custody order for the two elder children nor the amount of maintenance awarded. What he appeals against is the making of a separation order on the ground of persistent cruelty, and this not because he contends that the evidence was insufficient to establish persistent cruelty but because he says that on the facts proved or admitted the cruelty had been condoned.

The relevant facts are shortly as follows: the husband and wife are young people, now aged twenty-five and twenty-seven years. The marriage was in February, 1956, and the three children were born in 1957, 1958, and 1959. While living together the parties were engaged in the fairground business with which the husband's family were concerned in the north of England. The parties lived in caravans, with the husband's parents, and toured about north country fairgrounds. According to the wife's evidence, which was accepted by the justices, she was threatened, abused, punched, had her eyes blacked and had other painful injuries inflicted on her by her husband in a long series of incidents covering the period from about October, 1957, to April, 1960. The justices in their reasons say: "We felt that it was a very serious case of persistent cruelty". After twice leaving her husband and returning to him the wife ultimately went off on Apr. 9, 1960, taking with her the two elder children and joining her mother in the south of England. She made her complaints to the justices on Apr. 23, 1960, and before the case came on for hearing the husband wrote a letter to her on May 19, 1960, urging her to return to him for their own happiness and for the sake of the baby.

The first hearing was on June 1, 1960, when part of the wife's evidence was given and an interim order for maintenance was made. The second hearing was on June 16, when, before the wife's cross-examination had been completed, the case was adjourned for the parties to discuss reconciliation, with the help of a probation officer. Before they left the court the husband asked the wife if she would come back to him and she replied that she would if, and only if, he would leave his parents and come to the south of England and would never hit her again. He accepted these conditions, though he would have preferred to stay in the north with his parents because that would enable him to have a free stall on fairgrounds instead of having to pay £25 a week for one. It was arranged that the wife should go to Newcastle-upon-Tyne on June 27 to see her husband and, she said, to come back with him and the baby to the south. This baby was just over a year old and the wife had asked at the court on June 1 for him to be returned to her but the husband had refused and he had the baby with him and his parents at Newcastle. No order had then been made for the baby's custody but as the wife understood the position she had no right to have the baby or even to see him without her husband's concurrence.

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(31) [1952] 1 All E.R. at p. 1082; [1952] P. at p. 215.
(32) [1948] 2 All E.R. at p. 860.
(33) 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 257.

On June 27 the wife arrived at Newcastle Central Station at 7 a.m. and went by taxi to the Newcastle Town Moor where the husband and baby were in bed in his caravan. Soon after her arrival her husband told her that it was impossible for him to come south, or that he would not come south, for business reasons. She saw the point of this and, as she said in evidence, " agreed to a certain extent that it was better for him to stay in the north ", but she certainly did not then consent to stay in the north with him. Indeed, the husband's evidence was that when he told her he was not going to leave the north she replied " I might as well go back then ". She did not, however, go back at once. For two hours they discussed the matter and then they both left, together with the baby and the husband's parents, in two caravans for Goole, where the husband and his parents had their next business engagement. The husband and wife travelled together and stayed together at Goole, with the baby, until June 29. They slept in the caravan and had intercourse twice, willingly and happily.

The two parties' accounts of how this came about differed slightly. The husband said that after two hours' talk at Newcastle the wife " agreed to try one more time " and said that they would " have two days together ". The wife said: " It wasn't definitely settled he was leaving his parents. It was left in the balance. He was trying to talk me into staying and I was trying to talk him into leaving ". She gave this as an explanation of the acts of intercourse. The justices in their reasons say:

> " We decided that the acts of the wife, including sexual intercourse, were acts in an attempt to effect a reconciliation and ruled that there had been no condonation."

In so far as this is a finding of fact I take it to mean that the justices accepted the wife's account of the matter. On June 29 the wife left Goole and returned to the south of England. Again there is some discrepancy between the two accounts of their parting. The wife said that she told her husband that she would not be returning and had said this on quite a few occasions. The husband said that he told the wife that he would give her a week to sort things out and that she said that she would give it another trial. He said that she asked to be allowed to take the baby back with her but that he replied that it was a silly thing to do as she would be back in a week. Then, he said, he kissed her goodbye. It is common ground that the husband telephoned the wife a week later and she then said definitely that she was not coming back. The husband in his evidence said or implied that in this conversation she told him that she had changed her mind but the wife denied this, maintaining that she was merely repeating what she had said when leaving him at Goole. Again, it appears to me that the justices must have accepted the wife's account where it differed from the husband's and as they saw and heard the witnesses I am not prepared to say that they were wrong in finding, so far as it is a question of fact, that what happened at Goole was merely an attempt to effect a reconciliation. A

The question for this court is whether the events of June 16 and 27 to 29 necessarily amounted in law to a condonation by the wife of her husband's cruelty or, alternatively, whether the evidence of such condonation was so overwhelming that the decision of the justices must be held to be against the weight of evidence. The justices considered the matter with care and, so far as B the law is concerned, based their decision mainly on two citations from the judgments of DENNING, L.J., in *Tilley* v. *Tilley* (34), and in *Mackrell* v. *Mackrell* (35).

The passage from *Tilley* v. *Tilley* is as follows (34):

> " The question then arises: What facts are sufficient to raise a provisional C presumption of condonation. An attempt at reconciliation is so much favoured by the law that it does not, in itself, give rise to any presumption of condonation."

The passage from *Mackrell* v. *Mackrell* is as follows (35):

> " Reconciliation does not take place unless and until mutual trust and confidence are restored. D It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married, but their relationship must be restored, by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives. Then, and not till then, are the offences condoned. Reconciliation being the test of condonation, nothing short of it will suffice. E The fact that the parties continue to live in the same house or the fact that the guilty party is reinstated in his or her former position is, indeed, evidence from which reconciliation may be inferred, but it is by no means conclusive."

And then DENNING, L.J., added (36): " . . . attempts to effect a reconciliation do not amount to condonation . . .". F

The passage that I have read from *Mackrell* v. *Mackrell* (36) is the passage cited by the justices in their reasons and DENNING, L.J., added these words (36):

> " The only exception to this is the positive rule that one act of sexual intercourse by a husband, with full knowledge of his wife's guilt, is conclusive evidence of condonation, but as BUCKNILL, L.J., said in *Fearn* v. *Fearn* (37), G that is because of the serious prejudice to the wife that may thereby be occasioned. She may have a child in consequence of it."

In *Mackrell* v. *Mackrell* (38), however, the question was whether the wife had condoned her husband's cruelty by continuing to reside with him for three weeks, to have meals with him and act as his housekeeper, but sleeping separately. The Court of Appeal held unanimously that these facts were no necessary proof H of forgiveness and that there was, therefore, no condonation. Apparently nothing had been *said* between the parties about forgiveness and there is no indication that there were any signs of affection between them during the three weeks. The passages cited must be read in the light of these facts. Nevertheless, it is important to note that DENNING, L.J. (36), treats the special rule that one act of intercourse by a husband is conclusive against him as the *only* exception to the I general rule that a real reconciliation is necessary to condonation, and that he bases this exception on the risk to a wife that a child might be conceived.

In *Tilley* v. *Tilley* (39) the petition was on the ground of the wife's adultery and the co-respondent alleged that the adultery had been condoned because on

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(34) [1948] 2 All E.R. at p. 1123; [1949] P. at p. 260.
(35) [1948] 2 All E.R. at p. 860. (36) [1948] 2 All E.R. at p. 861.
(37) [1948] 1 All E.R. at p. 464; [1948] P. at p. 254. (38) [1948] 2 All E.R. 858.
(39) [1948] 2 All E.R. 1113; [1949] P. 240.

A two occasions when the husband had gone to see his wife for a few hours in the afternoon they had (it was alleged) had intercourse together. The wife was asked about this in cross-examination and after at first refusing to answer was ordered by the commissioner to do so and then stated that there had been intercourse. The points on which the case went to the Court of Appeal were whether the wife could be compelled to answer such a question and whether her uncorroborated B evidence was sufficient to prove the facts relied on as constituting condonation. It is to be observed that the issue was as to a husband's condonation, and, since no fraud was suggested, if once the act of intercourse was proved this was sufficient to establish condonation: see *Henderson* v. *Henderson & Crellin* (40). The passage in the judgment of DENNING, L.J., following that cited by the justices, is important (41):

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> "It is only when the parties continue living together or are reinstated in one household that the judge is put on inquiry to see whether there has been condonation or not: see the judgment of SIR WILLIAM SCOTT in *Elwes* v. *Elwes* (42). Short of that, if the parties have only met for a discussion on their affairs and have not spent the night together, there is no D reason to suspect condonation. If that is all that has happened, and then the rule is invoked that one act of sexual intercourse by the husband is conclusive evidence of condonation, then the party who relies on that act must at least point to a reasonable probability of it. After all, the act itself is not condonation. It is only evidence of it, albeit conclusive evidence, and it is only made conclusive because of the extreme prejudice which the wife E may suffer if she has a child as the result of it."

I read this passage as meaning that if the parties have spent the night together and had intercourse that would be conclusive against the husband but as against the wife it would be only one piece of evidence to be taken along with all the other evidence in the case in deciding whether there has been an *actual* reconciliation.

A case not cited to the justices but strongly relied on for the husband in this F court was *Baguley* v. *Baguley* (43). The facts were shortly that the husband had been guilty of cruelty but the wife had expressly forgiven him and they had agreed to resume living together, but the wife had made it clear that she would only be willing to live with her husband in a house different from their previous matrimonial home. Shortly after this they met at the husband's parents' home and while the husband and wife were doing the washing up together intercourse G took place between them in the kitchen. The Court of Appeal, reversing the decision of the commissioner who had tried the case, held that the facts established condonation. In the present appeal it was contended for the husband that the facts which we are considering correspond closely to those in *Baguley* v. *Baguley* (43) and must lead to a similar conclusion. Special reliance has been placed on a passage in the judgment of HODSON, L.J., in these words:

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> "The question is whether there is proof of condonation or whether there is not. This is not a case in which the wife was not her own mistress, or had not the option of going away, or had no place to go to or no person to receive her, or no funds to support her. There was nothing to explain her submission to the embraces of her husband except her own will. The authorities, as I I understand them, have consistently proceeded on the basis that the law of condonation is the same for the wife as for the husband in that sense— namely, that, if she has reinstated him by submitting voluntarily to his embraces without any extraneous circumstance weighing against the inference to be drawn from that submission, she must be held to have condoned the offence."

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(40) [1944] 1 All E.R. 44; [1944] A.C. 49.
(41) [1948] 2 All E.R. at p. 1123; [1949] P. at p. 260.
(42) (1794), 1 Hag. Con. at p. 292.
(43) (Oct. 10, 1957), "The Times".

So far as the facts in *Baguley* v. *Baguley* (44) are concerned, there is in my opinion a vital difference from the present case. In *Baguley* v. *Baguley* (44) there was complete, unconditional forgiveness. This is emphasised in all three of the judgments. Hodson, L.J., said that there was " complete reconciliation, so far as it could be effected by word of mouth ". Morris, L.J., said: " . . . the forgiveness is beyond all question ". Sellers, L.J., said: " She forgave him completely ". It is true that Sellers, L.J., added: ". . . she made one reservation . . . that she did not wish to return to . . . Thornton Road . . .". In my opinion, however, there is no true parallel between the wife's insistence in *Baguley* v. *Baguley* (44) that she was not going to live at Thornton Road and the wife's insistence in the present case that she was not going to live in the north of England. In *Baguley* v. *Baguley* (44) both parties were agreed that a new residence should be taken. There was no issue about it. The forgiveness was not conditional, it was absolute, and though it did not itself constitute condonation (because condonation requires the factum of reinstatement as well as the expression of forgiveness: *Fearn* v. *Fearn* (45)) it carried the matter beyond the stage of attempted reconciliation to a point where only the actual resumption of matrimonial relations was necessary to complete the condonation. What the Court of Appeal decided was that in these circumstances the intercourse was a resumption of matrimonial relations and could not be dismissed as a mere casual encounter.

I do, however, find in the passage cited from the judgment of Hodson, L.J., a strong indication of the view that in the absence of some kind of pressure, economic or otherwise, submission by a wife to intercourse is conclusive of condonation by her. Counsel before us were not able to refer to any previous authority for this proposition and I interpret the reference of Hodson, L.J., to " the authorities " as meaning that in the cases which he had mentioned earlier in his judgment (*Keats* v. *Keats & Montezuma* (46), *Snow* v. *Snow* (47) and *Henderson* v. *Henderson & Crellin* (48)) the only distinction that was drawn between the position of a husband and that of a wife in this matter was that the wife might not be a free agent. A similar view is, I think, implied in the judgments of Morris, L.J., and of Sellers, L.J. It was argued on behalf of the wife in the present case that when Hodson, L.J., referred to " any extraneous circumstance weighing against the inference to be drawn " against the wife he had in mind a wider category of circumstances than those mentioned in the cases which he had cited and that circumstances such as the wife's wish to be with her child and her wish to bring about a reconciliation with her husband on her own terms would be sufficient. I find it difficult to put so wide a meaning on the language used by Hodson, L.J. There would, indeed, seem to be no logical reason why if circumstances of that kind can be prayed in aid by a wife to resist the inference of condonation they cannot be prayed in aid by a husband when he is alleged to have condoned an offence of his wife.

It is, however, important to remember that what Hodson, L.J., was considering was not whether forgiveness must be inferred from the wife's submission to intercourse but whether, the forgiveness being already complete, reinstatement was to be inferred. This is clear from one passage which I have already quoted from his judgment, and is emphasised again in another place where he says:

> ". . . the proof of the reinstatement was the voluntary submission to the embraces of the husband . . ."

There is nothing in any of the judgments in the Court of Appeal in *Baguley* v. *Baguley* (44) indicating that forgiveness is necessarily to be inferred from a wife's voluntary submission to intercourse, and indeed the very fact that all the members of the court pointedly drew attention to the earlier forgiveness by word

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(44) (Oct. 10, 1957), " The Times ". (45) [1948] 1 All E.R. 459; [1948] P. 241.
(46) (1859), 1 Sw. & Tr. 334. (47) (1842), 2 Notes of Cases, Supp. i.
(48) [1944] 1 All E.R. 44; [1944] A.C. 49.

A of mouth suggests that the intercourse alone was not sufficient to establish forgiveness conclusively.

There is no doubt that forgiveness is an essential element of condonation. As VISCOUNT SIMON, L.C., said in *Henderson* v. *Henderson* (49):

> " The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with know-
> B ledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife."

In my opinion, participation in intercourse by a wife is not in any circumstances conclusive of forgiveness, though it is no doubt evidence of it. So, indeed, is the fact of a wife staying, as this wife did, for two days in a caravan with her husband.
C But where there is also evidence tending to disprove forgiveness (such as in the present case, the facts that the wife had agreed conditionally to a reconciliation that the husband had gone back on his acceptance of the condition, and that argument was continuing about this matter and never reached finality) then, in my opinion, the question whether there was condonation is a question of fact and it cannot be said that there was a strong preponderance of evidence in favour
D of forgiveness.

I prefer to rest my judgment on cases where condonation of cruelty or adultery has been under consideration rather than on cases such as *Rowell* v. *Rowell* (50), where the question was whether a separation deed had been brought to an end by intercourse; *Mummery* v. *Mummery* (51), where the question was whether desertion had been terminated by intercourse; and *Abercrombie* v. *Abercrombie*
E (52), where the question was whether a separation order had been brought to an end by a resumption of cohabitation. It appears to me, on the one hand, that a " reinstatement " may take place (as in *Baguley* v. *Baguley* (53)) without an " ending of the separation " (as negatived in *Rowell* v. *Rowell* (50)) or a " resumption of cohabitation " (as found in *Abercrombie* v. *Abercrombie* (52) but negatived in *Mummery* v. *Mummery* (51)). On the other hand, the element of
F forgiveness which is essential to condonation does not necessarily enter into the other cases. These differences between condonation and a resumption of cohabitation are emphasised by the Court of Appeal in *Perry* v. *Perry* (54), where it was held that acts of intercourse were not conclusive against a husband who was contending that cohabitation had not been resumed. For the reasons which I have given I am of opinion that in the present case the justices were entitled to
G reach the conclusion that there was no condonation and it follows that I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Judge & Priestley* (for the husband); *Wellers*, Bromley (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(49) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 52.
(50) [1900] 1 Q.B. 9.
(51) [1942] 1 All E.R. 553; [1942] P. 107.
(52) [1943] 2 All E.R. 465.
(53) (Oct. 10, 1957), " The Times ".
(54) [1952] 1 All E.R. 1076; [1952] P. 203.

LEWIS *v.* FRANK LOVE, LTD.

[CHANCERY DIVISION (Plowman, J.), January 11, 12, 13, 1961.]

Mortgage—Clog on equity of redemption—Transfer of mortgage—Option to purchase mortgaged property granted by mortgagor to transferees as part of arrangement for transferees lending a sum slightly larger than the amount secured by the mortgage—Whether option was void as a clog on the equity of redemption.

In 1955 the plaintiff, who was indebted to mortgagees for a little over £6,000 under a mortgage on which judgment had been recovered, arranged with the defendants that they would lend him £6,500 to enable the debt to the mortgagee judgment creditors to be repaid and to provide some surplus for other purposes, on terms, among others, that they should have an option to purchase part of the property comprised in the mortgage. The transaction was carried out by a transfer of the existing mortgage to the defendants for £6,070 and by a contemporaneous written agreement between the plaintiff and the defendants granting them the option on condition that they did not require payment of the principal sum secured by the mortgage for two years. The defendants having purported to exercise the option, but not having advanced the remainder of the £6,500,

Held: the principle on which a clog on the equity of redemption had been held to be void applied to the transfer of a mortgage where one of the terms arranged between the mortgagor and the transferee was that the transferee should have an option to purchase in return for taking the transfer; accordingly, looking at the substance of the transaction and not at the form in which it was carried out, the defendants' option to purchase was a clog on the plaintiff's equity of redemption and was therefore void.

Lisle v. *Reeve* ([1902] 1 Ch. 53) and *Samuel* v. *Jarrah Timber & Wood Paving Corpn.* ([1904] A.C. 323) applied.

[As to collateral benefits as clogs on the equity of redemption, see 27 HALSBURY'S LAWS (3rd Edn.) 236, para. 425; and for cases on the subject, see 35 DIGEST 356, 357, *996-1003*.]

Cases referred to:

- *Bradley* v. *Carritt*, [1903] A.C. 253; 72 L.J.K.B. 471; 88 L.T. 633; 35 Digest 354, *971*.
- *Edwards' Estate, Re*, (1861), 11 I. Ch.R. 367; 35 Digest 356, *996iii*.
- *Maxwell* v. *Tipping*, [1903] 1 I.R. 499; 35 Digest 648, *3797i*.
- *Noakes & Co., Ltd.* v. *Rice*, [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. 147; 35 Digest 241, *19*.
- *Olds Discount Co., Ltd.* v. *John Playfair, Ltd.*, [1938] 3 All E.R. 275; 159 L.T. 332; Digest Supp.
- *Reeve* v. *Lisle*, [1902] A.C. 461; 71 L.J.Ch. 768; 87 L.T. 308; *affg.* S.C. sub nom. *Lisle* v. *Reeve*, [1902] 1 Ch. 53; 35 Digest 357, *1003*.
- *Salt* v. *Northampton (Marquess)*, [1892] A.C. 1; 61 L.J.Ch. 49; 65 L.T. 765; 35 Digest 352, *954*.
- *Samuel* v. *Jarrah Timber & Wood Paving Corpn.*, [1904] A.C. 323; 73 L.J.Ch. 526; 90 L.T. 731; 35 Digest 353, *957*.
- *Toomes* v. *Conset*, (1745), 3 Atk. 261; 26 E.R. 952; 35 Digest 357, *1001*.
- *Yorkshire Railway Wagon Co.* v. *Maclure*, (1882), 21 Ch.D. 309; 51 L.J.Ch. 857; 47 L.T. 290; 10 Digest (Repl.) 756, *4917*.

Action.

By a writ dated July 25, 1957, the plaintiff, Charles Eyton Lewis, claimed against the defendants, Frank Love, Ltd., first, a declaration that an agreement in writing dated May 26, 1955, made between the plaintiff and the defendants and the contract alleged by the defendants to have been created by their purported exercise of the option contained therein, was not binding on the plaintiff

A and was void. Secondly, the plaintiff claimed a declaration that notwithstanding the agreement and the purported exercise of the option, he was entitled to redeem the whole of the land comprised in the registered charge dated Oct. 31, 1946, on payment to the defendants of £6,000, or alternatively £6,070, with interest thereon at £5 per cent. per annum to the date of redemption and the proper charges and costs; on giving to the defendants six months' notice or B paying to the defendants six months' interest at the above rate in lieu of notice; and that on redemption of the charge, the plaintiff might hold the land comprised therein free from all interest of the defendants under either the charge or the agreement.

The defendants counterclaimed for specific performance of the agreement dated May 26, 1955, or damages for its breach; but their counterclaim for C specific performance was abandoned in the course of the action.

The facts appear in the judgment.

Sir Lynn Ungoed-Thomas, Q.C., and *A. J. Balcombe* for the plaintiff.

C. A. Settle, Q.C., and *K. J. T. Elphinstone* for the defendants.

PLOWMAN, J.: The point which I have to determine in this action is D whether a certain option to purchase, which was given by the plaintiff to the defendants, is void as being a clog on the equity of redemption, in circumstances to which I shall refer. The property in dispute is part of the property which, in the statement of claim, is defined as the plaintiff's land—namely, the freehold land known as 1-35 (odd numbers), Barbel Street, and 49-57 (odd numbers), Westminster Bridge Road, Southwark. That property is delineated on an E agreed plan, and on that plan, which is printed on black paper, is edged white. The plaintiff bought that land and became registered as the proprietor of it at the Land Registry in 1946. The defendants are the occupiers of property adjoining the plaintiff's land, and their property is Nos. 45 and 47, Westminster Bridge Road.

On Oct. 31, 1946, by a registered charge, the plaintiff mortgaged his land to F one John Arthur Aikin to secure an advance of £6,000 with interest at five per cent. per annum. At some date between 1946 and 1953, Aikin, the mortgagee, died, and on Dec. 22, 1953, his personal representatives gave notice to the plaintiff calling in this sum of £6,000 which was outstanding on mortgage. The plaintiff was unable to repay this sum. He had then, as I understand it, recently suffered some considerable financial loss in a garage transaction, and he was G hard up. Since he was unable to pay, the personal representatives of the original mortgagee took proceedings against him, and on June 17, 1954, recovered judgment for £6,021 13s. 11d., the total amount then due on the security of the registered charge. That judgment not having been satisfied, the personal representatives, on Nov. 24, 1954, issued a bankruptcy notice.

This property was the plaintiff's sole asset or, at any rate, his sole asset of any H substance, and he got in touch with a friend of his, a Mr. Deighan, who had had some experience in property matters, with a view to seeking his advice how best to turn this property to account. Mr. Deighan, I think, realised that certainly the best way to turn it to account was to obtain town planning permission for its development, and then either to sell the property with the benefit of that town planning permission, or—although I think that this was the more remote I possibility in the minds of the plaintiff and Mr. Deighan—themselves, having got town planning permission, to develop the property. The plaintiff thought that it would be about two years before town planning permission could be obtained, and the question was what to do in the meantime. As regards this interim period, he decided that he wanted to raise a sum of £6,500, £6,000 or thereabouts of which was required in order to pay off Aikin's personal representatives who were pressing for their money, and the other £500 or thereabouts was required to cover architects' and surveyors' fees, solicitors' costs, and other matters in relation to the proposed town planning application. It is quite clear that the plaintiff's plans in that situation were dependent on raising the sum of £6,500 and that £6,000 would be no use for the purposes which he had in mind.

Mr. Deighan met Mr. Mann who was, as I understand, the managing director of the defendant company, for the first time, I think, in August or September, 1954, and from that point negotiations between Mr. Mann on the one hand, and Mr. Deighan on the other, took place. I do not propose to go in any detail into what those negotiations were because, first of all, I do not think it is really necessary for the purposes of my judgment and, secondly, because the facts are not really materially in dispute. I ought, however, to say enough about them to show what, in my view, was the true nature of the transaction or bargain which was taking place between the parties and which culminated in certain documents being signed on May 26, 1955. The plaintiff himself at this time—namely, 1954—only met representatives of the defendants on, I think, one occasion. From some time in December, 1954, or January, 1955, until April, 1955, the plaintiff was abroad, and matters were left in the hands of Mr. Deighan who was acting on the plaintiff's behalf.

On Feb. 11, 1955, the plaintiff's solicitors wrote to the defendants' solicitors saying this:

> " Our client [i.e., the plaintiff] is anxious to obtain a mortgage of the property in the sum of £6,500, and over the past few weeks negotiations have been going on between our respective clients on the understanding that in consideration of your clients' granting the appropriate mortgage to our client, he will grant to them an option to purchase part of the land at a figure to be agreed as and when certain demolitions have taken place and town planning consent to your clients' extensions has been obtained."

The defendants' solicitors, Messrs. Stilgoes, having received that letter, at once saw the red light, and wrote on Feb. 14 to Messrs. Ruston Clark & Ruston on behalf of the plaintiff, to say:

> " We think we must make it quite clear that we shall be unable to advise our clients to advance a sum of money on security of the property and for the mortgage to secure the advance, to contain an option to purchase any part of the mortgaged property. Such a bargain would be void as a clog on the equity of redemption."

To that the plaintiff's solicitors replied on Feb. 15 saying that they

> "... quite appreciate the point that you make. Perhaps our letter was not very clearly expressed, but there was certainly no intention of the option and the mortgage being contained in the same document. They must, of course, be separate transactions for the reason stated in your letter."

Then there were various suggestions made as to how the difficulty could be overcome.

That letter of Feb. 15 led to a telephone conversation the next day between Mr. Thorn of Messrs. Stilgoes on the one hand, and Mr. Chambres of the plaintiff's solicitors' firm on the other hand. Mr. Thorn recorded that telephone conversation in a contemporaneous entry, and the record is to the following effect:

> " When we explained that we did not know this was a case where there was to be a transfer of a mortgage which Major Lewis already granted on the property. We could take this transfer and also an option to purchase the piece of land in question. That was quite legal and was covered by a case. Mr. Chambres pointed out, however, that the mortgage that Major Lewis at the moment had granted on the property secured a loan to him of £6,000, whereas £6,500 was now to be secured. I told him I thought a

> transfer had better be made of the present mortgage and an option granted to us, and he must then take our word that in due course we would advance a further £500. It would have to be entirely a separate transaction and not the subject of agreement beforehand."

Therefore it is quite clear that at this stage the defendants' solicitors appreciated that what was wanted was an advance of £6,500, and that the defendants were willing to advance that sum provided that they got an option on part of the plaintiff's land. Whatever Mr. Thorn may have had in mind at the time when that note was written, in fact he handed over the conveyancing part of this matter to his partner, a Mr. Millar, and so far as the plaintiff is concerned whatever Mr. Millar did in the matter must be taken to have been the action of the defendants' solicitors, and as such to bind the defendants.

That was in February, 1955. I think Mr. Deighan was still periodically seeing Mr. Mann and having discussions with him, and the result of those discussions up to Mar. 24, 1955, is recorded in a letter from Mr. Deighan to Mr. Mann. That letter was approved by the plaintiff, and a copy of it was given to, and, I think, the draft was in fact approved by, Mr. Chambres, the plaintiff's solicitor. It is an important letter, and I will read the material parts of it. Mr. Deighan says:

> " Dear Mr. Mann,
>
> I write this letter to summarise and confirm our discussions over the past three months concerning the properties [57 to 49A, Westminster Bridge Road and 1 to 35 (odd), Barbel Street, S.E.1]. I understand Messrs. Love to have agreed to advance immediately a mortgage of £6,500 to Major C.E. Lewis, the owner of the properties, for a minimum period of two years, interest to be at the rate of five per cent. per annum, the recall of the mortgage to be subject to six months' notice after the expiration of the minimum period in consideration of Major Lewis granting to them an option to purchase at any time within two years, an area of land adjoining their offices and defined on the attached plan drafted by Mr. Soden and approved by Mr. Ward."

Mr. Soden and Mr. Ward respectively, I understand, have been the architects for the plaintiff and the defendants. The letter goes on:

> " It is understood that the purchase of the land will include such easements in respect of light and other constructional matters as Mr. Ward and Mr. Soden may agree on behalf of each party."

Then later on the letter says:

> " Whatsoever the precise area within these boundaries, Major Lewis will sell for the sum of £1,000 (One thousand pounds) and Messrs. Love have agreed to pay this sum whensoever they exercise their option. This price is to be regarded as preferential to Messrs. Love in view of the fact that they are advancing a mortgage on the whole of Major Lewis's property and does not commit Major Lewis, myself or developers of the remaining area of land to any proportionate price. It is agreed that this sum shall be applied to the reduction of the mortgage should it be outstanding at the time of completion of sale. The foregoing paragraphs constitute the basis of what might be called our first and essential agreement and is in no way prejudiced by any agreement regarding the development of the whole or remaining area of the property. I would point out, however, that it would be more convenient for both parties if the period of both the option within the agreement and the minimum mortgage period were extended from two to three years. Should we implement the terms of our second agreement concerning the development of the whole property, for the reason that, if either party found that for any reason after the decision of the town planning authority regarding the whole of the property had been given, he

> had still to make arrangements for independent development the period of two years might still be needed. We are agreed it may require one year to construct, agree and obtain approval of plans for the larger development. Major Lewis's solicitors, Messrs. Ruston Clark and Ruston, will receive a copy of this letter and await an intimation from Messrs. Stilgoes, your solicitors, that they have been instructed to proceed. The precise terms of the option and the details of the transfer of the mortgage moneys are, so far as Major Lewis is concerned, entirely in the hands of Messrs. Ruston Clark & Ruston."

Then he goes on to deal with what is called the second agreement, which was the longer term project for the development of the property.

That letter of Mar. 24 was answered by Mr. Mann on Apr. 15 in a letter in the following terms:

> "I am sorry that I have not acknowledged your letter previously, but immediately this came to hand on Mar. 28 I discussed it thoroughly with our solicitors, who were going to get into touch with Mr. Chambres of Messrs. Ruston Clark & Ruston, so that the details could be worked out. No doubt you are in touch with Mr. Chambres and are aware that the matter is being dealt with."

In that letter there is no expression of dissent from anything which Mr. Deighan had recorded as being the result of the discussions which he had had with Mr. Mann. But meanwhile, between the time when that letter was written and the time it was answered, Mr. Chambres, the plaintiff's solicitor, and Mr. Millar, the defendants' solicitor, had had a meeting on Mar. 29 to discuss the terms of that letter. As a result of that meeting, drafts and counter-drafts were going to and fro and were being approved or altered, and ultimately the matter was concluded by two documents, both of them dated May 26, 1955, which had been approved by the two firms of solicitors on behalf of their respective clients. They, no doubt, were satisfied that those documents were what was required to give effect to so much of the bargain between the parties as in fact they gave effect to. They did not go the whole way, because there were certain matters which had been the subject of negotiation which were not dealt with by the documents.

The first document was a transfer of mortgage, by which the personal representatives of Aikin, the original mortgagee, transferred to the defendants the benefit of the registered charge originally given by the plaintiff to Aikin. In fact the sum of £6,070 was paid by the defendants to Aikin's personal representatives on the occasion of that transfer.

The second document, which was dated May 26, 1955, was an agreement between the plaintiff of the one part and the defendants of the other part, which recited the legal charge of Oct. 31, 1946, securing £6,000, and that the benefit of the legal charge was vested in the defendants. It recited that the defendants required to purchase the piece of land referred to as the green land. The piece of land in question is coloured pink on the agreed plan to which I have already referred, but in this agreement it was coloured green on the plan attached, and in the agreement it was referred to as the green land. The agreement recited that the defendants required to purchase the green land and had requested the plaintiff to grant to them an option to purchase the green land which the plaintiff had agreed to do on condition that the defendants should agree not to require payment of the principal sum secured by the legal charge for the term of two years from the date of the granting of such option, which the defendants had agreed to do. Then in the operative part of the agreement it was witnessed that in consideration of the defendants agreeing not to require payment of the principal sum secured by the legal charge for the term of two years as aforesaid the plaintiff granted to the defendants the option of purchasing the green land for an estate in unencumbered fee simple in possession at the price of £1,000. In cl. 2 it was provided:

> "... the said option shall be exercisable by notice in writing to [the plaintiff] at any time within two years from the date hereof and if the same shall be exercised then [the plaintiff] shall as beneficial owner sell the green land to [the defendants] for the said estate at the said price of £1,000 and upon the terms and conditions hereinafter mentioned ..."

one of which was that, in the event of the option being exercised, the purchase price of £1,000 should be utilised in part repayment of the capital outstanding on the legal charge at the date of the completion of the sale of the green land. It was further witnessed by the agreement that in consideration of the plaintiff granting to the defendants the option to purchase the green land, the defendants would not call in the principal sum for two years.

On Mar. 18, 1957, the defendants purported to exercise their option to purchase. On that date, their solicitors wrote to the plaintiff a letter in these terms:

> " On instructions from our clients Frank Love, Ltd., we enclose formal notice whereby they exercise the option given to them in the agreement dated May 26, 1955, and we shall be obliged if you will kindly acknowledge receipt. For your information we have today written to Messrs. Ruston Clark & Ruston, your solicitors, with a copy of the notice."

The plaintiff has declined to comply with that notice, and I need not, I think, go into the question why that is so. But lest it should be thought that there is necessarily anything discreditable in the fact that he is taking a technical point on its validity, this much can be said. For reasons good or bad—again I need not go into it—the defendants declined to advance to the plaintiff the balance of £500, being the difference between the sum which they paid on the transfer of the mortgage and the contemplated loan of the £6,500. Again for reasons into which I need not go, the defendants did not give instructions which would have resulted in a converted value payment being made by the War Damage Commission to the plaintiff, although at one time, at any rate, it had clearly been contemplated that such instructions would be given.

On the facts I am satisfied, first of all, that at all material times the defendants were well aware of the fact that the plaintiff required a loan of £6,500. I am satisfied that the defendants were prepared to make a loan to the plaintiff of that amount, provided that they got an option to purchase the green land, as it was called in the agreement which I have read, but not otherwise. I am satisfied that the plaintiff was prepared to grant such an option if he got a loan of £6,500, but not otherwise. In other words, I am quite satisfied that the loan of £6,500 and the grant of the option were all part and parcel of one transaction.

The question then arises: What in law is the effect ? It was argued by counsel for the defendants that the doctrine of a clog on the equity does not apply where the clog was not imposed as part of the original mortgage transaction, and that there had not heretofore been a case in which the doctrine had been applied where the transaction in question was a transfer of an existing mortgage and not the original mortgage itself. It is agreed that there is not, in the reports, any such case. But in my view the principles on which the courts have held that a clog on the equity of redemption is void apply just as much to a transfer of a mortgage which is arranged between the mortgagor and the transferees, where one of the terms of that arrangement is that the transferees in return for parting with their money shall have an option to purchase part of the mortgaged property.

A number of cases on the principles which apply to questions of clogging the equity were cited, and the first one I refer to is *Reeve* v. *Lisle* (1). I refer to this case because to my mind it establishes, first of all, that what one has to look at in

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(1) [1902] A.C. 461.

A the case of a mortgage transaction is the substance of the matter and not the form in which the bargain is carried out. The EARL OF HALSBURY, L.C., said this (2):

> "The view of the Court of Appeal, who had all the facts before them (and I do not propose to question the view which they have taken of these documents read together), is this, that the later transaction was entirely separate—that it was, in truth, a matter applicable to the contemplated B partnership, and that the real position of the parties was this, that all the securities were already in their possession; that this further transaction altered the rate of interest, but that the real substance of the second transaction was the contemplated partnership. Under these circumstances it was a mere question of what inferences ought properly to be drawn from the nature of the instruments, and the object and purpose with which they C were entered into, as well as what the documents contained in themselves."

The Lord Chancellor is there stating that it is not enough merely to look at the documents themselves for the purpose of discovering what the true transaction is. One has to inquire into the object and purpose with which the documents were entered into. When one applies that to the present case, it seems to me D that the object and purpose with which these documents were entered into was as part of a bargain whereby the plaintiff was to get a loan of £6,500, and the defendants were to get an option to purchase part of his property.

The specific question of an option to purchase as a clog on the equity was dealt with by the House of Lords in *Samuel* v. *Jarrah Timber & Wood Paving Corpn.* (3), the headnote of which reads: E

> "A mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property. A limited company borrowed money upon the security of their debenture stock subject to the lender having the option to purchase the stock at forty per cent. within twelve months; the loan to become due and payable with interest at thirty days' notice on either side. Within the twelve months and before the F company gave notice of their intention to repay the loan, the lender claimed to purchase the stock at the agreed price:—Held, that the option was void, and that the company was entitled to redeem the loan on payment of principal, interest, and costs."

That was not, of course, a case of a transfer of mortgage at all. It was a case of an original mortgage, and that fact has to be borne in mind in considering G the opinions of LORD MACNAGHTEN and LORD LINDLEY, to which I will refer.

LORD LINDLEY said this (4):

> "The first question is, What is the true nature of this agreement? Is it a mortgage with an option to purchase, or is it a conditional sale? Or is it an agreement giving Samuel an option to hold the debenture stock as a mortgage or a purchase? It appears to me to be clearly a mortgage with an H option to purchase. A loan of £5,000 on security was what the company wanted, and what Samuel agreed to let the company have on terms. They were not bargaining for anything else. As soon as the £5,000 was advanced and the debenture stock was placed at Samuel's disposal he was in the position of mortgagee of that stock. He had the rights of a mortgagee, and the company had the rights of a mortgagor. There was that reciprocity I and mutuality of remedies which distinguish a mortgage transaction from a conditional sale and from other transactions more or less resembling a mortgage, but not really constituting a mortgage. The transaction was in my opinion a mortgage, plus, amongst other things, an option to purchase, which if exercised by the mortgagee would put an end to the mortgagor's right to redeem—i.e., would prevent him from getting back his mortgaged

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(2) [1902] A.C. at p. 463. (3) [1904] A.C. 323. (4) [1904] A.C. at p. 328.

property. This was the view taken by KEKEWICH, J., and by all the members of the Court of Appeal, and I am unable myself to view the transaction differently.

> " In *Lisle* v. *Reeve* (5) BUCKLEY, J., suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption; but although his decision was affirmed first by the Court of Appeal and afterwards by this House (6), the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. The Irish case *Re Edwards' Estate* (7) is to the same effect.
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> " I cannot help thinking that both parties intended that the two options to purchase the £30,000 debenture stock and to underwrite further capital or debenture stock if issued were to be exercisable even after payment off of the £5,000. But the decisions of this House in *Noakes & Co., Ltd.* v. *Rice* (8) and *Bradley* v. *Carritt* (9) conclusively show that, whatever might have been intended, Samuel could not have been entitled to exercise either option after repayment of his loan. But these decisions and the previous decision of *Salt* v. *Marquess of Northampton* (10) emphatically recognise the old doctrine, ' Once a mortgage always a mortgage ', which is too well settled to be open to controversy. LORD HARDWICKE, L.C., said in *Toomes* v. *Conset* (11): ' This court will not suffer in a deed of mortgage any agreement in it to prevail that the estate become an absolute purchase in the mortgagee upon any event whatsoever.' But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions."

Pausing there, I should have thought that the transactions carried out by the documents of May 26, 1955, were clearly in substance mortgage transactions or part of a larger mortgage transaction. LORD LINDLEY continued (12):

> " The doctrine ' Once a mortgage always a mortgage ' means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security."

Applying that last sentence to the facts of the present case, it seems to me perfectly clear that one of the terms on which the defendants were prepared to advance the sum of £6,500 was that they should obtain an option to purchase part of the plaintiff's land. If that is so, then it seems to me to follow from what LORD LINDLEY is here saying that the doctrine of clogging the equity applies to that transaction; and if the doctrine of clogging the equity does apply, it is, I should have thought, beyond argument that the option to purchase was in fact a clog on the equity because, of course, if it is exercised it will prevent the plaintiff from getting back the piece of land to which it applies. Then LORD LINDLEY goes on (12):

> " Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage. This principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is."

LORD MACNAGHTEN refers to the fact that both KEKEWICH, J., and the Court of Appeal decided in favour of the company, who were the respondents in the House of Lords. He goes on (13):

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(5) [1902] 1 Ch. at p. 68.
(6) [1902] A.C. 461.
(7) (1861), 11 I. Ch.R. 367.
(8) [1902] A.C. 24.
(9) [1903] A.C. 253.
(10) [1892] A.C. 1.
(11) (1745), 3 Atk. at p. 261.
(12) [1904] A.C. at p. 329.

> " Having regard to the state of the authorities binding on the Court of Appeal if not on this House, it seems to me that they could not have come to any other conclusion, although the transaction was a fair bargain between men of business without any trace or suspicion of oppression, surprise or circumvention."

I pause there simply to observe that the doctrine of a clog on the equity is a technical doctrine which is not affected by the question whether in fact there has been oppression, and which applies just as much where parties are represented, as they were here, by solicitors. Lord Macnaghten says (14):

> " In the Court of Appeal the question was treated as governed by the principle, of which *Noakes & Co., Ltd.* v. *Rice* (15) is a recent example, that on redemption the mortgagor is entitled to have the thing mortgaged restored to him unaffected by any condition or stipulation which formed part of the mortgage transaction. That principle, I think, is perfectly sound. But, in my opinion, the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property."

Counsel for the defendants referred me to an Irish case, *Maxwell* v. *Tipping* (16). When one comes to look at the case one sees that Sir Andrew Porter, M.R., was not dealing with it as a case which involved doctrines about clogging the equity at all. He referred to the speech of Lord Davey in *Noakes & Co., Ltd.* v. *Rice*, who said (17):

> " My Lords, there are three doctrines of the courts of equity in this country which have been referred to in the course of the argument in this case. The first doctrine to which I refer is expressed in the maxim ' Once a mortgage always a mortgage.' The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void. My Lords, the first maxim presents no difficulty: it is only another way of saying that a mortgage cannot be made irredeemable, and that a provision to that effect is void."

Then Sir Andrew Porter, M.R., dealt with the case on the footing that it was within the second of the three categories enumerated by Lord Davey, and not in the third, the second category being the type of case in which a mortgagee reserved to himself collateral advantage outside the mortgage contract. Sir Andrew Porter, M.R., said (18) that the case which he was considering fell within the second head referred to by Lord Davey rather than within the third head, and said (19) that this was not a case of a clog on the equity of redemption at all, because there was absolutely nothing to stop the mortgagor from redeeming. That is quite a different case from the present case, because an option to purchase, if exercised, indubitably does stop a mortgagor from redeeming.

I was also referred by counsel for the defendants to a number of cases in which the courts have held that if the form of a transaction is unobjectionable, the transaction may be good notwithstanding the fact that if it had been carried out in a different form it might have been objectionable. In my judgment, those cases do not apply to the present case, because in a case such as that of a clog on the equity, equity looks to the substance and not to the form. That, I think, appears from cases in the House of Lords which I have already cited; and cases such as *Olds Discount Co., Ltd.* v. *John Playfair, Ltd.* (20), and *Yorkshire Railway Wagon Co.* v. *Maclure* (21), are not, in my judgment, applicable to the present case.

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(13) [1904] A.C. at p. 325. (14) [1904] A.C. at p. 326. (15) [1902] A.C. 24.
(16) [1903] 1 I.R. 499. (17) [1902] A.C. at p. 32. (18) [1903] 1 I.R. at p. 509.
(19) [1903] 1 I.R. at p. 510.

In my judgment, therefore, this option to purchase the land which is called the green land in the agreement of Mar. 26, 1955, is void as being a clog on the equity, and it seems to me that the plaintiff is therefore entitled to succeed in the action. If the plaintiff is entitled to succeed in the action, it must inevitably follow that he must also succeed on the counterclaim.

Declaration accordingly.

Solicitors: *Ruston Clark & Ruston* (for the plaintiff); *Stilgoes* (for the defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

R. *v.* NORHAM AND ISLANDSHIRE JUSTICES, *Ex parte* SUNTER BROS., LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Salmon and Winn, JJ.), January 18, 1961.]

Magistrates—Procedure—Plea of guilty in accused's absence—Notice sent to accused of procedure for pleading guilty without appearing—Adjournments—Notification in writing on behalf of accused of desire to plead guilty—Prosecution's witnesses present on date of adjourned trial—Police and other evidence heard in accused's absence—Whether court could proceed under Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 15, *or was bound to proceed under Magistrates' Courts Act,* 1957 (5 *&* 6 *Eliz.* 2 *c.* 29), *s.* 1.

Informations charging offences against the Motor Vehicles (Construction and Use) Regulations, 1955, were laid, and the return date of the summonses issued for appearing before the magistrates' court was Jan. 12, 1960. The procedure under s. 1 of the Magistrates' Courts Act, 1957, for pleading guilty without appearing was invoked, and the forms of notice etc. for that purpose were duly served with the summonses. The accused obtained adjournments to Feb. 9 and then to Mar. 8. On Mar. 7 their solicitor wrote to the clerk of the court saying that the accused had reluctantly decided to plead guilty and setting out mitigating circumstances. On Mar. 8, the letter being received on that date, the magistrates' court dealt with the case under s. 15 of the Magistrates' Courts Act, 1952, hearing evidence of the prosecution's witnesses and convicting and sentencing the accused. On application for certiorari to quash the convictions and sentences for contravention of proviso (iii)* to s. 1 (2) of the Magistrates' Courts Act, 1957,

Held: when the procedure under s. 1 of the Act of 1957 for pleading guilty without appearing had once been invoked, it was open to an accused to tender a plea of guilty under that procedure up to the very last moment, not merely by the return date of the summons; accordingly, the magistrates' court had contravened s. 1 (2), proviso (iii), of the Act of 1957 by hearing evidence of the prosecution's witnesses and the convictions and sentences must be quashed.

[**Editorial Note.** Where a magistrates' court decides not to dispose of a case in an accused's absence under the plea of guilty procedure established by s. 1 (2) (a) of the Act of 1957, it is required to adjourn or further adjourn the

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(20) [1938] 3 All E.R. 275.

(21) (1882), 21 Ch.D. 309.

* The relevant terms of s. 1 (2), proviso (iii), are printed at p. 457, letter F, post.

trial for the purpose of dealing with the information (ibid., s. 1 (2) (b); see A
p. 458, letter E, post).

As to the procedure for pleading guilty without appearing before a magistrates' court, see 25 HALSBURY'S LAWS (3rd Edn.) 196-198, paras. 358, 359.

For the Magistrates' Courts Act, 1952, s. 15, see 32 HALSBURY'S STATUTES (2nd Edn.) 435.

For the Magistrates' Courts Act, 1957, s. 1, see 37 HALSBURY'S STATUTES B
(2nd Edn.) 627.]

Motion for certiorari.

This was a motion on behalf of Sunter Bros., Ltd. (herein called " the applicants ") for an order of certiorari to remove and quash four convictions and sentences recorded by the justices of the petty sessional division of Norham and Islandshire, sitting at Berwick-on-Tweed and dated Mar. 8, 1960. C

By three informations, dated Dec. 28, 1959, the applicants were charged with four offences under reg. 73 (1), reg. 76, reg. 78 and reg. 104 of the Motor Vehicles (Construction and Use) Regulations, 1955, in relation to the use of one vehicle, a Scammel light locomotive, on Sept. 30, 1959. The summonses, pursuant to the informations, were accompanied by the documents appropriate to the procedure for pleading guilty without appearing at the hearing established D
under the Magistrates' Courts Act, 1957, s. 1. In an affidavit by the clerk to the justices filed on the motion for certiorari he deposed that the hearing was adjourned twice at the applicants' request to Feb. 9, 1960 and Mar. 8, 1960; that a letter, dated Mar. 7, 1960, from the solicitor for the applicants to the deponent, pleading guilty to the charges was received at 9.30 a.m. on Mar. 8; that the prosecution, not having been informed of the applicants' intention E
to plead guilty, had their witnesses in attendance when the case was called on; that the magistrates were of opinion that, since no notification in writing of the plea guilty had been received on the return date of the summons (viz., Jan. 12, 1960), s. 1 (2) of the Magistrates' Courts Act, 1957, did not thereafter apply and the two adjournments had been by virtue of s. 14 (1) of the Magistrates' Courts Act, 1952, not by virtue of s. 1 (2) (b) of the Act of 1957; and that accordingly F
the hearing on Mar. 8, 1960, was under s. 15 (1) of the Magistrates' Courts Act, 1952. The letter of the solicitor for the applicants, dated Mar. 7, 1960, referred to the summonses but not to the documents accompanying them, and apart from setting out mitigating circumstances and circumstances concerned with the illness of a witness, merely stated that the applicants had with considerable reluctance instructed the solicitor to plead guilty on their behalf to the charges. G
This letter was read to the justices at the hearing, but, so the clerk to the justices deposed, was not accepted as a notification under s. 1 (2) of the Act of 1957. After hearing the sworn evidence of a constable and of an examiner from the Traffic Commissioner's Department, the magistrates convicted the applicants and imposed a fine of £20 on each charge.

The facts appear in the judgment of LORD PARKER, C.J. H

F. A. Stockdale for the applicants.

The respondents did not appear and were not represented.

LORD PARKER, C.J.: The ground on which this order is asked is that the justices did not comply strictly with the procedure laid down by s. 1 of the Magistrates' Courts Act, 1957. That procedure enables an accused party to enter a I
plea of guilty and make written submissions in mitigation. It is provided (1) that, under that procedure, the court shall not hear any evidence from the prosecution but shall be permitted only to read the statement made on behalf of the prosecution which will have already been served on the accused. It is a procedure which this court has said many times must be strictly observed.

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(1) Magistrates' Courts Act, 1957, s. 1 (2), proviso (iii), the relevant terms of which are at p. 457, letter F, post.

The short facts are these. Four charges were made under the Motor Vehicles (Construction and Use) Regulations, 1955, contained in three informations laid on Dec. 28, 1959. The return date was Jan. 12, 1960. The machinery under the Magistrates' Courts Act, 1957, s. 1, was invoked (2). The statutory form was sent to the accused setting out in simple language the effect of the section and requiring the accused to notify the clerk of the court at least three days before the date fixed for the hearing whether a plea of guilty would be entered in order to avoid unnecessary attendance of witnesses. Also sent was the statutory form setting out the statement of facts on which the prosecution relied and which would be read to the court. There was also appended a notice of plea of guilty, which was not a statutory form (3) but which for convenience the accused could fill up setting out his plea of guilty and the mitigating circumstances on which he relied. There was also a statutory form setting out a list of previous convictions which the prosecution intended to put before the court.

The defendants, the present applicants, took no action with regard to those forms except to ask for an adjournment. An adjournment was asked for and obtained from Jan. 12 until Feb. 9, 1960, and again from Feb. 9 to Mar. 8, 1960. It is clear that the applicants were minded at that time to resist these charges, but one of their witnesses was ill and accordingly these adjournments were requested. However, by letter dated Mar. 7, 1960, received by the court on Mar. 8, 1960, the applicants' solicitor wrote saying that they had reluctantly come to the conclusion that they must plead guilty, and proceeded to set out certain mitigating circumstances. When the matter was dealt with on Mar. 8, the witnesses for the prosecution had already arrived. The justices did not deal with it as a case under s. 1 of the Magistrates' Courts Act, 1957, but heard evidence, as now appears, not only from a police officer but from a Mr. Davies, who was the examiner from the Traffic Commissioner's Department. Accordingly, if this were a case to which the procedure envisaged by the Act of 1957 was applicable, the court did not obey one of the conditions laid down in that procedure, namely, the condition which appears in s. 1 (2), proviso (iii), of the Act of 1957, which says:

> " if the court proceeds under this subsection to hear and dispose of the case in the absence of the accused, the court shall not permit any statement to be made by or on behalf of the prosecutor with respect to any facts relating to the offence charged other than the statement of facts aforesaid . . ."

except on adjourning and giving the accused an opportunity of being present. Prima facie, therefore, this appears to be a case where the justices have broken one of the conditions envisaged in the procedure, and, accordingly, have acted outside their jurisdiction.

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(2) Three forms are prescribed by the Magistrates' Courts Rules, 1957 (S.I. 1957 No. 1429). The first is a form of notice to the defendant regarding the procedure for pleading guilty in the absence of the accused; the second is a form of statement of facts to be read in open court if the accused pleads guilty, and the third is a notice of intention to cite previous convictions.

The notice in the present case, after stating that if the offences were admitted and the applicants did not wish to appear, it was open to them under s. 1 of the Magistrates' Courts Act, 1957, to inform the clerk of the court in writing that they wished to plead guilty, read—" If you decide to do this, you should write to the clerk at least three days before the date fixed for the hearing in order to avoid unnecessary attendance of witnesses . . . ". After referring to the possibility of including a statement of mitigating circumstances, the notice read—" Unless the court adjourns the case after accepting your plea of guilty and before sentencing you . . . the prosecution will not be permitted to make any statement with respect to any facts relating to the offences other than the statements of facts ". The statement of facts referred to accompanied the notice and summons.

(3) The form is recommended in Home Office Circular No. 151/1957 dated Aug. 14, 1957.

A The justices through their clerk have put in, as they are entitled to do, an affidavit from which it appears that the court, not having been informed at once that a plea of guilty was being entered under the procedure of the Act of 1957, felt that when the date of hearing arrived on Mar. 8, 1960, that procedure had, as it were, disappeared into the background, and that they were dealing with a case which was before them under s. 15 of the Magistrates' Courts Act, 1952, (4).

B One can quite understand that there may have been some confusion in this case, but, for my part, I am quite clear that when once the procedure under the Act of 1957 has been invoked, an accused has the right up to the very last moment to enter a plea of guilty on the conditions laid down in the Act of 1957. It is quite wrong to say that that plea of guilty pursuant to that procedure must be given by the time fixed by the summons, in this case Jan. 12, 1960, because it is to be observed that s. 1 (2) of the Act of 1957 specifically refers not only to C the time appointed for the trial but also to the time appointed for the adjourned trial. Accordingly, this was a case in which the procedure under the Act of 1957 was invoked. A plea was put in under that procedure on the statutory conditions as to what evidence was to be received at the trial. In those circumstances, the justices, having broken that condition, had no jurisdiction to record the plea of guilty or the sentences of £20 on each charge. It is a highly technical D point, but none the less in my judgment the applicants are entitled to succeed and these convictions and sentences must be quashed.

SALMON, J.: I agree.

WINN, J.: I agree for the same reasons that my Lord has given; but I would add that since, as the court thinks clear, these justices could not in law E proceed to deal with this matter otherwise than under the provisions of the Magistrates' Courts Act, 1957, it was mandatory by reason of s. 1 (2) (b) that they should adjourn. As soon as they decided not to proceed they were directed by that subsection to adjourn. Further, by proviso (iii) they were prohibited expressly from having regard to any facts relating to the offence charged except on a resumption of the trial after an adjournment under s. 14 (3) of the Magistrates' F Courts Act, 1952, which applies only after conviction and not before conviction.

Convictions and sentences quashed.

Solicitors: *Doyle, Devonshire & Co.*, agents for *T. H. Campbell Wardlaw*, Newcastle-upon-Tyne (for the applicants).

[*Reported by* Jenifer Sandell, *Barrister-at-Law.*]

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(4) Section 15 (1) provides: "Where at the time and place appointed for the trial or adjourned trial of an information the prosecutor appears but the accused does not, the court may . . . proceed in his absence."

THE BALLYALTON. OWNERS OF STEAMSHIP BALLYALTON v. PRESTON CORPORATION.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), November 2, 3, 1960, January 13, 1961.]

Harbour—Negligence of harbour authority—Exemption—Insufficient supervision of bed of berth—Damage to ship at berth on taking ground—Notice issued by port authority known to shipowners and stipulating for exemption from liability—Whether port authority exempted from liability for negligence.

Horrocksford wharf at the port of Preston was managed and controlled by the defendants. Berths at that wharf required constant supervision owing to the action of the river waters and tides. On the evidence the berth received no supervision or treatment from the defendants between August, 1955, and April, 1956. On Apr. 16, 1956, the plaintiffs' steamer Ballyalton, being berthed at Horrocksford wharf with a cargo of stone and her charges for use of the berth being paid, was damaged owing to the unevenness of the bottom of the berth. The damage was found to be due to the defendants' negligence in supervising the berths at the wharf. In an action by the plaintiffs for damages for negligence, breach of contract or breach of warranty of safety of the berth, the defendants claimed exemption by reason of a notice of which the plaintiffs admitted knowledge. The notice* intimated, among other things, that vessels going to the wharf had to take the ground after high water and that, though the defendants took steps to keep the quays in order, they did not ensure the berths always being level; that the defendants would not be responsible for any damage to vessel or cargo resulting from the use of the wharf or taking the ground from the berths thereat or therein, and that the owners of a vessel sent to the port must satisfy themselves that the vessel both in her construction and the disposition of her cargo might safely take the ground and lie in the berth.

Held: (i) apart from any exemption conferred by the notice, the liability of the defendants would rest solely in negligence (see p. 464, letter H, post).

Principle stated by ATKIN, L.J., in *Forbes, Abbott & Lennard, Ltd.* v. *Great Western Ry. Co.* ((1928), 138 L.T. at p. 292) applied.

(ii) the words of exemption in the notice were, on its true construction, wide and unambiguous enough to cover negligence; therefore the plaintiffs' claim failed.

Principle stated by SCRUTTON, L.J., in *Rutter* v. *Palmer* ([1922] All E.R. Rep. at p. 370) applied.

[As to the liability of harbour authorities to take reasonable care to see that the harbour is in proper condition for vessels, see 30 HALSBURY'S LAWS (2nd Edn.) 988, para. 1379; and for cases on the subject, see 41 DIGEST 958, 959, *8524-8531*, 976, *8660*, 979, *8676*, *8677*, 980, 981, *8685-8692*, and DIGEST Supps.]

Cases referred to:

Forbes, Abbott & Lennard, Ltd. v. *Great Western Ry. Co.*, (1928), 138 L.T. 286; 17 Asp. M.L.C. 347; 41 Digest 984, *8715*.

Hughes (Richard) & Co. v. *Southern Ry. Co.*, (1929), 34 Lloyd's Rep. 114.

Jessmore (Owners) v. *Manchester Ship Canal Co.*, [1951] 2 Lloyd's Rep. 512.

Moorcock, The, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 6 Asp. M.L.C. 373; 44 Digest 104, *828*.

Pyman S.S. Co. v. *Hull & Barnsley Ry. Co.*, [1915] 2 K.B. 729; 84 L.J.K.B. 1235; 112 L.T. 1103; 13 Asp. M.L.C. 64; 41 Digest 976, *8660*.

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* This notice is set out at p. 462, letters C to H, post.

Reynolds v. *Boston Deep Sea Fishing & Ice Co., Ltd.*, (1922), 38 T.L.R. 429; 3 Digest (Repl.) 78, *160*. A

Rutter v. *Palmer*, [1922] All E.R. Rep. 367; [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419; 3 Digest (Repl.) 78, *159*.

White v. *Warrick (John) & Co., Ltd.*, [1953] 2 All E.R. 1021; [1953] 1 W.L.R. 1285; 3 Digest (Repl.) 96, *241*.

B

Action.

This was an action by the plaintiffs, the owners of the steamship Ballyalton, for damages for negligence and breach of contract against the defendants, the mayor, aldermen and burgesses of the county borough of Preston, as the port authority. The claim was in respect of damage sustained by the Ballyalton on Apr. 16, 1956, whilst at berth at the Horrocksford wharf, which formed part C of the port of Preston and which was under the management and control of the defendants. The facts and contentions of the parties are set out in the judgment. The case cited below* was quoted in argument in addition to those in the judgment.

Kenneth Carpmael, Q.C., and *Gerald Darling* for the plaintiffs.

J. V. Naisby, Q.C., and *R. J. H. Collinson* for the defendants. D

Cur. adv. vult.

Jan. 13. **KARMINSKI, J.**, read the following judgment: On the morning of Apr. 15, 1956, the Ballyalton, a small steamship owned by the plaintiffs, arrived in the Preston dock basin from Penmaenmawr laden with some 230 tons of stone. The Ballyalton is a steel screw steamship of 266 tons gross, E 140 feet in length and 21 feet in beam. At the time of her arrival at Preston her draft was approximately seven feet nine inches forward and eleven feet six inches aft, and she was manned by a crew of nine hands all told.

At about 1 p.m. on Apr. 15 she was moved to a berth at Horrocksford wharf, which forms part of the port of Preston and is under the control and management of the defendants. At some stage the proper rates for using the quay were paid on behalf of the plaintiffs to the defendants. On Apr. 16 the Ballyalton com- F menced bunkering at 6 a.m. This operation was soon completed, and at 8 a.m. she commenced to discharge her cargo of stone. At that time she was aground. At 11.30 a.m., the discharge of cargo being almost completed, the master of the Ballyalton went ashore to see his agents. At this time there was nothing noticeably amiss with the Ballyalton; the master noticed that she was lying with a list of some two to three degrees to starboard; but this list was not in G any way unexpected since she was moored with her port side along the wharf and the river bottom would inevitably slope towards the centre of the river. Soon after he had reached his agents, however, the master was summoned back to the ship. On investigation he found serious damage in the hold and the flooring broken. On further investigation the damage to the Ballyalton proved to be of a serious nature, and the nature of the damage has been fully indicated H in survey reports.

The plaintiffs now complain that the damage was caused by reason of the unevenness of the berth at which the Ballyalton lay. It is alleged against the defendants as owners of the berth that the damage was wholly caused by their negligence or breach of contract, since they invited the Ballyalton to take the ground at a berth which they knew or ought to have known was unsafe. It is I further alleged that the berth was not maintained in a safe and proper condition and that the defendants took no steps to ascertain the condition of the berth before allowing the Ballyalton to come and lie there, and had further failed to warn the Ballyalton that the berth might be unsafe. In the alternative the plaintiffs allege that the defendants warranted that the berth was a safe and proper one for the Ballyalton to ground on, and, as the berth was neither safe nor proper, the defendants were in breach of such a warranty. The defendants wholly deny negligence, breach of contract, or any breach of warranty. The defendants also say that even if they were negligent or in breach of contract or of warranty they are protected by the terms of a notice to owners and charterers making it clear that vessels used this berth at their owners' risk and that the defendants would not be responsible for any damage to vessels resulting from taking the ground. The defendants allege that the terms of this notice were communicated to the plaintiffs by a Mr. Rowe through a Mr. Braley acting as agent of the plaintiffs in arranging the charter of the Ballyalton. The defendants further allege that the existence and contents of the notice were known to the directors of the plaintiffs' agents at Preston.

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* *Cawood, Wharton & Co., Ltd.* v. *Samuel Williams & Sons, Ltd. The Cawood III*, [1951] P. 270.

By their reply the plaintiffs contend that the defendants expressly undertook by the terms of the notice to take reasonable steps to keep their berths in order or, alternatively, that it was a condition precedent to the defendants relying on that notice that they should have taken such steps. So far as the communication of the notice is concerned, the plaintiffs deny that Mr. Braley was acting as their agent except in so far as he was a chartering agent on behalf of both shipowners and charterers, but it is admitted that by reason of the knowledge of their Preston agents the plaintiffs had knowledge of the notice and of its contents. I am not, therefore, concerned with the precise position of Mr. Braley in this transaction as agent of the plaintiffs, since it is now admitted that the knowledge was derived through their Preston agents.

The area of controversy on fact in this case was remarkably small. [His Lordship referred to evidence concerning certain chalk marks on a wall at the berth, which he held were immaterial, and continued:] So far as the condition of the berth was concerned, the main evidence comes from Mr. Theaker, a naval architect and surveyor, who, together with Mr. Huckle, representing the defendants, surveyed the Ballyalton on Apr. 18, 1956. Mr. Theaker described the berth as consisting of gravel, large stones and deep mud. He produced a plan of the Ballyalton as she lay on his survey, showing clearly that there was a considerable hump which lay beneath the midships portion of her keel. Mr. Theaker thought that some gravel and stones had been dumped at this spot in one large heap. He also found some building bricks and part of a drain pipe, but I am inclined to think that these constitute the kind of débris which is to be found in any river of this kind. Mr. Theaker has had a good deal of experience of berths all over the west of England. He expressed the view, which on the evidence I accept, that this particular berth showed no signs of having been tended. Mr. Theaker also expressed the view that this was not a safe berth for the Ballyalton to lie on. For the defendants, neither Mr. Huckle nor their harbour master was called, but I heard evidence from Mr. Williams, the master of the grab barge No. 2. This grab barge is owned by the defendants and was operating in the river at the material times. Mr. Williams has described to me how in August and October, 1955, and again in January, 1956, he took considerable quantities of material from the south side of the river and dumped it near the Horrocksford wharf. I was, however, satisfied from Mr. Williams' evidence, which I accept entirely, that the material so deposited by him was not deposited at the berth occupied by the Ballyalton, but at a place adjacent thereto. Mr. Williams has worked on the River Ribble for the defendants for some 14½ years and has had great experience there. He explained to me how the river affects this particular berth under certain conditions, especially when large quantities of fresh water came down the river from the Yorkshire hills and are met by big tides and a strong westerly wind. Mr. Williams explained to me that he had often seen water under these conditions wash the berth to any shape or form. I have no doubt at all after hearing Mr. Williams that this was a berth which needed constant supervision. I had no evidence from the defendants to show that it received either supervision or treatment between August, 1955, and April, 1956; I am satisfied that nothing was done to this berth during that period by the defendants and that Mr. Theaker was wholly justified in saying that he found no signs of the berth being tended, and that his inspection of the berth on Apr. 18, 1956, showed it to be unsafe for the Ballyalton to lie on.

Before I deal with the effects of these findings of fact, I must turn to the terms of the notice on which the defendants rely. The notice is contained in a booklet published in 1956 described as " Tide Tables and Information for Mariners ", and issued by the defendants. In addition to the tide tables themselves, the booklet contains a good deal of historical and general information irrelevant to the present case. At p. 43 of this booklet the notice is set out, and it is necessary for me to refer to the terms in full:

> " NOTICE.
>
> To Owners, Charterers, Captains and Others Using the River Quays (Outside the Dock).
>
> (1) " NOTICE is hereby given that vessels going to the New Quay, or the quay by the Bull Nose in the river diversion, have to take the ground after high water, and it must be understood that, while the corporation take steps to keep them in order, they do not ensure the berths being always level.
>
> (2) " The dock and wharfage rates payable in respect of vessels and goods are the same for these quays as for the dock.
>
> (3) " NOTICE is therefore hereby given as regards the cases of vessels going to or using the quays and the river diversion, or either of them, for which use there must, of course, be payment, that notwithstanding that rates be charged and taken by the corporation therefor, vessels going to or using the same respectively and their cargo, must be and are at the risk of the owners, or charterers, captains, or others interested in vessels or their cargoes and not of the corporation, who will not be responsible for and will repudiate any liability in respect of any damage either to vessel or cargo resulting from using the quays or river diversion or either of them, or taking the ground thereat or therein or from the berths thereat or therein.
>
> (4) " And with regard to vessels sent to this port, which are to go into, or use, or do go into or use the quays and river diversion, or either of them, instead of using the dock, owners, or charterers, captains, and others interested in the vessels or their cargoes, must satisfy themselves that the vessels both in their construction and the disposition in them of the cargo, may safely take the ground and lie in the berths, and of the condition of the berths, as the corporation will not be responsible for and will repudiate any liability in respect of any damage either to vessel or cargo resulting from using the quays or river diversion, or either of them, or taking the ground thereat or therein, or from the berths thereat or therein.
>
> (5) " This notice is given for the benefit and in the interest of all desiring to frequent this port."

Counsel for the plaintiffs contended that para. 1 of the notice contains a contract by the defendants to keep the berth level, and that by failing to take any steps so to do the defendants are in breach of that agreement. Counsel for the plaintiffs further argued that keeping the berth level is a condition precedent to paras. 3 and 4 of the notice coming into operation. Counsel for the defendants agreed that para. 1 must mean that the defendants will take reasonable steps to keep the berth in order; but he submitted that the notice must be construed as a whole, and pointed out that on counsel for the plaintiffs' argument if the defendants were in breach of para. 1, paras. 3 and 4 were otiose and could achieve no result, since if the berth was safe there could be no liability on the defendants. To this counsel for the plaintiffs answered that the defendants could only obtain the protection of paras. 3 and 4 if they had first taken steps to keep the berth in order.

My first task is to consider the general principles of construction of an exemption clause, and these are to be found in the well-known passage of SCRUTTON, L.J.'s judgment in *Rutter* v. *Palmer* (1):

> "In construing an exemption clause certain general rules may be applied, the first of which is that the defendant ought not to be relieved from liability for the negligence of his servants unless clear and unambiguous words to that effect are used. In the second place the liability of the defendant has to be ascertained quite apart from the exempting words in the contract. Then, again, the particular clause in the contract has to be construed and considered, and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to discharge him: see *Reynolds* v. *Boston Deep Sea Fishing & Ice Co., Ltd.* (2)."

Rutter v. *Palmer* (3) was a case where the owner of a motor car deposited the car for sale with a garage keeper on terms set out in a printed document, and the car was damaged by reason of the negligence of a driver employed by the garage keeper. The principles set out by SCRUTTON, L.J , have been applied in cases where locks or berths have not been maintained in a safe state by their owners. Cf. *Forbes, Abbott & Lennard, Ltd.* v. *Great Western Ry. Co.* (4), and *Jessmore (Owners)* v. *Manchester Ship Canal Co.* (5).

I propose to subject the facts of the present case to the tests laid down by SCRUTTON, L.J., bearing in mind particularly the words used by the defendants in their notice. Counsel for the plaintiffs rightly insisted that in construing exemption clauses the court should interpret them against the party putting them forward, unless satisfied as to their meaning. On the other hand, in seeking to arrive at a meaning, I have equally no doubt that I must look at the notice as a whole. It is easy to criticise the notice and to say that it could have been more clearly, and also more concisely, drafted. It might, for example, have been better in para. 3 to have said that vessels using the berths were at the sole risk of the owners or charterers. Cf. the terms of the Manchester Ship Canal Notice in *Jessmore (Owners)* v. *Manchester Ship Canal Co.* (6). But I have here to look also at the other terms used in this notice:

> ". . . vessels going to or using the same . . . must be and are at the risk of the owners, or charterers, captains, or others interested in vessels or their cargoes and not of the corporation, who will not be responsible for and will repudiate any liability in respect of any damage either to vessel or cargo . . . the corporation will not be responsible for and will repudiate any liability in respect of any damage either to vessel or cargo resulting from using the quays or river diversion, or either of them, or taking the ground thereat or therein."

I have considered *White* v. *John Warrick & Co., Ltd.* (7), where a different exemption clause was held to exempt defendants from their liability in contract but not from negligence. But looking at this notice as a whole I have come to the conclusion that the words here used are adequate to exempt the defendants from liability for the negligence of their servants.

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(1) [1922] All E.R. Rep. at p. 370; [1922] 2 K.B. at p. 92.

(2) (1922), 38 T.L.R. 429.

(3) [1922] All E.R. Rep. 367; [1922] 2 K.B. 87.

(4) (1928), 138 L.T. 286; 17 Asp. M.L.C. 347.

(5) [1951] 2 Lloyd's Rep. 512.

(6) [1951] 2 Lloyd's Rep. at p. 525. This notice reads: "The Manchester Ship Canal Company do not take any charge of or assume any responsibility whatever in respect of any vessel, boat, barge, lighter, or other craft navigating the Canal, all craft under such circumstances being at the sole risk of the owners, who alone are responsible for the safety and security of their vessels and moorings and also for any damage done by their vessels or servants to the premises or property of the company or to vessels or goods in or upon or any part of the company's premises."

(7) [1953] 2 All E.R. 1021.

I have now to consider the liability of the defendants here, apart from the exempting words. Counsel for the plaintiffs contended that the defendants in addition to their negligence have failed to carry out what they agreed to do in para. 1 of the notice. Counsel for the plaintiffs relied first on *Richard Hughes & Co.* v. *Southern Ry. Co.* (8), but in my view that case must be distinguished on the facts, since Bateson, J., found that the defendants' harbour master was not employed as a general agent by the plaintiffs. Counsel for the plaintiffs also relied on *Pyman S.S. Co.* v. *Hull & Barnsley Ry. Co.* (9), and in particular that part of the judgment of Lord Reading, C.J., which indicated that where a breach of warranty is alleged there must be language intending to exempt from liability for breach of warranty, and that the court must not ordinarily read into words of general exemption an extension of the exemption to such an obligation (10).

I think that the answer to counsel for the plaintiffs' argument on this point is to be found in the judgment of Atkin, L.J., in *Forbes, Abbott & Lennard, Ltd.* v. *Great Western Ry. Co.* (11):

> " Now the other liability that was suggested was the liability of the defendants in respect of the warranty which has been held in the well-known case of *The Moorcock* (12), to attach to a contract between parties in a case where a dock owner invites the shipowner to send his ship into a dock. That is a warranty that the dock owners have taken reasonable steps to see that the berth offered to the boat is safe and to see that it is safe, and if it is not safe that they will give notice of the fact to the shipowner. That appears to me again to be precisely similar in practice, though it is expressed in terms of warranty, to a liability for the negligence of their servants, a duty to take care, and, if care is not taken, to warn; but however that may be, it is precisely similar to the liability which is sought to be imposed in this case, which is put upon the very ground that the defendants by their servants invited or directed the plaintiffs' servant to put his barge in the lock in such conditions that being in the lock and proceeding to use the lock it would necessarily place itself on a sill where it might ground and be likely to suffer damage. That being so, I find no reason at all for coming to the conclusion that the words of this contract are not quite plain and unambiguous. It appears to be on their reasonable intendment that they plainly exempt the railway company from liability for the negligence of their servants. In substance that is the sole liability to which they were exposed, and I cannot give any sufficient meaning to the words unless I give them the effect which is contended for by the defendants. I think, therefore, that the defendants are protected by the contract between the parties as far as the construction of the contract is concerned."

In my view, applying those words to this case, the only liability to which the defendants are exposed is the liability for the negligence of their servants.

Turning to the third and last of the tests suggested by Scrutton, L.J., in

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(8) (1929), 34 Lloyd's Rep. 114. (9) [1915] 2 K.B. 729; 13 Asp. M.L.C. 64.

(10) [1915] 2 K.B. at p. 734: 13 Asp. M.L.C. at p. 66, where Lord Reading, C.J., said: " . . . when you have an obligation, such as, for example, the warranty of seaworthiness in a ship, and a contract of carriage or affreightment is entered into, you must find from the language of the contract words which indicate that it was intended to exempt the shipowner from liability for breach of that warranty, and that you would not ordinarily read into words of general exemption an extension of the exemption to such an obligation as that. But even so it is quite plain that in law the language used may be sufficient to exclude the shipowner even from such an obligation. It may be by express words; it may be by necessary implication to be gathered from the language which has been used in the contract; but in any event you must find in the contract words which would justify the exemption of the shipowner for a breach of that obligation, and unless you do find them quite clearly the courts have said that he is to be held liable."

(11) (1928), 138 L.T. at p. 292; 17 Asp. M.L.C. at p. 353.

(12) (1889), 14 P.D. 64; 6 Asp. M.L.C. 373.

Rutter v. *Palmer* (13), I have to consider the exemption clause here, and to ask myself as a matter of construction whether the words used are wide and unambiguous enough to cover negligence. I have no doubt that they are wide enough, and, indeed, I have come to the conclusion that any other interpretation would make the words used here meaningless. In the result I hold that by the terms of the notice the defendants have protected themselves from the results of their own negligence and that there must be judgment in their favour accordingly.

Order accordingly.

Solicitors: *Batesons & Co.*, Liverpool (for the plaintiffs); *Weightman, Pedder & Co.*, Liverpool (for the defendants).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION (PROBATE).

Administration of Estates—Grant of administration—Domicil of deceased—Statement of domicil in grant—Non-Contentious Probate Rules, 1954 (*S.I.* 1954 *No.* 796), *r.* 6 (5)—*Non-Contentious Probate* (*Amendment*) *Rules*, 1961 (*S.I.* 1961 *No.* 72), *r.* 2.

Probate—Grant—Domicil of deceased—Statement of domicil in grant—Non-Contentious Probate Rules, 1954 (*S.I.* 1954 *No.* 796), *r.* 6 (5)—*Non-Contentious Probate* (*Amendment*) *Rules*, 1961 (*S.I.* 1961 *No.* 72), *r.* 2.

The Non-Contentious Probate (Amendment) Rules, 1961, which come into force on Mar. 1, 1961, amend r. 6 of the Non-Contentious Probate Rules, 1954*, to permit a statement of the place where the deceased died domiciled to be included in the grant whenever the domicil is stated in the oath. In the absence of any special application such a statement of domicil will be included in the grant as a matter of routine if it is included in the oath. Where a country has no uniform system of law, the statement of domicil should specify the state, province or other judicial division of the country as heretofore.

B. LONG,
Senior Registrar.

Jan. 24, 1961.

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(13) [1922] All E.R. Rep. at p. 370; [1922] 2 K.B. at p. 92.

* For the Non-Contentious Probate Rules, 1954, r. 6, see 7 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 288.

R. *v.* PETRIE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Salmon and Winn, JJ.), January 24, 25, 1961.]

Criminal Law—Prevention of crime—Offensive weapon—Having offensive weapon in public place without lawful authority—Direction to be given to jury—Prevention of Crime Act, 1953 (1 *&* 2 *Eliz.* 2 *c.* 14), *s.* 1 (4).

The appellant was a passenger in a motor car which was involved in a collision with a motor scooter. The driver of the scooter was injured; the pillion passenger was thrown off the scooter, but was uninjured. He went up to the car to remonstrate with its driver whom he regarded as responsible for the accident. The driver and the appellant got out of the car and a fight ensued in which the appellant was alleged to have drawn a " cut-throat " razor and wounded the pillion passenger. The appellant denied this. When the police arrived the appellant was seated in the car, and on inspecting the car the police found a cut-throat razor under the passenger seat in which the appellant was sitting. He was charged with possessing an offensive weapon in a public place contrary to s. 1 (1)* of the Prevention of Crime Act, 1953, and with occasioning actual bodily harm. By s. 1 (4) " offensive weapon " meant " any article made or adapted for use for causing injury to the person, *or intended by the person having it with him for such use by him* ". The definition of offensive weapon was not read to the jury in the summing-up, and they were directed that possession of the razor in the circumstances of the collision was possession of an offensive weapon in a public place, which shifted the onus on to the appellant to prove that he had a reasonable excuse for being in possession of it. The jury convicted the appellant of possessing an offensive weapon in a public place, but acquitted him of occasioning bodily harm. On appeal,

Held: the onus was on the prosecution throughout to prove the intent with which the appellant was in possession of the razor, which was not an article made or adapted for use for causing injury within s. 1 (4), but the jury had been wrongly directed to convict on the first count unless the appellant proved lawful authority or reasonable excuse; accordingly, the conviction would be quashed.

Per CURIAM: it was essential in summing-up in such a case not to confuse the definition of offensive weapon since, once possession in a public place was proved, if an article were one that was made or adapted for use for causing injury to the person (such as a cosh, a knuckleduster or a revolver) the onus shifted to the defence to prove on a balance of probabilities, lawful authority or reasonable excuse; but if the article were not made or adapted for such use (such as a sandbag or a razor) the onus was on the prosecution throughout to show that it was carried with the intention of using it to injure (cf. p. 468, letters E and F, post).

Appeal allowed.

[As to carrying offensive weapons and the meaning of offensive weapon, see 10 HALSBURY'S LAWS (3rd Edn.) 583, para. 1084, especially note (a) and Supplement; and for cases on the subject, see 15 DIGEST (Repl.) 783, *7358* and 3rd DIGEST Supp.

For the Prevention of Crime Act, 1953, s. 1, see 33 HALSBURY'S STATUTES (2nd Edn.) 34.]

Appeal.

The appellant, Dudley Leighton Petrie, was indicted on two counts: (i) that on Oct. 1, 1960, in a public place he without lawful authority or reasonable excuse had with him an offensive weapon, namely, a razor, and (ii) that on the same day he assaulted Sidney David Franklin and thereby occasioned him some actual bodily harm. The appellant was tried at London Sessions on Nov. 21 and Nov. 22, 1960, before the chairman (R. E. SEATON, ESQ.) and a jury and was convicted on the first count and acquitted on the second count. He was sentenced to six months' imprisonment. The facts appear in the judgment of the court.

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* The relevant part of s. 1 is set out at p. 468, letter A, post.

S. Stout-Kerr for the appellant.
H. J. Leonard for the Crown.

SALMON, J., gave the following judgment of the court: The facts of the case are quite short. It appears that on Oct. 1, 1960, the appellant attended a wedding, and the celebration of the wedding went on till half past eight in the evening. He then, with another man called Walker, went in a motor car to fetch some other guests. When the motor car was outside a public house in Ladbroke Grove, it was reversed by Walker, who was driving it, with the appellant sitting next to him in the passenger seat; on being reversed the motor car collided with a motor scooter which was driven by a man called Briggs, who had another man called Franklin riding as a passenger. Briggs was injured and Franklin, thinking that the motor car was going to drive away, got off the scooter and came to the front of the motor car and remonstrated violently with the driver. There was a very sharp conflict of evidence as to what then ensued. According to Briggs and Franklin and a man called Cowan, who was called on behalf of the prosecution, there was a fight in which Franklin was knocked to the ground by Walker and kicked in the stomach when he was lying on the ground by the appellant. It was also part of the prosecution case that the appellant drew a razor, an old-fashioned razor which is commonly called a cut-throat razor, from his pocket and threatened Franklin with it and, indeed, inflicted a wound on Franklin with that razor. The appellant and his witnesses denied that anything of that kind had happened but said that Franklin had kicked the appellant and all that the appellant did was to kick back in self-defence. When the police arrived on the scene the appellant was sitting in the motor car in the passenger seat. He was asked to get out and under the passenger seat there was found a cut-throat razor. The appellant was asked if he knew anything about the razor. He denied any knowledge of it. There is no question but that the appellant did tell a lie to the police constable on that occasion. He admits it and says that he lied because he was afraid. The appellant was then taken to the police station and he signed a statement the contents of which afforded ample evidence on which the jury could have convicted him.

According to the police officer that statement was a perfectly voluntary statement made by the appellant after caution. According to the appellant, he was stripped and severely beaten in the police station, and he said he signed the statement only as the result of being hurt and terrified by the police. According to the police, when charged with the two offences the appellant said that he was guilty of each of them. In his evidence the appellant admitted that he did have a razor in his pocket when he was in the car. He said that when he had set out in the morning to go to the wedding he put the razor in his pocket in order to shave the bridegroom. He said that when the trouble started at Ladbroke Grove he took the razor out of his pocket and put it down in the car so that it would be out of his reach. Apparently he appreciated that if he got into a fight the temptation to use it might be irresistible.

It seems to this court that there was ample evidence on which the jury if properly directed could have found this appellant guilty of being in possession of an offensive weapon. This is an unfortunate case because the court is of the opinion that the summing-up was wholly wrong and that it is impossible to say that if the correct direction had been given, the appellant might not have been acquitted.

Section 1 (1) of the Prevention of Crime Act, 1953, reads as follows:

> "Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence . . ."

Then in s. 1 (4) an offensive weapon is defined thus:

> ". . . 'offensive weapon' means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him."

The learned chairman never read that definition of "offensive weapon" to the jury. It may be that he did not even refresh his own memory about it because he directed the jury, as will presently appear, that the mere carrying of that razor in Ladbroke Grove was necessarily the possession of an offensive weapon in a public place, which shifted the onus on to the appellant to prove that he had a reasonable excuse for being in possession of it. It is clear that the definition section of the Act contemplates offensive weapons of, at any rate, two classes, namely, (a) an article which per se is an offensive weapon, that is to say, an article made or adapted for use for causing injury to the person; and (b) an article which, though it is not made or adapted for such use, is carried with the intent so to use it. A cosh, a knuckleduster, and a revolver are examples of articles in the first class. A sandbag and a razor are examples of articles in the second class. No jury could find that a sandbag was in the first class because there would be no evidence to support such a finding. It seems to this court that the same is true about an ordinary razor. There are some articles which are equivocal, for example, knives. It would always be for a jury to say whether a knife was made or adapted for use for causing injury to the person. It would depend on the view the jury took of the knife.

It is absolutely essential in summing-up to the jury in a case of this sort not to muddle up the definition of "offensive weapon" because, if the article in question is an offensive weapon, per se, once possession in a public place is proved, the onus shifts to the defence to prove on a balance of probability that there was lawful authority or reasonable excuse for carrying the weapon. If the accused fails to discharge this onus the jury must convict him. On the other hand, if the article is something like a sandbag or a razor, the onus is on the prosecution to show that it was carried with the intention of using it to injure. The onus remains on the prosecution throughout, and if at the end of the day the jury are left in doubt about the intent of the accused, he is entitled to be acquitted.

The direction which was given by the learned chairman was as follows:

> "But if you come to the conclusion on what you have heard here that this accused was in possession of that razor—and, of course, the Crown have to satisfy you about that—then the circumstances in which there was possession, namely, the collision at Ladbroke Grove, are such that the onus shifts to him to show that his possession was legitimate, lawful and reasonable; it is for him to satisfy you that that is probably the case . . .
>
> ". . . the essence of the matter is that the onus of proving possession of the razor is on the Crown. No doubt you will be satisfied that a razor is an offensive weapon. Once the Crown have proved that he was in possession of that weapon the onus of proof shifts to him to satisfy you as a reasonable probability that he had it in his possession for a lawful purpose, that there was a reasonable excuse for having it."

Counsel for the Crown has very fairly said that that cannot be supported because he cannot argue that a razor is an offensive weapon within the meaning of the Act, unless it is proved by the Crown that it was carried in a public place with the intention of injuring some person.

The jury were obviously somewhat puzzled by the direction that had been given to them and, after they had retired for some time, they came back and asked for further directions, and [the foreman] said: "We are not quite clear as to what constitutes carrying an offensive weapon". The learned chairman then said:

> A "The charge here is being in possession of an offensive weapon: In a certain public place at Ladbroke Grove without lawful authority or reasonable excuse had with him an offensive weapon. If you have in your motor car an offensive weapon, that would amount to carrying in law. In fact, of course, that is what happened, assuming you accept what was said by this man [that is to say, if you believe the admission the accused made in the
> B witness box]. It is said on the other hand by Mr. Franklin and by other persons that this man had the weapon in his hand, and in fact was seen to draw it against Franklin. Now, that would be possession."

The jury then found the appellant guilty of possessing an offensive weapon and not guilty of assault.

It is clear that, as already indicated, there was abundant evidence that the
C appellant was carrying this razor with the intent necessary to make it an offensive weapon within the meaning of the Act. Indeed, if a man is found carrying a razor in a public place, there is at any rate some evidence on which a jury could say that he had the necessary intent. It would be entirely a matter for the jury. But it was quite wrong for the chairman to direct the jury as a matter of law that the appellant was in possession of an offensive weapon and that the onus was on
D him to prove lawful authority or reasonable excuse.

If the jury had wholly accepted the evidence of the prosecution witnesses they would, no doubt, have convicted the appellant on the second count as well as on the first. It is accordingly plain that the jury may well have been in grave doubt about the evidence called for the prosecution as well as that called for the defence. If they were, and they had been given a proper direction, which was that
E the onus was on the prosecution throughout to prove the intent with which the appellant was in possession of the razor, they would have acquitted him. But if, being in grave doubt about all the evidence, they were wrongly told, as they were, that they must convict on the count of being in possession of an offensive weapon unless they accepted the appellant's story, then they had no alternative other than to convict.

F In these circumstances, this court feels that it would be very unsafe to allow this conviction to stand, as it rests on what is a wholly wrong direction as to the onus of proof. The only other matter to which this court wishes to allude is this, that when in the presence of the jury learned counsel for the defence indicated that he wished to object to the admissibility in evidence of the alleged statement by the appellant on the ground that it had been obtained by duress, the learned
G chairman made this remarkable observation:

> "That would not make it inadmissible, would it?, (to which counsel said): That it is not his statement, my Lord, in fact. (The Chairman): Well, which, duress or that it is not his statement? (Mr. Stout-Kerr): My Lord, as a result of duress—— (The Chairman): You see, if a statement is taken under duress that does not make it inadmissible, does it?"

H That is a very surprising remark. The chairman then proceeded to try the question whether or not the statement was admissible and he admitted it. It was clearly inadmissible unless the prosecution satisfied him that it was free and voluntary. It seems a pity that the learned chairman in the course of his summing-up did not instruct the jury what would be the effect of their disbelieving the police evidence about the circumstances in which the statement was taken; but
I apparently that was a contingency which he did not contemplate.

For the reasons which I have given the court feels that this conviction cannot be allowed to stand, and it will accordingly be quashed.

Appeal allowed. Conviction quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

Re WYKES' WILL TRUSTS. RIDDINGTON *v.* SPENCER.

[CHANCERY DIVISION (Buckley, J.), December 7, 8, 21, 1960.]

Charity—Validation by Charitable Trusts (Validation) Act, 1954*—Imperfect trust provision—Benevolent or welfare purposes—No express reference to a charitable purpose—Trust for employees—Whether trust was imperfect trust provision—Whether trusts validated—Charitable Trusts (Validation) Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 58), *s.* 1, *s.* 2, *s.* 3.

The words of s. 1 (1)* of the Charitable Trusts (Validation) Act, 1954, defining what is "an imperfect trust provision", are clear and unambiguous and should not be restricted to a meaning narrower than their natural meaning, such as would limit their application to trusts that include express reference both to a charitable purpose and to a non-charitable purpose (e.g., "for charitable or benevolent purposes"), as distinct from a trust expressed by a general description (e.g., "for public purposes") which would embrace both charitable and non-charitable purposes (see p. 475, letter F, and p. 477, letter E, post.

Dictum of HARMAN, J., in *Re Gillingham Bus Disaster Fund* ([1958] 1 All E.R. at p. 40) not followed.

Re Harpur's Will Trusts ([1960] 3 All E.R. 237) considered and dictum of CROSS, J. (at p. 241) not followed.

Dictum of ORMEROD, L.J., in *Re Gillingham Bus Disaster Fund* ([1958] 2 All E.R. at p. 756) followed.

By his will dated Mar. 10, 1944, a testator, having given his widow, who died in April, 1954, a life interest in his residuary estate and bequeathed reversionary pecuniary legacies to be paid on her death, directed that the residue of his estate be divided into three equal parts and disposed of as therein provided. By cl. 9 (c) one part was bequeathed ". . . to the board of directors of E. Wykes (Leicester), Ltd. to be used at their discretion as a benevolent or welfare fund or for welfare purposes for the sole benefit of the past, present and future employees of the company". On the question whether this bequest, which would otherwise be invalid, was validated by the Charitable Trusts (Validation) Act, 1954,

Held: clause 9 (c) was validated by s. 1 (2), being an imperfect trust provision within s. 1 (1), because cl. 9 (c) described the objects of the trust in such a way that the trust property could be used exclusively for charitable purposes (e.g., the relief of poverty) notwithstanding that it could be used for purposes that were not charitable.

[**Editorial Note.** The decision in the present case should be considered with the decision of UPJOHN, J., in *Vernon* v. *Inland Revenue Comrs.* ([1956] 3 All E.R. 14) where a trust for the benefit of employees was also under consideration. Distinction is drawn (ibid., at p. 21, letters E, F) between property which in that case could have been applied exclusively to a charitable purpose (the relief of the indigent) and other property which could only be used for a legally charitable purpose by the trustees' exercising a power to admit to premises local inhabitants as well as employees. Such a power did not render the primary trust of a charitable nature for the purpose of constituting an "imperfect trust provision".

As to the validation of imperfect charitable trusts, see SUPPLEMENT to 4 HALSBURY'S LAWS (3rd Edn.) para. 563; and for cases on the subject, see 8 DIGEST (Repl.) 387-397, *804-892*, and Supplements.

For the Charitable Trusts (Validation) Act, 1954, s. 1, s. 2, s. 3, see 34 HALSBURY'S STATUTES (2nd Edn.) 68-70.]

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* See p. 472, letter F, post.

Cases referred to:

Chichester Diocesan Fund & Board of Finance (Incorporated) v. *Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 8 Digest (Repl.) 395, *875*.

Ellis v. *Inland Revenue Comrs.*, (1949), 31 Tax Cas. 178; 2nd Digest Supp.

Foveaux, Re, Cross v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 8 Digest (Repl.) 348, *291*.

Gibson v. *South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 985; [1950] Ch. 177; 8 Digest (Repl.) 320, *51*.

Gillingham Bus Disaster Fund, Re, Bowman v. *Official Solicitor*, [1958] 1 All E.R. 37; [1958] Ch. 300; [1957] 3 W.L.R. 1069; *affd.* C.A., [1958] 2 All E.R. 749; [1959] Ch. 62; [1958] 3 W.L.R. 325; 3rd Digest Supp.

Harpur's Will Trusts, Re, Haller v. *A.-G.*, [1960] 3 All E.R. 237; [1960] 3 W.L.R. 607.

Macduff, Re, Macduff v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest (Repl.) 395, *879*.

National Anti-Vivisection Society v. *Inland Revenue Comrs.*, [1947] 2 All E.R. 217; [1948] A.C. 31; [1947] L.J.R. 1112; 177 L.T. 226; 8 Digest (Repl.) 313, *3*.

Oppenheim v. *Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 8 Digest (Repl.) 321, *55*.

Oxford Group v. *Inland Revenue Comrs.*, [1949] 2 All E.R. 537; 31 Tax Cas. 221; 2nd Digest Supp.

Adjourned Summons.

This was an application by originating summons dated Aug. 28, 1959, by Cyril Robert Riddington, one of the trustees of the will dated Mar. 10, 1944, of Edward Wykes, deceased, to determine (among other questions) whether the bequest contained in cl. 9 (c) of the will to the board of directors of E. Wykes (Leicester), Ltd., was a valid charitable bequest or was originally invalid but was validated by the Charitable Trusts (Validation) Act, 1954, or was void for uncertainty or otherwise. The defendants were: (i) Francis Leslie Lees Spencer; and (ii) Trevor Charles Lodge, who claimed to be beneficially interested in the testator's residuary estate; (iii) Harold William Watterson, who, with the plaintiff, was a trustee of the will and who, as secretary to E. Wykes (Leicester), Ltd., claimed to be beneficially interested in the testator's residuary estate; (iv) Frank Storer Smith; and (v) George Winram, who, as personal representatives of the testator's deceased widow, claimed to be interested in any property as to which he died intestate; (vi) Peter Allen, who claimed to be beneficially interested in any property as to which the testator died intestate; and (vii) the Attorney-General. The facts appear in the judgment.

B. S. Tatham for the plaintiff.
A. P. McNabb for the first and second defendants.
J. W. M. Turner for the third defendant.
C. M. G. Butterfield for the fourth, fifth and sixth defendants.
B. J. H. Clauson for the Attorney-General.

Cur. adv. vult.

Dec. 21. BUCKLEY, J., having given judgment on previous questions, read the following judgment: I have now to decide whether a bequest contained in cl. 9 (c) of the will of Edward Wykes, deceased, dated Mar. 10, 1944, is validated by the Charitable Trusts (Validation) Act, 1954. Having given his widow, who died on Apr. 25, 1954, a life interest in his residuary estate, the testator bequeathed a number of reversionary pecuniary legacies to be paid on her death, and directed that the residue of his estate should be divided into three equal parts, with the bequests of two of which I have already dealt. Clause 9 (c) of the will is in the following terms:

> "The remaining one part to the board of directors of E. Wykes (Leicester), Ltd. to be used at their discretion as a benevolent or welfare fund or for welfare purposes for the sole benefit of the past, present and future employees of the company. I declare that my executors are empowered to accept the receipt of the then acting secretary in full discharge of the amount due."

The value of the share of residue disposed of by this clause is of the order of £800. E. Wykes (Leicester), Ltd. (which I will call "the company") carries on the business of elastic rubber thread coverers, and is said to be prosperous. It at present employs a hundred and fifty persons, and there are some fifty former employees alive. In 1946 the company instituted a superannuation scheme for its employees, but a number of employees were excluded from it on the ground of their ages when the scheme was set up. Some fourteen of these persons are still alive.

The present directors of the company are the third and fifth defendants. The fifth defendant, as one of the persons entitled to share in any property as to which the testator died intestate, has an adverse personal interest, and, accordingly, the argument in support of the trust has been presented by counsel appearing for the third defendant. He very properly concedes that the bequest contained in cl. 9 (c) is void unless it is validated by the Charitable Trusts (Validation) Act, 1954, as he contends that it is. The bequest, being one which, apart from that Act, is invalid, but would be valid, if the objects for which this fund is directed to be held or applied, were exclusively charitable, is a disposition, to which, by virtue of s. 2 (1), the Act applies, if the bequest constitutes an "imperfect trust provision" as defined by s. 1 (1) of the Act. If the bequest is such an "imperfect trust provision", then, since it is contained in an instrument which took effect before Dec. 16, 1952, the Act validates the trust by the operation of s. 1 (2). Section 1 (1) of the Act defines an "imperfect trust provision" as follows:

> "In this Act, 'imperfect trust provision' means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable."

I have therefore to consider whether cl. 9 (c) of the will so declares the objects for which this share of the testator's residuary estate is to be held or applied, that consistently therewith, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable. A trust for the benefit of employees of a particular company, unless it be for the relief of poverty, cannot be charitable in the eye of the law because such a trust lacks a sufficient element of public benefit (*Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* (1)). On the other hand, a trust to relieve the poverty of employees of a particular company has been held to be charitable (*Gibson* v. *South American Stores* (*Gath & Chaves*), *Ltd.* (2)). The class of persons to be benefited under cl. 9 (c) of the will is confined to past, present and future employees of the company. Consequently, the only application of the fund, or its income, for the benefit of members of this class which would be legally charitable, would be of a kind calculated to relieve the poverty of the beneficiaries. The relief of poverty would, I think, certainly be one, if not the sole or primary, object of a benevolent or welfare fund, and clearly comes within the term "welfare purposes", and it seems to me that, if cl. 9 (c) were valid, the directors of the company could, consistently with its terms, apply the whole of this share of residue for relieving poverty amongst employees or former employees of the company. In other words, they could apply it all for charitable purposes.

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(1) [1951] 1 All E.R. 31; [1951] A.C. 297.
(2) [1949] 2 All E.R. 985; [1950] Ch. 177.

A notwithstanding that they might consistently with the terms of the clause use it all for purposes which were not charitable.

This would seem to demonstrate that this is an "imperfect trust provision" within the meaning of the Act of 1954. It is said, however, that it has been decided by authorities binding on me that an "imperfect trust provision" must declare the objects of the trust in such a form as to include by express reference B some legally charitable purpose as well as other non-charitable purposes. An example of objects so declared would be "charitable or benevolent objects". If this be so, cl. 9 (c) cannot be an "imperfect trust provision" within the meaning of the Act, for it is impossible to point to any purpose mentioned in this sub-clause which is of an exclusively charitable character. I must, therefore, consider the relevant cases.

C *Re Gillingham Bus Disaster Fund, Bowman* v. *Official Solicitor* (3) related to money contributed by the public after a tragic street accident in response to an appeal for a memorial fund (4)

> "... to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause D or causes in memory of the boys who lost their lives, as the mayors may determine."

It was held that the words "among other things" did not confer a general discretion on the trustees. The appeal contemplated three objects, and the word "then" indicated that it was only after the first two, namely, paying funeral expenses and caring for the disabled, had been satisfied that anything E was to be applied to worthy causes. It was conceded that the first two objects lacked a sufficient element of public benefit to be charitable. Accordingly, if the whole trust had to be considered together it could not constitute an "imperfect trust provision" because the fund could not be used exclusively for charitable purposes. The argument presented on behalf of the Attorney-General was based on s. 2 (3) of the Act (5) which, it was contended, required the court to F apply the Act to the trust for worthy causes as though there were a separate disposition on trust, for such worthy causes as the mayors should determine, of the surplus moneys not required for the first two purposes. HARMAN, J., held that s. 2 (3) was not applicable, and that, accordingly, there was no "imperfect trust provision". In the course of his judgment, however, the learned judge, after stating, in effect, that the argument was that the Act should be G applied to the trust for worthy causes, as though there were a separate disposition for that purpose, and that this trust satisfied the terms of s. 1 (1), because all the money applicable for worthy causes might be applied to charitable purposes, said this (6):

> "This is a very far-reaching submission. If it be right, a bequest 'for such objects as my trustees think fit' will be validated although nothing H whatever about charity is mentioned in the will. The vaguer the words are, the better they will do. In my judgment, the Act was not intended to produce any such result. It was, as the long title shows, intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable, or not wholly charitable, so long as the whole of the money could be devoted to charity by excluding words which I were too wide or too vague."

That observation was not germane to the learned judge's decision that s. 2 (3) could not be called in aid in that case; nor was it, I think, an alternative ground of decision. It was, in my view, obiter dictum. Nevertheless, I should naturally wish to pay great attention to it. Before discussing it, however, I should mention the course the case took in the Court of Appeal (7). Lord Evershed, M.R., having reached the conclusion that s. 2 (3) of the Act of 1954 was not applicable, declined to express a view on the construction of s. 1 (1). He said (8):

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(3) [1958] 1 All E.R. 37; [1958] Ch. 300.

(4) [1958] 1 All E.R. at p. 39; [1958] Ch. at p. 300.

(5) Section 2 (3) of the Charitable Trusts (Validation) Act, 1954, provides: "A disposition in settlement or other disposition creating more than one interest in the same property shall be treated for the purposes of this Act as a separate disposition in relation to each of the interests created."

(6) [1958] 1 All E.R. at p. 40; [1958] Ch. at p. 306.

> " It is, accordingly, unnecessary for me to express a view of my own on the second question, whether the phrase ' to such worthy cause or causes . . . ' is itself capable of constituting an imperfect trust provision. I feel, as did the learned judge, considerable difficulty that a formula so vague and wide as ' for such purposes as the trustees think fit ' could have been within the contemplation of the Act merely because such a formula would, on the face of it, allow the exclusive selection of charitable purposes. But the phrase in the present case is ' to such worthy . . .' and I feel also the force of the argument of counsel for the Attorney-General that such a phrase has within it at least the notion of charitable objects or objects analogous thereto, and that the sense of the phrase would not be materially different if it had read ' to such charitable or other worthy causes . . .' In the circumstances, therefore, I prefer to express no view of my own on this part of the Attorney-General's case."

Romer, L.J., also held that s. 2 (3) was not applicable and concluded his judgment as follows (9):

> ". . . it therefore becomes unnecessary to consider whether a gift for ' worthy causes ', in the context of the ' Daily Telegraph ' letter, could properly be regarded as a disposition in favour of ' an imperfect trust provision '. The learned judge held that it could not and there appear to be powerful considerations which support his view. It may be that an ' imperfect trust provision ' under s. 1 (1) of the Act is confined to cases where, among the declared objects for which property is to be held or applied, one, at least, is charitable; and that, accordingly, while a gift to ' charitable or benevolent ' objects would be within the Act, a gift to ' philanthropic or benevolent ' objects would not. It is not necessary, however, to express any concluded opinion on the point, and I refrain from doing so."

Ormerod, L.J., on the other hand, held that s. 2 (3) did apply. It was, therefore, necessary for him to consider whether the trust for " worthy causes " complied with s. 1 (1). In his view, the language of that subsection was unambiguous, and he could see no reason why the trust for " worthy causes " should not come within it, since the money applicable for that purpose, although it could be used exclusively for purposes which were not charitable, could be used exclusively for charitable purposes consistently with the terms of the trust. Both Lord Evershed, M.R., and Romer, L.J., referred to Harman, J., having " held " that the trust for " worthy causes" could not constitute an "imperfect trust provision " within s. 1 (1). If by this they intended to say (as I do not think that they did) that this formed part of the ratio decidendi of Harman, J., I would with the utmost deference differ from them in this respect, as I conceive that I am entitled to do.

I will return to consider *Re Gillingham Bus Disaster Fund* (10) further, after mentioning the more recent decision of Cross, J., in *Re Harpur's Will Trusts, Haller* v. *A.-G.* (11). The testatrix in that case directed her trustees, stating it shortly, to divide her residue between such institutions, having for their main object the assistance and care of wounded and incapacitated members of the armed forces, in such manner and proportion as they should determine. The learned judge held that not all such institutions would necessarily be charitable; some would and some would not. In his view, the gift was equivalent to a gift for distribution amongst charitable or benevolent institutions, and he declined to accept a submission that the case should be decided on the ground that this was not so. So construed, unless a distinction should be drawn for the relevant purposes between a gift for charitable or benevolent institutions and one for charitable or benevolent purposes, it is clear that the bequest constituted an "imperfect trust provision" whether the view of Harman, J., of the construction of s. 1 (1) of the Act of 1954 was right or wrong, for the bequest as construed by Cross, J. (except that it was a gift for institutions and not purposes) fell precisely within the narrower of the possible constructions of s. 1 (1). Cross, J., went on to hold that trusts for division amongst institutions, as opposed to trusts for the promotion of purposes, could not without violence to the language of s. 1 (1) be brought within the Act. He, accordingly, held that the Act did not apply. Earlier in his judgment the learned judge referred to *Re Gillingham Bus Disaster Fund* (12), and to the fact that in that case Harman, J., had held that the Act applied only to a gift which was expressed to be for charitable purposes, as well as for other non-charitable purposes. After referring shortly to the views expressed in the Court of Appeal in that case, Cross, J., said (13): " In these circumstances I must clearly treat the view of Harman, J., on the point as binding on me ". For the reasons, however, which I have endeavoured to explain, the point did not arise for decision in *Re Harpur's Will Trusts* (14), and it was, in my respectful opinion, irrelevant whether Cross, J., considered the view of Harman, J., as binding on him or not. In my view, Cross, J., did not decide, and, having regard to his interpretation of the bequest, could not have decided, *Re Harpur's Will Trusts* (14) on this ground. If, however, what Cross, J., said with regard to *Re Gillingham Bus Disaster Fund* (12) was an alternative ground for his decision, then, as it seems to me, what he was in effect saying was that, if his construction of the will were mistaken, then, since he would feel himself bound by what Harman, J., had said, he would decide against the Attorney-General on that ground. Cross, J., himself, in my view, did not decide that the view of Harman, J., of s. 1 (1) was correct.

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(7) [1958] 2 All E.R. 749; [1959] Ch. 62.
(8) [1958] 2 All E.R. at p. 755; [1959] Ch. at p. 75.
(9) [1958] 2 All E.R. at p. 756; [1959] Ch. at p. 76.
(10) [1958] 1 All E.R. 37; [1958] Ch. 300.
(11) [1960] 3 All E.R. 237.

The matter, therefore, stands thus. In *Re Gillingham Bus Disaster Fund* (12) Harman, J. (as I understand him) said, obiter, that the Charitable Trusts (Validation) Act, 1954, should be construed as applying only to trusts framed in such terms that the objects referred to include some express reference to a charitable purpose, but also include other non-charitable purposes (e.g., " for charitable or benevolent purposes "); and not as applying to purposes stated in a general way (e.g., " for public purposes ") which could embrace charitable purposes, but contains no express reference to charity or any charitable purpose. In the Court of Appeal in *Re Gillingham Bus Disaster Fund* (15) the majority decided the case on a ground which rendered this point irrelevant and, although they expressed some sympathy with the view of Harman, J., abstained from exrpessing any opinion on the point; while the third, and dissenting, member of the court, to whose decision alone among the judgments I have mentioned the point was relevant, decided that s. 1 (1) should not be construed in the restricted manner favoured by Harman, J., but in accordance with its language, which he considered to be unambiguous. In these circumstances, with deference to Cross, J., I conceive that I am at least free to adopt the view favoured by Ormerod, L.J., if I think it preferable to the view favoured by Harman, J.

It is well established that the language of a statute must primarily be construed according to its natural meaning. If the language is ambiguous, the long title of the Act may be looked at to help resolve the ambiguity: it may not be looked at to modify the interpretation of plain language. The language of

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(12) [1958] 1 All E.R. 37; [1958] Ch. 300.

(13) [1960] 3 All E.R. at p. 241.

(14) [1960] 3 All E.R. 237.

(15) [1958] 2 All E.R. 749; [1959] Ch. 62.

s. 1 (1) of the Act of 1954 is, in my judgment (as in the view of Ormerod, L.J.), clear and unambiguous, and its operation cannot be in any way controlled by reference to the long title of the Act. Moreover, the long title does not, in my view, point the way in which Harman, J., considered that it did. It refers to instruments "... providing for property to be held or applied for objects partly but not exclusively charitable ..." If it be conceded, as it must, that an expression such as "public purposes" embraces charitable as well as non-charitable purposes, that expression is, I consider, as aptly described by the language of the long title as the expression "charitable or other public purposes". It is not surprising that legal minds should be startled by the idea that Parliament may have intended the language of s. 1 (1) to have as wide a potential operation as its terms suggest. It must, however, be borne in mind, first, that the Act only applies to trusts contained in instruments which took effect some nineteen months before the Act became law (see s. 1 (2), (16)), so that any trust which was palpably invalid would be likely to have been recognised as such before the Act was passed; secondly, that s. 3 preserved the right of anyone who might be concerned to assert the invalidity of a trust to do so within the times limited by that section, so that except in the case of a trust which, having been assumed to be valid, had been in operation since Dec. 16, 1946 (which would not have been the case where the trust was palpably invalid), the rights of those concerned to assail its validity were not abrogated by the Act although a time limit was put on seeking to enforce them; thirdly, that the Act has no application to any trust, the invalidity of which had been recognised and acted on before Dec. 16, 1952 (see s. 2 (2), (17)). Notwithstanding the wide language of s. 1 (1) of the Act of 1954, therefore, the Act was only calculated to validate trusts which were not palpably invalid, or, in respect of which, those interested to assert invalidity had slept on their rights. It is also not surprising that it should occur to legal minds that one, at least, of the kinds of trust which the legislature had in mind to validate, was the "charitable or benevolent" kind. Although this trap for charitably minded but unwary or uninstructed testators has been well known to the profession at least since the time of the decision in *Re Macduff, Macduff* v. *Macduff* (18) and in fact from much earlier, the celebrated "Diplock" case, reported on appeal to the House of Lords under the name *Chichester Diocesan Fund & Board of Finance* (*Incorporated*) v. *Simpson* (19) made this aspect of charity law prominent in the minds of lawyers, and perhaps this may be particularly so of lawyers who were in practice in this branch of the law at and about the time of that decision. The same principle has been applied in other, or somewhat more complicated, circumstances in more recent cases, of which I may perhaps mention *Oxford Group* v. *Inland Revenue Comrs.* (20) and *Ellis* v. *Inland Revenue Comrs.* (21). But it does not follow that this was the only form of defective quasi-charitable trust that the Act was intended to validate. From the year 1895, when Chitty, J., decided *Re Foveaux, Cross* v. *London*

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(16) Section 1 (2) of the Charitable Trusts (Validation) Act, 1954, provides: "Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before Dec. 16, 1952, shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies—(a) as respects the period before the commencement of this Act, as if the whole of the declared objects were charitable; and (b) as respects the period after that commencement as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable purposes".

(17) Section 2 (2) of the Charitable Trusts (Validation) Act, 1954, provides: "This Act does not apply to a disposition if before Dec. 16, 1952, property comprised in, or representing that comprised in, the disposition in question or another disposition made for the objects declared by the same imperfect trust provision, or income arising from any such property, has been paid or conveyed to, or applied for the benefit of, the persons entitled by reason of the invalidity of the disposition in question or of such other disposition as aforesaid, as the case may be".

(18) [1896] 2 Ch. 451.

(19) [1944] 2 All E.R. 60; [1944] A.C. 341.

(20) [1949] 2 All E.R. 537.

(21) 31 Tax Cas. 178.

A *Anti-Vivisection Society* (22) until that case was overruled in *National Anti-Vivisection Society* v. *Inland Revenue Comrs.* (23) the suppression of vivisection was believed to be a charitable purpose, although in the latter case this was held not to be so. There may well be other trusts in operation as charitable trusts at the present time which are similarly vulnerable. Why should it be supposed that the legislature did not intend the Act to apply to such trusts if, within the B ambit of their objects, some charitable purpose can be found? Indeed, the Committee on the Law and Practice relating to Charitable Trusts (Cmd. Paper 8710 of 1952), whose recommendations in this respect, be it said, were not precisely followed by Parliament, suggested legislation in the case of trusts which had been in operation for six years or more, on the footing that they were valid charitable trusts, which, as the committee recognised, would have C had the effect of validating them even if such trusts should in fact have no charitable object at all (see para. 503 of the Committee's Report). I mention this not, of course, for the purpose of construing the Act in the light of the report, but to demonstrate the danger of speculating about the intention of Parliament. The intention of the legislature, like the intention of a testator, is primarily to be ascertained by reading the language employed, and it is not for this court D to corset that intention, if it be clearly expressed, into some shape which accords better with the fashion of professional legal thought than the natural meaning of the language employed. More particularly, I think, this must be so when one is concerned with a definition section, where one must presume that Parliament would be specially precise and careful in its choice of language. The language of s. 1 (1) of the Act of 1954 is, in my view, clear and unambiguous. E Construed in its natural sense, it produces no absurdity or hardship. There appears to me to be no reason for thinking that, so construed, its effect exceeds what Parliament may reasonably be expected to have intended. I can discern no justification for declining to allow the language its full and natural effect. For these reasons, with respect to HARMAN, J., I cannot agree with his view of the subsection as expressed in *Re Gillingham Bus Disaster Fund* (24) which I F think puts an unjustifiable gloss on the language of the statute.

I return, therefore, to the language of s. 1 (1) of the Act, and inquire whether the will of the testator (which, in this case, both effects the relevant disposition and is the instrument which in cl. 9 (c) contains the "imperfect trust provision" if there be one) describes the objects for which this share of residue is to be held or applied, in such a way that, consistently therewith, the property G could be used exclusively for charitable purposes, notwithstanding that, admittedly, it could be used for purposes which are not charitable. If the answer is affirmative, cl. 9 (c) by definition constitutes or contains an "imperfect trust provision". For the reasons indicated at the beginning of this judgment, I think the answer must be affirmative, with the consequence that, in my judgment, the Act applies in the present case.

H I will, accordingly, declare that on the true construction of the will and of the Charitable Trusts (Validation) Act, 1954, the bequest contained in cl. 9 (c) of the will was originally invalid but has been validated by the Act in the manner provided by s. 1 (2) thereof.

I should add that counsel for the fourth, fifth and sixth defendants suggested that the evidence established that there could be no objects of a trust to relieve I poverty amongst past, present and future employees of the company, but I feel myself unable to reach this conclusion on the evidence.

I might also add that just as in *Re Gillingham Bus Disaster Fund* (25) LORD EVERSHED, M.R., discerned in the phrase "worthy causes" a notion of charity, so in the reference to a benevolent or welfare fund and to welfare purposes in the present case, a notion or flavour of charity may be discerned. Members A of the Bar are well acquainted with a charity in the name of which the word "benevolent" is prominent, and the Family Welfare Association is a very well-known charity which includes the word "welfare" in its name. I prefer, however, not to base my decision in any way on this consideration, but on the grounds which I have earlier elaborated.

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(22) [1895] 2 Ch. 501.

(23) [1947] 2 All E.R. 217; [1948] A.C. 31.

(24) [1958] 1 All E.R. 37; [1958] Ch. 300.

(25) [1958] 2 All E.R. 749; [1959] Ch. 62.

Declaration accordingly. B

Solicitors: *Wilberforce Allen & Bryant*, agents for *Arthur Headley & Co.*, Leicester (for the plaintiff); *Alfred Neale & Co.*, agents for *Bray & Bray*, Leicester (for the first, second, third, fourth, fifth and sixth defendants); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*] C

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WESTON *v.* LAURENCE WEAVER, LTD.

[QUEEN'S BENCH DIVISION (Lawton, J.), January 11, 12, 13, 16, 1961.]

Easement—Right of way—Excessive user—Damage to surface of private road by the excessive user by owner of one dominant tenement—Whether action for such damage lay at suit of owner of another dominant tenement as distinct from action for interference with right to pass and repass. E

Both the plaintiff and the defendant company had rights of way over a private road separating their respective properties. The defendant company's right of way was limited to the disposal of timber and to horticultural purposes. In the process of building new housing on their property the F defendant company used the private road for the transport of building materials, thereby causing damage to the surface of the road.

Held: an action did not lie at the plaintiff's suit for damage to the surface of the road, as distinct from damages for unlawful interference with his right of way, since damage to the surface of the road was damage to the servient tenement and the plaintiff was owner only of a dominant tenement. G

[As to actions for excessive user of rights of way, see 12 HALSBURY'S LAWS (3rd Edn.) 582, para. 1260; and for cases on the subject, see 19 DIGEST 112, *719-724*.]

Case referred to:

Wimbledon and Putney Commons Conservators v. *Dixon*, (1875), 1 Ch.D. 362; 45 L.J.Ch. 353; 33 L.T. 679; 40 J.P. 102; 19 Digest 15, *37*. H

Action.

By writ dated June 1, 1956, the plaintiff, Maurice Weston, claimed, so far as is material to this report, damages for nuisance caused by the defendant company's wrongful obstruction and excessive user of the plaintiff's right of way over a private road adjoining his property. By their defence the defendant I company denied the allegations of nuisance and obstruction and pleaded that they were entitled to a right of way at all times and for all purposes over the private road.

In May, 1955, the plaintiff purchased, and thereafter he had been the owner and occupier of, freehold premises known as Elibank, St. Mary's Road, Sunninghill, in Berkshire. The origin of the private road, over which a right of way was conveyed to the plaintiff on the occasion of his purchase, was obscure, but the court found as a fact that the plaintiff had a right of way over the private

A road starting from a public road (St. Mary's Hill) on the east of Elibank and
extending along the northern boundary of Elibank to land lying to the west of
Elibank. This right of way extended over the whole length of the private
road and was a right of way for general purposes connected with the use of
Elibank as a residential property. In August, 1955, the defendant company
purchased freehold premises known as Woodend, for the purpose of building a
B housing estate. Those premises lay to the north of the plaintiff's property
and were separated from Elibank by the private road. The court found that
the defendant company, as owners of Woodend, were entitled to a right of
way over the private road, starting from the public road, St. Mary's Hill, and
extending all along the private road to a gate into Woodend. This private
way of the defendant company was a way limited to the disposing of timber and
C to horticultural purposes connected with the good management of the Woodend
estate, and to foot passengers who were the owners and servants and agents and
licensees of the occupiers of Woodend. It was not established who was the
owner of the servient tenement, viz., of the soil of the private road.

The defendant company's Woodend estate comprised about sixteen acres. Trees
on this land were felled and some of them were taken away over the private
D road. The court held that the defendant company's use of the private road for
this purpose was a lawful use. The defendant company proposed to develop
the Woodend estate by erecting forty-nine houses on it. Between March, 1956,
and June, 1956, lorries came along the private road and tipped heaps of building
material onto the grass verge on the Woodend side. This and other use of the
private road by the defendant company interfered with the plaintiff's use of it.
E The use thus made by the defendant company of the private road was not
justified*, so the court found, by the right of way since that right was limited to
a right of way for horticultural purposes. Accordingly the defendant company
was not entitled to use the private road for purposes connected with the building
of new houses on their Woodend estate. The court found that there was substantial
interference with the plaintiff's right of way and assessed damages for
F this at £50.

As a result of the extra traffic on the private road, its surface suffered wear
and tear. The extra traffic on the private road was not wholly attributable to
the defendant company, but was also partly attributable to the plaintiff, who
was carrying out building work on Elibank. The proportion attributable to the
defendant company was, however, greater than that attributable to the plaintiff.
G As a consequence of the extra traffic there was substantial damage to the surface.

The case is reported only on the decision concerning the plaintiff's claim for
damages for wear and tear of the private road by the defendant company, who
were also owners of a dominant tenement.

J. Bradburn for the plaintiff.
H *A. L. Price* for the defendant company.

LAWTON, J., having referred to the cause of action and reviewed the
facts and the evidence and made the findings of fact previously stated, turned
to the problem raised by the plaintiff's claim for damages in respect of wear and
tear to the surface of the private road caused by the extra traffic thereon. HIS
LORDSHIP said: I have been told by counsel for the plaintiff and for the defendant
I company that their combined researches have not revealed any case similar to
this, where there has been excessive user by one dominant tenement to the
surface of the servient tenement and where the servient tenement has not sought
any remedy, but another dominant tenement has. The damage suffered here is
primarily damage to the servient tenement. It seems to me that on principle
the plaintiff cannot claim for physical damage to the servient tenement. His

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* On this point the court applied *Wimbledon and Putney Commons Conservators* v. *Dixon* ((1875), 1 Ch.D. 362).

rights to damages lie in an unlawful interference with his right to pass and repass, A and, unless the damage caused to the servient tenement substantially interferes with his right to pass and repass, in my judgment he has not succeeded in establishing a cause of action. It is interesting to see that the pleader who drafted the statement of claim on behalf of the plaintiff—it was not the present counsel—pleaded it in this way:

> " The [defendant company] have created a nuisance on the said way . . . B by churning up and destroying the surface of the said right of way so as to impede its use by the plaintiff and his licensees."

I am not satisfied that the word " impede " is really the best word to use, but, if one substitutes the phrase " interfere with ", it seems to me that the pleader has really put the matter in its correct legal form. C

In my judgment, I have to ask myself whether the plaintiff has proved that such damage to the surface of the private road as I have found to have been caused by the defendant company's excessive use substantially interfered with the use of the private road by the plaintiff and his licensees, and the evidence with regard to that seems to me really to be non-existent. [His Lordship briefly reviewed the evidence on this matter and continued:] In the circumstances D I do not find that there was a substantial interference with the plaintiff's rights of access from and to his property, and I award no damages in respect of that.

I also hold, as a matter of law, that the plaintiff cannot claim in respect of physical damage done to the surface of the servient tenement. [His Lordship indicated that had he come to a different conclusion he would have assessed E the amount of damage to the surface of the servient tenement due to the defendant company's excessive user at £30.]

The last head of claim relates to the so-called ditch and bank, and the first problem, which is one of fact, is to whom did the ditch and bank belong. [His Lordship found as a fact that the ditch and bank running along the north side of the private road belonged to the defendant company, and F that they had filled in the ditch and partially levelled the bank in March, 1956, with the result that storm water no longer escaped by the ditch but washed away part of the gravel from, deposited sludge and silt on, and aggravated the wear and tear to the surface of the private road. After referring to the submission on behalf of the plaintiff that this substantially interfered with the lawful exercise of his right of way, His Lordship continued:] In so far as G the filling in of the ditch was a factor which contributed to the deterioration of the surface of the private road, in my judgment the plaintiff is not entitled to claim. Once again it is the problem of the dominant tenement seeking to claim damages in respect of injury to the servient tenement. Learned counsel have been unable to refer me to any authority where any such claim has been established, and in my judgment no cause of action of that kind arises.

Judgment for the plaintiff for £50.

Solicitors: *H. E. Aston & Co.* (for the plaintiff); *Gamlen, Bowerman & Forward,* agents for *Lovegrove & Durant,* Windsor (for the defendant company).

[*Reported by* Kathleen J. H. O'Brien, *Barrister-at-Law.*]

WESTBURY PROPERTY & INVESTMENT CO., LTD. *v.* CARPENTER.

[CHANCERY DIVISION (Danckwerts, J.), November 24, 1960.]

Landlord and Tenant—Notice to quit—Business premises—Sub-tenancy of part of premises—Expiration of sub-tenancy and sub-tenant holding over as tenant from year to year—Notice by owner of freehold purporting to terminate sub-tenancy—Notice given before termination of tenant's lease—Date specified in notice as date of termination of sub-tenancy later than date on which tenancy would terminate—Whether notice effective—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 25 (3), (4), *s.* 44 (1).

The plaintiffs were the owners in fee simple of business premises. On June 28, 1946, the plaintiffs' predecessors in title granted a lease of the premises to P. & G. for a term of fourteen years from Mar. 25, 1946. On Mar. 31, 1948, P. & G. granted a sub-tenancy of the first floor of the premises to the defendant for a term of three years from Mar. 25, 1948. After the expiry of the term the defendant continued in occupation of the first floor premises and became a tenant from year to year on such terms of the sub-tenancy as were applicable On Aug. 10, 1959, the plaintiffs served on P. & G. a notice under s. 25 of the Landlord and Tenant Act, 1954, terminating their tenancy on Mar. 25, 1960, the date on which the term granted by the lease of June 28, 1946, would expire. On Jan. 22, 1960, the plaintiffs served on the defendant a notice, purporting to be a notice under s. 25 of the Act of 1954, requiring her to give up possession of the first floor premises on July 31, 1960.

Held: although the notice dated Jan. 22, 1960, specifying July 31, 1960, as the date at which the defendant's tenancy was to come to an end was a notice the terms of which were in accordance with s. 25 of the Landlord and Tenant Act, 1954, being within sub-s. (4)* thereof, yet the notice was ineffective, because on Jan. 22, 1960, the plaintiffs were not the defendant's "landlord", within s. 44 (1)† of the Act, and, therefore, were not competent to give notice pursuant to s. 25.

[As to the meaning of "landlord", see 23 HALSBURY'S LAWS (3rd Edn.) 888, para. 1710.

For the Landlord and Tenant Act, 1954, s. 25, s. 44 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 410, 427.]

Cases referred to:

Bleachers' Assocn. Ltd.'s Leases, Re, Weinbergs Weatherproofs, Ltd. v. *Radcliffe Paper Mill Co., Ltd.*, [1957] 3 All E.R. 663; sub nom. *Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mills Co., Ltd.*, [1958] Ch. 437; [1958] 2 W.L.R. 1; 3rd Digest Supp.

Cornish v. *Brook Green Laundry, Ltd.*, [1959] 1 All E.R. 373; [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; 3rd Digest Supp.

Consolidated Actions.

The plaintiffs, Westbury Property & Investment Co., Ltd., were the present owners in fee simple of business premises at No. 50, Bedford Street, Strand, London. By a lease under seal, made on June 28, 1946, the plaintiffs' predecessors in title demised the premises to Edward George Peartree and Krikor Parsegh Gulbenkian for a term of fourteen years from Mar. 25, 1946. By an agreement made in March, 1948, Messrs. Peartree & Gulbenkian granted to the defendant a sub-tenancy of the first floor of the premises for a term of three years expiring on Mar. 25, 1951. After that date the defendant continued in possession as a tenant from year to year. On Jan. 22, 1960, the plaintiffs gave to the defendant a notice under s. 25 of the Landlord and Tenant Act, 1954, to terminate her tenancy on July 31, 1960. The plaintiffs claimed (i) a declaration that at the date when the notice was given they were the competent landlord within the meaning of the provisions of Part 2 of the Landlord and Tenant Act, 1954; (ii) a declaration that the notice was a valid and effective notice under Part 2 of the Act to terminate the defendant's tenancy; (iii) a declaration that the defendant's tenancy would on July 31, 1960, absolutely cease and come to an end. The defendant, by her defence, claimed that the notice was ineffective to determine her tenancy in that (a) the plaintiffs were not the landlords of the defendant for the purposes of the Act at the date of service of the notice; and (b) the date specified in the notice was a date earlier than that provided for by s. 25 of the Act as the earliest date which might be specified in the notice.

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* The terms of s. 25 (4) are printed at p. 483, letter, H, post.

† The terms of s. 44 (1) are printed at p. 484, letter A, post.

In a second action the plaintiffs claimed possession of the premises. By an order dated Nov. 3, 1960, the two actions were consolidated.

V. G. Wellings for the plaintiffs.
E. A. Bramall for the defendant.

DANCKWERTS, J.: This is a case concerning two actions which have been consolidated, and which involve difficult points under that difficult Act, the Landlord and Tenant Act, 1954. The plaintiffs are the present owners in fee simple of the property concerned, which is the first floor in No. 50, Bedford Street, Strand, London. In 1948 the defendant became a sub-tenant of the existing tenants, who were a firm known as Peartree & Gulbenkian. The defendant was granted by them, by an agreement of Mar. 31, 1948, a term for three years from Mar. 25, 1948. The agreement contained an option for renewal which was not exercised. But after the expiry of the term of three years on Mar. 25, 1951, the defendant continued in occupation and held over, and became a tenant from year to year on the terms of the agreement so far as applicable to such a tenancy. Messrs. Peartree & Gulbenkian held the property under a lease dated June 28, 1946, for a term of fourteen years from Mar. 25, 1946, a term, therefore, which would expire on Mar. 25, 1960. Apart from any provisions of the Landlord and Tenant Act, 1954, that term would result in the tenancy of the defendant also coming to an end on Mar. 25, 1960. That would be automatic by effluxion of time in respect of the intermediate tenants, and by the fact that the defendant's landlords had no further interest on that date in her case.

On Aug. 10, 1959, notice pursuant to s. 25 of the Landlord and Tenant Act, 1954, was served on the intermediate tenants by the plaintiffs, requiring them to give up possession on Mar. 25, 1960. On Dec. 8, 1959, the intermediate tenants made an application to the county court for a new tenancy, but the application was eventually withdrawn by them on Jan. 29, 1960, because they had been advised that they had no chance of success in view of the plaintiffs' intention to pull down and rebuild the premises, one of the grounds mentioned in s. 30 (1) of the Landlord and Tenant Act, 1954. The interest of the intermediate tenants has come to an end, and they have now quitted the premises (1).

On Jan. 22, 1960, the plaintiffs served a notice under s. 25 of the Landlord and Tenant Act, 1954, on the defendant, requiring her to give up possession on July 31, 1960. She has served the necessary counter-notices, and proceedings are pending under the Act for the grant of a further tenancy to her. It seems probable that those proceedings on her part will be unsuccessful, and this present delay by the points which have been taken by the defendant seems to have been merely for the purpose of securing further time for her occupation; I think that it is merely an attempt to take advantage of the provisions of the Act which enable a tenant to keep out his landlord for a certain period.

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(1) According to the statement of claim the tenancy of Messrs. Peartree & Gulbenkian, which would have expired at common law on Mar. 25, 1960, came to an end on or about May 19, 1960.

A Two points have been raised by the defence in these actions. It is said that the notice was not given for a proper date, because the defendant was entitled to a notice, if one was given, which expired on Mar. 25, 1961. It is also said that the plaintiffs were not the competent persons to give the notice, because they were not the " competent landlord " within the meaning of the appropriate provisions (2) of the Landlord and Tenant Act, 1954.

B I now turn to the provisions of the Act. There is no doubt that the provisions of s. 23 of the Act are satisfied; that is to say, this property is property to which the Act applies and this is a tenancy to which Part 2 of the Act applies. Section 24 (1) provides:

> " A tenancy to which this Part of this Act applies shall not come to an
> C end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act."

D Accordingly, the effect of that subsection is that, though, apart from the Act, the tenancy or term of years might come to an end by effluxion of time, or under a notice to quit which was in accordance with the contractual terms of the tenancy, it will continue until the particular requirements mentioned in the Act are satisfied.

Section 25 provides for termination of the tenancy by the landlord. One of
E the questions depends on the terms of s. 25 (3) and s. 25 (4). Section 25 (3) provides:

> " In the case of a tenancy which apart from this Act could have been brought to an end by notice to quit given by the landlord—(a) the date of termination specified in a notice under this section shall not be earlier than the earliest date on which apart from this Part of this Act the tenancy
> F could have been brought to an end by notice to quit given by the landlord on the date of the giving of the notice under this section . . . "

Then there is a provision in para. (b) with which I need not trouble. It seems to me that s. 25 (3) does not apply to the present case because, under s. 44 (2) a notice to quit, under the Act, has to be given by the immediate landlord (3), and,
G at the date when the notice was given, on Jan. 22, 1960, the immediate landlords could not have given notice to quit, as their tenancy was coming to an end automatically on Mar. 25, 1960, and, by virtue of that, the defendant's tenancy would also come to an end, apart from the provisions of the Act. Consequently, it does not seem to me that s. 25 (3) is appropriate at all. It seems to me obvious that s. 25 (4) is the appropriate subsection. Section 25 (4) reads:

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> " In the case of any other tenancy, a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of this Act the tenancy would have come to an end by effluxion of time."

That date was Mar. 25, 1960. Consequently, it seems to me that a notice which
I specified July 31, 1960, was plainly in accordance with the terms of the section, and, therefore, the notice itself was perfectly effective if the plaintiffs were the right landlords to give the notice.

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(2) By Sch. 6, para. 1, to the Act of 1954, the expression " the competent landlord " is defined as " the person who in relation to the tenancy is for the time being the landlord (as defined by s. 44 of this Act) for the purposes of Part 2 of this Act." Part 2 of the Act consists of s. 23 to s. 46, inclusive.

(3) Section 44 (2) reads: " References in this Part of this Act to a notice to quit given by the landlord are references to a notice to quit given by the immediate landlord."

Then comes the other point as to the meaning of "competent landlord". That depends on the meaning to be given to s. 44 (1) of the Act, which provides:

> "Subject to the next following subsection, in this Part of this Act the expression 'the landlord', in relation to a tenancy (in this section referred to as 'the relevant tenancy'), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(a) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (b) that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord, and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions."

The subsection is not an easy one to construe, and, when it was first read to me, I felt inclined to say that it was referring to a tenancy not under the statutory provisions but under the contractual provisions between the landlord and the tenant; but that seems to be contrary to the law as stated by the Court of Appeal in *Cornish* v. *Brook Green Laundry, Ltd.* (4). I was puzzled, at one time, to see quite how the words "effluxion of time or by virtue of a notice to quit", if they referred only to the contractual state between the landlord and tenant, could be given effect to, but, of course, it must be the case that there can be intermediate landlords who have a term of years which is not a tenancy to which Part 2 of the Act applies, and there might at the same time be a sub-tenant, who, by virtue of occupying the property for his business, would have a tenancy to which Part 2 of the Act applied, and, accordingly, the tenancy of the intermediate tenant, or immediate landlord, might easily come to an end by effluxion of time or by virtue of a notice to quit already given to him. Therefore, if the provisions of the Act are also to be given effect to in this section, it would seem possible that Messrs. Peartree & Gulbenkian might be the persons who are to be considered as "the competent landlord" until they disappear from the picture by not attempting to get a further lease and by giving up possession.

An argument was put forward on the words "notice to quit" by reference to the definition of the words "notice to quit" contained in s. 69 (1) of the Act. The definition reads:

> "'notice to quit' means a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy."

It was argued by counsel for the plaintiffs that that included the statutory terms brought about by the Act, and he referred me to certain observations by LORD DENNING when he was in the Court of Appeal (5), but I think that the observations to which counsel referred really have no force in regard to the question which I have to consider. HARMAN, J., in *Re Bleachers' Assocn., Ltd.'s Leases, Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.* (6), said that the notice under s. 25 of the Act was not a notice included in the definition of "notice to quit" in s. 69 (1) of the Act, and with that opinion I agree. The reason why I agree is that "notice to quit" is used in a number of places throughout the Act: see s. 24 (2) and s. 24 (3); and in s. 25, notice required by the Act seems to be contrasted with "notice to quit". The words in s. 44 (1) are the words "come to an end", which are the same words as are used in s. 24 of the Act. It seems to me that, when the Act is referring to a notice given under s. 25, it is not referring to a notice to quit, and the notice to quit, therefore, only means the notice given in pursuance of the contractual provisions between the landlord and the tenant.

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(4) [1959] 1 All E.R. at pp. 383, 384; [1959] 1 Q.B. at p. 410.

(5) See *Wheeler* v. *Mercer*, [1955] 3 All E. R. at p. 457; [1956] 1 Q.B. at p. 283. The decision of the Court of Appeal in this case was reversed by the House of Lords ([1956] 3 All E.R. 631; [1957] A.C. 416).

(6) [1957] 3 All E.R. at p. 665; [1958] Ch. at p. 442.

Consequently, I come to the conclusion that the conditions in s. 44 of the Act are not satisfied in respect of the plaintiffs, and that the plaintiffs, on the date when the notice was given (i.e., Jan. 22, 1960), were not the competent landlord and, therefore, were not in a position to exercise the necessary provisions of the Act by virtue of that position. Therefore, it seems to me that, while I am in favour of the plaintiffs on one point, I am bound to decide the case against them on the second point, and the actions fail.

Judgment for the defendant.

Solicitors: *Hewitt, Woollacott & Chown* (for the plaintiffs); *Dudley Clarke & Son* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

MASH & MURRELL, LTD. *v.* JOSEPH I. EMANUEL, LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), January 11, 12, 13, 1961.]

Sale of Goods—Implied condition of fitness—Merchantable quality—C. & f. contract—Potatoes for human consumption in England shipped from Cyprus —Contract made with sellers' agents who knew nature of buyers' business as dealers in potatoes for human consumption and that potatoes required for the business—Whether buyers made known to sellers purpose for which goods required so as to show reliance on sellers' skill and judgment—Requirement of merchantability in c. & f. contract—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14 (1), (2).

The plaintiffs were dealers in potatoes for human consumption in the United Kingdom and the defendants were also dealers in and importers of potatoes By a c. & f. contract dated July 8, 1957, made between the plaintiffs and the defendants' agents, the defendants sold to the plaintiffs two thousand half-bags of Cyprus spring crop potatoes, then afloat the s.s. Ionian bound for Liverpool, at 16s. per half-bag, c. & f. Liverpool. Cyprus spring crop potatoes were normally used for human consumption and the defendants' agents knew the nature of the plaintiffs' business, having dealt with them for many years, and knew that the plaintiffs required the potatoes for use in their business in England. The potatoes were loaded on the Ionian at Limassol, Cyprus, on June 29, 1957, and were properly stowed and ventilated for the purposes of the voyage to Liverpool, which was a normal voyage. On arrival of the vessel at Liverpool, on July 18, 1957, the potatoes were found to be suffering from soft-rot and to be rotten and wholly unfit for human consumption. It was found by the court on the evidence that the potatoes when loaded at Limassol were not fit to travel to Liverpool. In an action by the plaintiffs for damages for breach of contract,

Held: the plaintiffs were entitled to damages for breach of contract for the following reasons—

(i) the defendants were in breach of the condition implied in the contract by s. 14 (1) of the Sale of Goods Act, 1893, that the goods would be fit for the purpose for which they were required, since the knowledge of the defendants, through their agents, of the plaintiffs' business coupled with the plaintiffs' request for Cyprus potatoes for use in England raised the inference that the plaintiffs made known to the defendants the particular purpose for which the goods were required so as to show that they relied on the defendants' skill and judgment (see p. 490, letter E, post).

Manchester Liners, Ltd. v. *Rea, Ltd.* ([1922] All E. R. Rep. 605) applied; observation of Lord Wright in *Cammell Laird & Co., Ltd.* v. *Manganese Bronze & Brass Co., Ltd.* ([1934] All E.R. Rep. at p. 11) considered.

(ii) the defendants were also in breach of the condition implied by s. 14 (2) of the Act that the goods would be of merchantable quality since in a c.i.f. or c.&f. contract that condition required that the goods should remain of merchantable quality from the time of shipment, throughout normal transit to the destination and for a reasonable time thereafter for disposal of the goods (see p. 492, letter F, post).

Beer v. *Walker* ((1877), 46 L.J.Q.B. 677) followed.

Bowden Brothers & Co., Ltd. v. *Little* ((1907), 4 C.L.R. 1364) considered and doubted.

[**Editorial Note.** Under s. 11 of the Sale of Goods Act, 1893, breach of condition may be treated at the buyer's election as breach of warranty, rather than as a ground for repudiation of the contract.

As to implied terms as to quality or fitness, see 34 Halsbury's Laws (3rd Edn.) 51-55, paras. 76-78; and for cases on the subject, see 39 Digest 438-451, *676-788.*

For the Sale of Goods Act, 1893, s. 14 (1), (2), see 22 Halsbury's Statutes (2nd Edn.) 993, 994.]

Cases referred to:

Beer v. *Walker*, (1877), 46 L.J.Q.B. 677; 37 L.T. 278; 41 J.P. 728; 39 Digest 442, *714.*

Bowden Brothers & Co., Ltd. v. *Little*, (1907), 4 C.L.R. 1364; 39 Digest 446, *l.*

Cammell Laird & Co., Ltd. v. *Manganese Bronze & Brass Co., Ltd.*, [1934] All E.R. Rep. 1; [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; Digest Supp.

Dawes v. *Peck*, (1799), 8 Term Rep. 330; 3 Esp. 12; 101 E.R. 1417; 8 Digest (Repl.) 167, *1078.*

Dutton v. *Solomonson*, (1803), 3 Bos. & P. 582; 127 E.R. 314; 39 Digest 574, *1782.*

Evanghelinos v. *Leslie & Anderson*, (1920), 4 Lloyd's Rep. 17.

Frenkel v. *MacAndrews & Co., Ltd.*, [1929] All E.R. Rep. 260; [1929] A.C. 545; 98 L.J.K.B. 389; 141 L.T. 33; 17 Asp. M.L.C. 582; Digest Supp.

Manchester Liners, Ltd. v. *Rea, Ltd.*, [1922] All E.R. Rep. 605; [1922] 2 A.C. 74; 91 L.J.K.B. 504; 127 L.T. 405; 39 Digest 445, *744.*

Ollett v. *Jordan*, [1918] 2 K.B. 41; 87 L.J.K.B. 934; 119 L.T. 50; 82 J.P. 221; 25 Digest 110, *336.*

Action.

In this action the plaintiffs, Mash & Murrell, Ltd., claimed damages for breach of warranty under a c. & f. contract for the sale of potatoes against the defendants, Joseph I. Emanuel, Ltd. The plaintiffs carried on business as dealers in potatoes for human consumption in the United Kingdom, in particular supplying them to shipping companies for ship's stores, and to a lesser extent to canteens. The defendants also were dealers in, and importers of, potatoes. On July 8, 1957, Mr. Mash, a director of the plaintiffs, telephoned the defendants' agents, Messrs. Constant, Smith & Co., who knew the nature of the plaintiffs' business, and asked them if they had available some Cyprus potatoes. Mr. Mash was told that some two thousand half-bags of Cyprus potatoes could be made available on the s.s. Ionian and he agreed to buy them. On July 8, 1957, Messrs. Constant, Smith & Co. issued a contract note to the plaintiffs in the following terms:

"We have this day sold to you on behalf of our principals:—about

> 2,000 (two thousand) half-bags Cyprus spring crop potatoes mixed sizes up-to-dates and/or Arran Banners. Price: 16s. per half-bag, c. & f. Liverpool . . . Shipment: afloat per the s.s. Ionian to Liverpool. Payment: net cash against documents on first presentation."

On June 29, 1957, the potatoes had been loaded on the Ionian at Limassol, on the south coast of Cyprus, for shipment to Liverpool. They were stowed in No. 3 hold between decks and were properly stowed and ventilated for the purposes of the voyage, the Ionian being fitted with thermo-tank ventilation, consisting of inlet and outlet fans which operated when the hatch covers were on. The potatoes were loaded under a liner bill of lading in the ordinary form, cl. 1 of which provided:

> "The ship (in the ordinary course of the liner services maintained by the shipowner) has liberty to proceed by any route from the port or ports of departure to the port or ports of discharge and in following such route to proceed to, and call at, ports other than those mentioned in this bill of lading, and to do so in such order as the shipowner or the master may decide for the purpose of loading and/or discharging cargo . . . (even if involving departure from the ordinary or advertised routes or calls at the same port or ports more than once in their geographical order or otherwise)".

On June 29, 1957, the Ionian left Limassol for Famagusta which was on the east coast of Cyprus and geographically more distant from Liverpool than Limassol. She arrived at Famagusta on June 30 and discharged and loaded there until July 4, 1957. While at Famagusta the hatches of No. 3 hold were opened from 8 a.m. to 5 p.m. on June 30, from 7 a.m. to 5 p.m. on July 1, and from 8 a.m. to 11 a.m. on July 3, and discharging and loading were going on at the other holds. Having left Famagusta on July 4, 1957, the Ionian arrived at Tripoli on July 9 where she loaded further cargo in No. 2 and No. 4 holds only. She arrived at Liverpool on July 18, 1957, when the potatoes were found to be rotten and the bags wet and collapsed. The potatoes were suffering from a disease called soft-rot. They were examined and condemned by the port health authority as unfit for human consumption and, under the supervision of the health authority, were sold by the plaintiffs as pig food at £3 per ton. The plaintiffs also incurred a surveying fee and labour charges known as "dirty money" in respect of the removal of the potatoes.

The plaintiffs contended that the contract was subject to the following implied terms which the defendants had broken: that the goods were at the time of shipment fit for the purpose of being carried by the Ionian on her voyage to Liverpool and for the purpose of being carried to Liverpool for sale for use after arrival for human consumption. Alternatively, that the goods were at the time of shipment of merchantable quality as potatoes sold for carriage to and delivery at Liverpool by the Ionian. Alternatively, that the goods were at the time of shipment in such condition as to be fit to stand the voyage from Cyprus to Liverpool on which the Ionian was about to embark and arrive sound and fit for sale for human consumption after arrival.

T. G. Roche, Q.C., and *J. Perrett* for the plaintiffs.
Ashton Roskill, Q.C., and *M. R. E. Kerr* for the defendants.

DIPLOCK, J., stated the facts and continued: The voyage on which the Ionian was engaged was a normal voyage from Limassol to Liverpool. It is true that the cargo of potatoes was loaded on the outward voyage in the sense that the vessel went on to Famagusta, geographically further from Liverpool, before returning there, but this was merely because the shipper chose to do so: he knew the route which the vessel was taking and, in fact, shipped other potatoes at Famagusta on the same voyage. The shipper, I may say, was not the defendants; he was a buyer from the actual shipper. It is plain, I think, on that account of the voyage that no deviation was involved on the part of the A shipowner (see *Frenkel* v. *MacAndrews & Co., Ltd.* (1)), and, indeed, I do not think it is seriously contended on behalf of the defendants that there was any deviation on the voyage.

The plaintiffs claim that they are entitled to recover damages from the defendants arising out of the state of the goods on arrival at Liverpool. They rely on the rotten state of the potatoes on arrival and ask me to infer that the B potatoes shipped cannot have been fit to travel at the time of shipment. By "fit to travel" I mean fit to be carried to Liverpool so as to arrive in a condition fit for the purpose for which they would normally be used. There is no doubt at all that on arrival the potatoes were rotten, and were wholly unfit for human consumption. As this is the purpose for which Cyprus spring crop potatoes would normally be used, I do not think that it is seriously contended that they C were then merchantable. I find that on arrival at Liverpool they were unmerchantable.

The plaintiffs have not called any scientific evidence, but they have relied on the inference to be drawn from the state of the potatoes on inspection at Liverpool. The defendants have called a very highly qualified expert on potato diseases, Dr. Wilson, who said that there are three possible causes for the state D in which the potatoes arrived. He did not have the benefit of inspecting them on arrival because, unfortunately, the plaintiffs gave no intimation to the defendants in time for him to inspect, but the description of their state made it plain to Dr. Wilson that the potatoes on arrival were suffering from soft-rot. [HIS LORDSHIP reviewed Dr. Wilson's evidence regarding the three possible causes for the condition of soft-rot affecting the potatoes, namely, heat asphyxiation, E wetting of the potatoes at the time of shipment, and dry-rot due to fungus on the potatoes, and said that he was not satisfied on the evidence to which of these three causes the soft-rot found in the potatoes on their arrival at Liverpool was due. HIS LORDSHIP continued:] In the result, whatever the cause may have been—and it may have been any one of those three—I am satisfied that when the potatoes, the subject-matter of this action, were loaded at Limassol F they were "not fit to travel" to Liverpool on the Ionian on the voyage which she was taking, which I have held was a normal voyage, in the sense that they were in such a condition that in the ordinary course of events they would, on arrival at Liverpool, be unfit for human consumption, which is the purpose for which Cyprus spring crop potatoes in bags are normally used.

On those findings of fact a question of law, which has been hotly debated, G arises. I have so far travelled through my legal life under the impression, shared by a number of other judges who have sat in this court, that when goods are sold under a contract such as c.i.f. contract, or f.o.b. contract, which involves transit before use, there is an implied warranty not merely that they shall be merchantable at the time they are put on the vessel, but that they shall be in such a state that they can endure the normal journey and be in a merchantable H condition on arrival. It has been strenuously argued by counsel for the defendants in this case that that impression under which I have been for so long is quite erroneous and, like a similar impression (2) of ATKIN, J., is founded on a misreading of the famous old case about rabbits, *Beer* v. *Walker* (3). It is, therefore, necessary to analyse the way in which the plaintiffs put their case.

The plaintiffs have put their case in three different ways. First, founding I themselves on s. 14 (1) of the Sale of Goods Act, 1893, they say that here was a case where the buyer by implication made known to the seller the particular purpose for which the goods were required so as to show that they relied on his skill and judgment, and that accordingly they rely on the implied condition that the goods were fit for that purpose, namely, the purpose of being carried by the Ionian on her voyage to Liverpool and for the purpose of being carried to Liverpool for sale for use after arrival for human consumption. Alternatively, they rely on s. 14 (2), namely, on an implied condition as to merchantable quality, and they say that the merchantable quality as regards these potatoes is that at the time of shipment they should be merchantable as potatoes sold for carrying and delivery to Liverpool by the Ionian. The third way in which the plaintiffs put their case is that there is an implied warranty in a c.i.f. or c. & f. contract, as this was, that the goods should be fit to stand the voyage from Cyprus to Liverpool on which the Ionian was about to embark, a normal voyage from Cyprus to Liverpool, and should arrive sound and fit for sale for human consumption after arrival.

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(1) [1929] All E.R. Rep. 260; [1929] A.C. 545; 17 Asp. M.L.C. 582.
(2) See p. 491, letter A, post.
(3) (1877), 46 L.J.Q.B. 677.

For those propositions, counsel for the plaintiffs relies primarily on *Beer* v. *Walker* (4), *Ollett* v. *Jordan* (5), and, for the last proposition, on a decision of McCARDIE, J., in *Evanghelinos* v. *Leslie & Anderson* (6). I shall have to examine those cases a little more carefully.

It does not seem to me that there is really any very great distinction between the three alternative ways in which the plaintiffs put their case. Had the case been tried before the Sale of Goods Act, 1893, was passed, it would have been unnecessary to put it in the first two ways, and it seems to me, in a case of this kind, that sub-s. (1) and sub-s. (2) of s. 14 of the Sale of Goods Act, 1893, are really two sides of the same coin. If a buyer makes known a particular purpose —those, of course, are the words of sub-s. (1)—to the seller so as to show that he relies on the seller's skill and judgment, then the suitability for that particular purpose is a warranty and implied condition of the contract. If he does not make known any particular purpose, then, the assumption being that he requires them for the ordinary purposes for which such goods are intended to be used, the implied condition is one that they are fit for those ordinary purposes, that is to say, that they are merchantable, and I venture to think that there is no other distinction between sub-s. (1) and sub-s. (2).

If it were possible for the coin to have three sides, I should have said that the implied term on which counsel for the plaintiffs relies as a third ground, applicable to c.i.f., c. & f., and f.o.b. contracts, was a third side of the same coin. I think it really comes to no more than this, that merchantability in the case of goods sold c.i.f. or c. & f. means that the goods must remain merchantable for a reasonable time, and that in the case of such contracts a reasonable time means time for arrival and disposal on arrival.

However, I think that it is necessary, in the way this case has been argued, that I should deal with the three alternatives. So far as s. 14 (1) is concerned, the evidence which I have already alluded to shows, first, that the defendants' agents, Messrs. Constant, Smith & Co., knew the nature of the plaintiffs' business; they knew it as the result of having had dealings with the plaintiffs for many years; indeed, there was produced by Mr. Mash (7) a letter from them of 1951 which refers particularly to their hotel and ships' stores trade in which they say they know him to be well established. It is also plain from the evidence that Mr. Mash made it clear to Mr. Smith, the defendants' agent, that he wanted the potatoes for use in his trade in this country. Counsel for the plaintiffs, in those circumstances, relies on the well-known case of *Manchester Liners, Ltd.* v. *Rea, Ltd.* (8) which he says, I think rightly, establishes the proposition that if the particular purpose is made known by the buyer to the seller, then, unless there is something in effect to rebut the presumption, that in itself is sufficient to raise the presumption that the buyer relies on the skill and judgment of the seller; and counsel for the plaintiffs relies particularly on a passage in LORD ATKINSON'S speech (9):

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(4) (1877), 46 L.J.Q.B. 677.

(5) [1918] 2 K.B. 41.

(6) (1920), 4 Lloyd's Rep. 17.

(7) A director of the plaintiffs.

(8) [1922] All E.R. Rep. 605; [1922] 2 A.C. 74.

(9) [1922] All E.R. Rep. at p. 610; [1922] 2 A.C. at p. 84.

> A "It is by no means necessary at common law that the buyer at the time he contracts or proposes to buy should state the purpose for which he requires the goods. If the seller knows from past transactions with the buyer or otherwise what is the purpose for which the buyer requires the goods, it will equally be implied that the seller warrants them to be reasonably fit for that purpose."

B It does not seem to me that the statement of the law in the *Manchester Liners* case (10) is cut down by the passage in LORD WRIGHT's speech in *Cammell Laird & Co., Ltd.* v. *Manganese Bronze & Brass Co., Ltd.* (11) on which counsel for the defendants relies. The passage on which counsel relies is the passage where LORD WRIGHT says (12):

> C "But the more difficult question remains whether the particular purpose for which the goods were required was not merely made known, as I think it was, by the appellants to the respondents, but was made known so as to show that the appellants as buyers relied on the sellers' skill and judgment. Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the D basis of a contractual obligation."

That observation must be read secundum subjectam materiam, and the *Cammell Laird* case (11) is indeed the high-water mark of the s. 14 (1) cases. It seems to me that in this case the knowledge of the defendants, through their agents, of the business carried on by the plaintiffs, coupled with the request by Mr. Mash (13) for Cyprus potatoes to be made available for use in England, is E sufficient to raise the inference, which I accept, that the plaintiffs did make known to the defendants the particular purpose for which the goods were required, namely, for the purpose of use in this country for human consumption after arrival.

Now, if that is so, and counsel for the defendants, of course, contests it, he does not, I think, contest that the decision of the Divisional Court in *Beer* v. F *Walker* (14) does get the plaintiffs home. It is right, however, that I should deal with the second way in which the plaintiffs put their case, namely, "merchantability", because I think that the result is the same. So far as merchantability is concerned, it is, I think, convenient for me to take as the definition of "merchantability", or, more accurately, "merchantable quality"—to follow the words of s. 14—a statement again in LORD WRIGHT's speech in the *Cammell* G *Laird* case (15) where he says:

> "What sub-s. (2) [of s. 14] now means by 'merchantable quality' is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description."

H I do not think that it is seriously contended, as I have said, that these goods were fit for any purpose for which Cyprus spring potatoes in bags would be normally used, which is human consumption, at the time of their arrival.

The question, therefore, is whether merchantability in a contract of this kind does require that the goods should remain from the time of delivery, which is, of course, in a c.i.f. contract, the time of shipment, in a merchantable condition I until arrival at destination and a reasonable time for disposal. The authority for the affirmative proposition relied on by counsel for the plaintiffs is *Beer* v. *Walker* (14), a case which I shall have to examine a little more closely. What

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(10) [1922] All E.R. Rep. at p. 610; [1922] 2 A.C. at p. 84.
(11) [1934] All E.R. Rep. 1; [1934] A.C. 402.
(12) [1934] All E.R. Rep. at p. 11; [1934] A.C. at p. 423.
(13) A director of the plaintiffs.
(14) (1877), 46 L.J.Q.B. 677.
(15) [1934] All E.R. Rep. at p. 14; [1934] A.C. at p. 430.

Atkin, J., thought the effect of *Beer* v. *Walker* (16) to be is to be found in *Ollett* v. *Jordan* (17) where Atkin, J., says:

> ". . . I think that the effect of the decision in *Beer* v. *Walker* (16) is that the condition that the goods must be merchantable means that they must be in that condition when appropriated to the contract and that they will continue so for a reasonable time. That does not necessarily mean that goods shall be merchantable on delivery if the vendee directs them to be sent by a long and unusual transit. It is, however, not necessary to decide that."

Counsel for the defendants contends that in so summarising the effect of *Beer* v. *Walker* (16) Atkin, J., was doing what he seldom did, nodding, and that *Beer* v. *Walker* (16) was, or would have been, had it been tried after the passing of the Sale of Goods Act, 1893, a s. 14 (1) case, not a s. 14 (2) case, because it had got nothing to do with merchantable quality but only with fitness for a particular purpose.

I must, therefore, turn now to *Beer* v. *Walker* (16). That was the rabbits case, the rabbits being sent from London to Brighton. The rabbits were of merchantable quality, that is to say, fit for human consumption, when they were sent from London, but when they were delivered to the defendants in Brighton they were putrid and valueless. The case came before the Divisional Court on appeal from the county court. I think it is necessary that I should read a little of the judgment from which the appeal came. The learned deputy county court judge said (18):

> "When the rabbits were sent from London they were in good order and condition, but when they were delivered to the defendant they were putrid and valueless. The question in the case is, upon whom is the loss to fall? There is no doubt that in such a case there was an implied warranty that the rabbits would be merchantable, but I am of opinion that that condition was satisfied if they were delivered in good order and condition to the railway in London: see *Dawes* v. *Peck* (19) and *Dutton* v. *Solomonson* (20). There is, therefore, no breach of warranty, and the plaintiff is entitled to be paid the contract price for the rabbits. There will, therefore, be judgment for the plaintiff with costs."

Then the report goes on (18):

> "From this judgment the defendant appealed. The questions for the opinion of the court were:—(1) Whether there was, under the said circumstances, such an implied warranty? (2) Whether such implied warranty (if any) was satisfied by the delivery of the said rabbits to the railway company in the order, condition and state so warranted",

the implied warranty referred to being an implied warranty that the rabbits would be merchantable. I think that statement of the questions for the opinion of the court is probably the statement by the editor of the report. Now I come to look at the judgment (18), which I think that I must read in full:

> "The case finds that what took place was in the ordinary course of business, so that there was nothing in the mode of sending the rabbits which was out of the usual course, and therefore the rabbits which were unfit for human food had become so in the ordinary course of transit. Then, that being so, the question is, was there an implied warranty that they should be fit for food? It cannot, I think, be contended that when a person undertakes to supply another with goods which are not specific goods, there is not an implied warranty that the goods shall be fit for the purpose for

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(16) (1877), 46 L.J.Q.B. 677.

(17) [1918] 2 K.B. at p. 47.

(18) (1877), 46 L.J.Q.B. at p. 678.

(19) (1799), 8 Term Rep. 330.

(20) (1803), 3 Bos. & P. 582.

> which they ordinarily would be intended to be used, and that with regard to animals used for human food that they are fit to be so used . . ."

I emphasise those words, because they are an exact definition of what is meant by "merchantable quality", almost the ipsissima verba of Lord Wright in the speech which I have just read (21). Then the judgment goes on (22):

> "Then the second, and in fact the only question, which is really arguable in this case is, whether such a warranty was satisfied by the delivery to the railway company at their station in London, or whether the warranty was not such that if nothing happened out of the ordinary course, the rabbits should reach the person for whom they were destined in good order and fit for human food. Now I am of opinion that the implied warranty extended to the time at which, in the ordinary course of transit, the rabbits should reach the defendant, and not only to that time, but that it continued until the defendant should have a reasonable opportunity of dealing with them in the ordinary course of business. Our judgment, therefore, will be for the appellant."

Now, remembering that *Beer* v. *Walker* (23) was decided before the Sale of Goods Act, 1893, was passed (so there was no particular magic in fitness for a purpose or merchantable quality), it seems to me to be quite clear that the court in that case was dealing with a warranty which today would be called a "warranty of merchantable quality", and I respectfully agree with the analysis of Atkin, J., of what the decision in *Beer* v. *Walker* (23) really meant.

Counsel for the plaintiffs, through his industry, has drawn my attention to three other cases (24), in none of which was there a direct decision on the matter, but in which it is evident, from the language used by judges accustomed to sitting in this court, that they took the same view as Atkin, J., as to the effect of *Beer* v. *Walker* (23), a view which, with the greatest respect, I think is correct. It follows, therefore, applying that view of the law to the present case, that, these goods being bought c. & f. Liverpool, the implied condition as to merchantability was a condition that they should remain merchantable for a reasonable time, the time reasonable in all the circumstances, which means a time for the normal transit to the destination, Liverpool, and for disposal after. That condition was, in my view, broken.

I can deal very shortly with the third contention of the plaintiffs, namely, the implied term which is based on a passage in the judgment of McCardie, J., in *Evanghelinos* v. *Leslie & Anderson* (25). The passage is a very short one. McCardie, J., was dealing with a Special Case stated by Mr. Chance, of Messrs. Coward, Chance & Co., the well-known solicitors, and I need do no more than read what McCardie, J., says (25):

> "There may be a point as to the obligations of the sellers. [This was a c.i.f. contract.] If there is, that point of law has been correctly stated by Mr. Chance among his findings of fact, where he says that the sellers were under an obligation to ship the goods in such a condition as would enable the goods to arrive at their destination on a normal voyage, and under normal conditions, in merchantable condition."

I do not think that McCardie, J., was intending in that case to do any more than to apply the law stated in *Beer* v. *Walker* (23) as explained by Atkin, J., in *Ollett* v. *Jordan* (26).

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(21) [1934] All E.R. Rep. at p. 14; [1934] A.C. at p. 430.

(22) (1877), 46 L.J.Q.B. at p. 679.

(23) (1877), 46 L.J.Q.B. 677.

(24) *Dent* v. *Glen Line, Ltd.*, (1940), 45 Com. Cas. 244; *Wills & Sons, Ltd.* v. *Thomas Brown & Sons*, (1922), 12 Lloyd's Rep. 292; *Broome* v. *Pardess Co-operative Society of Orange Growers (Est. 1900), Ltd.*, [1939] 3 All E.R. 978, *revsd.* C.A., [1940] 1 All E.R. 603.

(25) (1920), 4 Lloyd's Rep. at p. 18.

(26) [1918] 2 K.B. at p. 47.

Against those authorities counsel for the defendants relies on a decision of the High Court of Australia, *Bowden Brothers & Co., Ltd.* v. *Little* (27). May I say that I greatly welcome the citation of Australian and other Commonwealth cases, particularly in a commercial court, where great assistance can be derived from seeing the way in which other great common law courts have dealt with analogous problems. *Bowden Brothers & Co., Ltd.* v. *Little* (27) is a case which was decided in 1907, that is to say, it was decided before the *Manchester Liners* (28) and *Cammell Laird* (29) cases. Those two cases have thrown a great deal of light on the matter and extended considerably the pre-existing law so far as s. 14 (1) of the Sale of Goods Act, 1893, is concerned. The second point to remember, I think, about *Bowden Brothers & Co., Ltd.* v. *Little* (27) is that *Beer* v. *Walker* (30) was not apparently cited to the court. *Beer* v. *Walker* (30) was not reported in the Law Reports. I think that it was only reported in the Law Times and the Law Journal reports (30). At any rate, it does not appear to have been cited to the court. The third matter to be remembered, and it is, I think, an important matter, is that this was an appeal from a trial before a jury, and if I am not mistaken, at that time, in 1907, the New South Wales courts on appeal from the Supreme Court of New South Wales still adopted the pre-Judicature Act system of pleading. It is, therefore, necessary to see what were the issues pleaded.

The action was one brought on a c.i.f. contract for the sale of 450 tons of Japanese onions shipped from Japan to Sydney; they arrived in Sydney, as the potatoes in this case did, rotten, and cross-actions were brought, one for price and one for damages for breach of warranty. The relevant part of the pleadings is set out in the report (31). The first count set out the contract as an agreement that the onions should be delivered by the appellants in merchantable condition. It is plain from reading the rest of the report that " delivered " meant " delivered in Sydney ". The second count set out an agreement that in consideration of the respondent agreeing to buy the onions at certain prices, the appellants promised that " the onions upon arrival in Sydney would be in merchantable condition except for such deterioration as would be the necessary and inevitable result of the transit, yet the onions upon arrival in Sydney were not in such condition ". As counsel for the plaintiffs points out, the second count alleges a warranty which is almost exactly the converse of what he contends and which I hold to be the right warranty in such a case. It is extraordinary deterioration of the goods due to abnormal conditions experienced during transit for which the buyer takes the risk. A necessary and inevitable deterioration during transit which will render them unmerchantable on arrival is normally one for which the seller is liable. The jury gave a special verdict in which they said that the onions when shipped in Kobi were in merchantable condition, but not fit for a voyage from Kobi to Sydney, and were saleable in the market of Kobi, and they said that the onions when delivered in Sydney were not in merchantable condition. Much of the argument in the case was devoted to the question as to when the risk passed in a c.i.f. contract. It is unnecessary to deal with that, but at the end of the case, having dealt with that, GRIFFITH, C.J. (32) did consider, without deciding it, what implied warranties there might be—bearing in mind that the Sale of Goods Act, 1893, was not in force in New South Wales at the time of this decision—and in the result he decided to express no opinion as to the proper warranty to be inferred, beyond saying that

> " there must of necessity have been some obligation on the part of the shippers, not less than an obligation to ship onions merchantable in Japan (which the jury found they performed), and not greater than an obligation to ship onions reasonably fit in fact for the voyage to Sydney."

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(27) (1907), 4 C.L.R. 1364. (28) [1922] All E.R. Rep. 605; [1922] 2 A.C. 74.
(29) [1934] All E.R. Rep. 1; [1934] A.C. 402.
(30) (1877), 46 L.J.Q.B. 677; 37 L.T. 278. (31) (1907), 4 C.L.R. at p. 1367.
(32) (1907), 4 C.L.R. at p. 1380.

Isaacs, J., said (33) that he did not think, on the facts of this particular case, that a matter which had not been put to the jury, namely, that the sellers understood that the buyers relied on the sellers' skill and judgment to select onions fit for the voyage, had been made out.

It does not seem to me on analysis that *Bowden Brothers & Co., Ltd.* v. *Little* (34) detracts from the correctness of the decision in *Beer* v. *Walker* (35), and so far as it deals with matters which would now come under s. 14 (1) of the Sale of Goods Act, 1893, its date, in 1907, before the date of the *Manchester Liners* case (36) and the *Cammell Laird* case (37), makes it of doubtful authority. It does not seem to me, therefore, that there is anything in *Bowden Brothers & Co., Ltd.* v. *Little* (34) to cause me to take the view that the law is otherwise than as I have stated.

I accordingly hold that the defendants were in breach of an implied condition to ship goods in such a condition as to be capable of standing a normal voyage to Liverpool and to be of merchantable quality at the time of arrival.

So far as the damages are concerned, the plaintiffs claim that the value of the potatoes, if sound on arrival at Liverpool, was 40s. per cwt., but they have not satisfied me that the value was higher than 32s. per cwt.; indeed, there was very cogent evidence that that was the market price in Liverpool at almost exactly the time of arrival. The plaintiffs are, therefore, entitled under that head to £1,625 less £139 1s., that being the price at which they were in fact disposed of, and they are entitled also to an item of £32 3s. for "dirty money" paid to the stevedores for unloading. There is a minor claim of £25 for fumigation. That has got, so far as I can see, on the evidence, nothing in particular to do with the rottenness of the potatoes and was due to moths. There has been no evidence to show that that was in any way due to the fault of the defendants, and that is not recoverable.

[His Lordship awarded the plaintiffs half only of the costs of the action having regard to the fact that they did not give the defendants an opportunity to survey the potatoes at Liverpool and the defendants had to incur the costs of calling an expert witness on potato diseases.]

Judgment for the plaintiffs.

Solicitors: *Hicks, Arnold & Co.* (for the plaintiffs); *Constant & Constant* (for the defendants).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

PRACTICE DIRECTION.

CHANCERY DIVISION.

Contempt of Court—Appeal—Chancery Division—Procedure.

Notices of appeal which by R.S.C., Ord. 58, r. 20 (1)*, are required to be served on "the proper officer of the court from whose order or decision the appeal is brought" may, in the case of appeals from the Chancery Division of the High Court of Justice, be served on the Chief Registrar of that Division and such service may be effected by leaving a copy of the notice of appeal with the Cause Clerk in Room 136, Royal Courts of Justice, Strand, London, W.C.2.

By direction of the judges of the Chancery Division.

J. B. H. WYMAN,
Feb. 3, 1961. Chief Registrar, Chancery Division.

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(33) (1907), 4 C.L.R. at p. 1393. (34) (1907), 4 C.L.R. 1364.
(35) (1877), 46 L.J.Q.B. 677. (36) [1922] All E.R. Rep. 605; [1922] 2 A.C. 74.
(37) [1934] All E.R. Rep. 1; [1934] A.C. 402.

* Rule 20 was added to R.S.C., Ord. 58, by the Rules of the Supreme Court (No. 4), 1960 (S.I. 1960 No. 2327), in consequence of the provisions in the Criminal Justice Act, 1960, s. 13, whereby a general right of appeal was given in cases of contempt of court.

A

RIVERSTONE MEAT CO., PTY., LTD. *v.* LANCASHIRE SHIPPING CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Merriman, Lord Radcliffe, Lord Keith of Avonholm and Lord Hodson), December 5, 6, 7, 8, 12, 13, 1960, February 7, 1961.]

B

Shipping—Seaworthiness—Due diligence to make ship seaworthy—Lloyd's Register and load line surveys—Work entrusted to competent independent contractors—Unseaworthiness due to negligence of contractors' employee—Whether due diligence exercised by shipowners—Australian Sea Carriage of Goods Act, 1924 (*No.* 22 *of* 1924), *Schedule, art.* III, *r.* 1, *art.* IV, *r.* 1.

C Cargo shipped under a bill of lading subject to the Hague Rules (as enacted in the Australian Sea Carriage of Goods Act, 1924) was damaged by sea water, which got into the ship's hold by reason of the unseaworthiness of the ship. The unseaworthiness was due to the carelessness of a fitter, employed by ship repairers of high repute to whom the shipowners had entrusted the ship for passing her survey. The fitter had carelessly refixed D inspection covers to two storm valves, which had been opened for the purposes of a load line inspection and a special survey. The refixing of inspection covers was a matter which by proper practice was left to the fitter to do without supervision. The cargo owners claimed damages from the shipowners on the ground that they, the carriers, had not exercised due diligence to make the ship seaworthy as required by art. III, r. 1*, E art. IV, r. 1*, of the Hague Rules.

Held: on the true construction of r. 1 of art. III of the Hague Rules, considered in the light of the history of the relevant rule, the obligation imposed thereby on the carriers to " exercise due diligence . . . to make the ship seaworthy " was an obligation that there should be due diligence in the work, and, the ship having been entrusted by the shipowners to the F ship repairers for survey, the negligence of the fitter employed by the ship repairers was a lack of diligence for which the shipowners were responsible; therefore, the cargo owners were entitled to recover damages.

Dictum of BROWN, D.J., in *The Colima* ((1897), 82 Fed. Rep. at p. 678) adopted; and dicta of LORD ESHER, M.R., and KAY, L.J., in *Dobell & Co.* v. *S.S. Rossmore Co.* ([1895] 2 Q.B. at pp. 413, 416), of MACKINNON, L.J., G in *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* ([1939] 2 All E.R. at p. 857), of LORD WRIGHT in *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* ([1934] All E.R. Rep. at pp. 486, 487), of LORD ROCHE in *Paterson S.S., Ltd.* v. *Robin Hood Mills, Ltd.* ((1937), 58 Lloyd's Rep. at p. 40), and of LORD SOMERVELL OF HARROW in *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.* H ([1959] 2 All E.R. at p. 744) applied.

W. Angliss & Co. (*Australia*) *Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* ([1927] 2 K.B. 456) distinguished.

Decision of the COURT OF APPEAL ([1960] 1 All E.R. 193) reversed.

[**Editorial Note.** Article III, r. 1, and art. IV, r. 1, of the Australian Sea Carriage of Goods Act, 1924, are in similar terms to the English Carriage of I Goods by Sea Act, 1924, Schedule, art. III, r. 1, and art. IV, r. 1.

As to the Carriage of Goods by Sea Act, 1924, Schedule, art. III, r. 1, and art. IV, r. 1, see 30 HALSBURY'S LAWS (2nd Edn.) 611, para. 771, 614, para. 772.

For the Carriage of Goods by Sea Act, 1924, Schedule, art. III, r. 1, and art. IV, r. 1, see 23 HALSBURY'S STATUTES (2nd Edn.) 887, 890.]

Cases referred to:

Alvena, The, (1896), 74 Fed. Rep. 252; *affd.*, (1897), 79 Fed. Rep. 973.

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* The terms of art. III, r. 1, and art. IV, r. 1, are printed at p. 499, letter E, post.

American Linseed v. *Norfolk and North American Steamship Co.*, (1929), 32 Fed. Rep. 292.

Angliss (W.) & Co. (Australia) Proprietary v. *Peninsular & Oriental Steam Navigation Co.*, [1927] 2 K.B. 456; 96 L.J.K.B. 1084; 137 L.T. 727; 41 Digest 474, *3054*.

Australian Newsprint Mills, Ltd. v. *Canadian Union Line, Ltd.*, [1952] 1 D.L.R. 850.

Australian Star, The, (1940), 67 Lloyd's Rep. 110.

Ball (B. J.) (New Zealand), Ltd. v. *Federal Steam Navigation Co., Ltd.*, [1950] N.Z.L.R. 954.

Brown & Co., Ltd. v. *Harrison, Hourani* v. *Harrison*, [1927] All E.R. Rep. 195; 96 L.J.K.B. 1025; 137 L.T. 549; 17 Asp. M.L.C. 294; 41 Digest 433, *2720*.

City of Alberni, The, [1947] 2 D.L.R. 647.

Colima, The, (1897), 82 Fed. Rep. 665.

Cranfield Bros., Ltd. v. *Tatem Steam Navigation Co., Ltd.*, (1939), 64 Lloyd's Rep. 264.

Davie v. *New Merton Board Mills, Ltd.*, [1959] 1 All E.R. 346; [1959] A.C. 604; [1959] 2 W.L.R. 331; 3rd Digest Supp.

Dimitrios N. Rallias, The, (1922), 13 Lloyd's Rep. 363.

Dobell & Co. v. *S.S. Rossmore Co.*, [1895] 2 Q.B. 408; 64 L.J.Q.B. 777; 73 L.T. 74; 41 Digest 429, *2697*.

Flamborough, The, (1895), 69 Fed. Rep. 470.

Francis v. *Cockrell*, (1870), L.R. 5 Q.B. 501; 39 L.J.Q.B. 291; 23 L.T. 466; 42 Digest 908, *49*.

Gosse Millerd, Ltd. v. *Canadian Government Merchant Marine, Ltd., The Canadian Highlander*, [1928] All E.R. Rep. 97; [1929] A.C. 223; 98 L.J.K.B. 181; 140 L.T. 202; 17 Asp. M.L.C. 549; Digest Supp.

Green v. *Fibreglass, Ltd.*, [1958] 2 All E.R. 521; [1958] 2 Q.B. 245; [1958] 3 W.L.R. 71; 3rd Digest Supp.

Grote v. *Chester & Holyhead Ry. Co.*, (1848), 2 Exch. 251; 5 Ry. & Can. Cas. 649; 154 E.R. 485; 34 Digest 161, *1262*.

Haseldine v. *Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.

International Packers, Ltd. v. *Ocean S.S. Co., Ltd.*, [1955] 2 Lloyd's Rep. 218.

Irrawaddy, The, (1898), 171 U.S. 187.

M'Alister (*or Donoghue*) v. *Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*.

Mary L. Peters, The, (1895), 68 Fed. Rep. 919.

Maxine Footwear Co., Ltd. v. *Canadian Government Merchant Marine, Ltd.*, [1959] 2 All E.R. 740; [1959] A.C. 589; [1959] 3 W.L.R. 232; 3rd Digest Supp.

Nord-Deutsche Lloyd v. *President, etc., of Insurance Co. of North America*, (1901), 110 Fed. Rep. 420.

Northumbrian Shipping Co., Ltd. v. *Timm (E.) & Son, Ltd.*, [1939] 2 All E.R. 648; [1939] A.C. 397; 108 L.J.K.B. 503; 160 L.T. 573; Digest Supp.

Paterson Steamships, Ltd. v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] All E.R. Rep. 480; [1934] A.C. 538; 103 L.J.P.C. 166; 151 L.T. 549; Digest Supp.

Paterson S.S., Ltd. v. *Robin Hood Mills, Ltd.*, (1937), 58 Lloyd's Rep. 33; Digest Supp.

Phillips v. *Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; 92 L.J.K.B. 389; 128 L.T. 69; *affd.* C.A., [1923] All E.R. Rep. 127; [1923] 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 36 Digest (Repl.) 92, *497*.

Searle v. *Laverick*, (1874), L.R. 9 Q.B. 122; 43 L.J.Q.B. 43; 30 L.T. 89; 38 J.P. 278; 3 Digest (Repl.) 77, *152*.

A *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.*, [1939] 2 All E.R. 855; *affd.* H.L., [1940] 3 All E.R. 405; [1940] A.C. 997; 109 L.J.K.B. 848; 163 L.T. 261; 2nd Digest Supp.

Stag Line, Ltd. v. *Foscolo Mango & Co., Ltd.*, [1931] All E.R. Rep. 666; [1932] A.C. 328; 101 L.J.K.B. 165; 146 L.T. 305; 18 Asp. M.L.C. 266; Digest Supp.

B *Wilkinson* v. *Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; 24 Digest (Repl.) 1088, *400*.

Wilsons & Clyde Coal Co., Ltd. v. *English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 1937 S.C. (H.L.) 46; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

Woodward v. *Mayor of Hastings*, [1944] 2 All E.R. 565; [1945] K.B. 174;
C 114 L.J.K.B. 211, 218; 172 L.T. 16; 109 J.P. 41; 2nd Digest Supp.

Appeal.

Appeal by Riverstone Meat Co., Pty., Ltd., cargo owners, from an order of the Court of Appeal (MORRIS, ORMEROD and WILLMER, L.JJ.), dated Nov. 26, 1959, and reported [1960] 1 All E.R. 193, affirming an order of MCNAIR, J., dated
D July 31, 1958, and reported [1958] 3 All E.R. 261, in an action by the appellants claiming damages against the Lancashire Shipping Co., Ltd., shipowners, in respect of the carriage of goods on board the respondents' vessel, the Muncaster Castle, which were found to be damaged when they were discharged from the vessel. The facts are set out in the opinion of VISCOUNT SIMONDS.

Ashton Roskill, Q.C., and *J. F. Willmer* for the appellants, the cargo owners.
E *A. A. Mocatta, Q.C.*, and *M. R. E. Kerr* for the respondents, the shipowners.

Their Lordships took time for consideration.
Feb. 7. The following opinions were read.

VISCOUNT SIMONDS: My Lords, on May 7, 1953, one hundred and fifty cases of canned ox tongue, the property of the appellants, Riverstone Meat
F Co., Pty., Ltd., were shipped in good order and condition on board the Muncaster Castle at Sydney under a bill of lading of that date for carriage to London. It was provided by the bill of lading that it should have effect subject to the rules (commonly known as the Hague Rules) which are contained in the Schedule to the Australian Sea Carriage of Goods Act, 1924, and that the carriers, the respondents, should be entitled to all the privileges, rights and immunities contained
G in that Act and in the Schedule thereto. On July 16, 1953, four days after the beginning of the discharge in London, sea water was discovered in the hold in which the goods were stowed and one hundred and thirteen of the appellants' cases were found to be damaged thereby. It was admitted that, in a certain respect which I shall state in some detail, the ship was unseaworthy at the beginning of the voyage. I find it necessary to go into detail because it is on
H the particular facts of the case that MCNAIR, J., and the Court of Appeal have relied and that the respondents rely in supporting their decision on this appeal. In order that these facts may be presented in as favourable a light as possible to the respondents, I find it convenient to adopt the statement of them in the respondents' formal case, which I believe to be accurate. It is as follows:

> I "The Muncaster Castle was built in the United States during the 1939-45 war and was acquired by the respondents in 1949. She remained in the respondents' service until 1955. Throughout this period she was well maintained and classed with the British Corporation (which was united with Lloyd's Register in 1949) in the highest class for vessels not built under the supervision of this classification society.
>
> "In February, 1953, immediately before her outward voyage to Australia where she loaded the goods in question in this action, she passed her No. 2 special survey by Lloyd's Register surveyors and was reported to be 'so far

as seen in good condition and eligible to remain as at present classed in the Register Book '. On the same occasion she was passed through her annual load line survey pursuant to the Load Line Rules, 1941, made under the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, and a report to this effect was issued dated Feb. 3, 1953.

" The normal practice for classed ships (see r. 60 and r. 64 of the ' Instructions to Surveyors ' issued by the Ministry of Transport and Civil Aviation in connexion with load line surveys) is to carry out the load line survey while the ship is in a dry dock and at the same time as a periodical classification survey.

" For the purposes of the above special survey and annual load line survey the vessel was placed in the hands of Alexander Stephen & Sons, Ltd. of Glasgow, who are a ship repairing concern of the highest repute.

" Under the Load Line Rules, 1941, provision is made for the examination at the annual survey of the discharges leading through the ship's side from spaces below the freeboard deck. In practice, Lloyd's surveyors (acting as assigning authority on behalf of the Ministry of Transport) are satisfied if twenty-five per cent. of the sea outlets are opened up for inspection, but it was the respondents' practice to insist that they should all be opened up. In the case of the load line survey in the dry dock in the yard of Alexander Stephen & Sons in February, 1953, thirty-one storm valves in the vessel were accordingly opened up for inspection, including the two storm valves in question in No. 5 hold. This was done upon the instructions of one Atkinson, an experienced and competent marine superintendent employed by Moller Line (U.K.), Ltd., the managers of the vessel, who attended the Glasgow surveys on behalf of the respondents. The opening up of the storm valves necessarily involved opening up the inspection covers.

" After the storm valves had been inspected by the surveyor to Lloyd's Register it was the duty of a fitter employed by Alexander Stephen to replace and close the inspection covers. This is done by placing the inspection cover over the studs in the top of the inspection chamber, placing the nuts in position and tightening up the nuts. The nuts should be tightened gradually at opposite angles so as to ensure that the pressure all round is even. If the nuts are tightened up in the wrong order, i.e., by tightening up all the nuts on one side before those on the other side, the pressure will be uneven and it will be impossible to make a secure joint, and this will also be so if the nuts are not fully tightened. Once the nuts have been tightened up, no visual inspection or tapping with a spanner will reveal improper or insufficient tightening up.

" According to ordinary and prudent practice the task of tightening up the nuts on the inspection cover is left to a fitter and is well within the competence of a skilled fitter and is not supervised by Lloyd's surveyors or by the owners' superintendent.

" The vessel carried cargo on the outward voyage to Australia in No. 5 hold, but none of it was damaged by sea water. After the discharge at Sydney of the outward cargo stowed in the after half of No. 5 hold the hold was inspected by the vessel's chief officer. There was no sign of leakage of sea water. The appellants' cargo was then loaded in the after part of No. 5 lower hold. The vessel then proceeded to Brisbane where the outward cargo in the forward part of the said hold was discharged, as a result of which the places where the storm valves were situated became visible. The chief officer again inspected the said hold and there were no signs of sea water staining or rust. No sea water in fact entered No. 5 hold either through the storm valves or at all on the outward voyage to Australia.

" On the voyage from Australia to the United Kingdom there was some heavy weather which caused the vessel to roll and pitch, which was sufficient

> to loosen the nuts of the inspection covers in No. 5 hold if they had been improperly tightened up in Glasgow and there had been some loosening in the working of the ship on the outward voyage.
>
> "The cause of the admission of sea water into No. 5 hold and of the damage to the cargo in question was that a fitter employed by Alexander Stephen in Glasgow 'negligently failed to secure the nuts on the inspection cover evenly or sufficiently, with the result that the working of the ship on the outward voyage was sufficient to produce the condition, by the time the [appellants'] cargo was loaded at Sydney, that the nuts had been loosened to such an extent that with the vessel rolling and waves striking the sides of the ship, sea water was forced through the interstices below the inspection covers'.
>
> "There was no negligence on the part of anyone (other than the fitter) in failing to discover that the nuts had not been evenly or sufficiently tightened, in particular, the failure to discover this was not due to any negligence on the part of Lloyd's surveyor, the superintendent acting on behalf of the respondents, or any of the ship's officers."

On these facts, the appellants brought an action in the Queen's Bench Division against the respondents claiming that they were liable for the damage to their goods. The respondents pleaded that they were protected from liability by the Act and rules to which I have referred, and their plea was upheld by the learned trial judge and by the Court of Appeal. They relied specifically on s. 5 of the Act and art. III, r. 1, and art. IV, r. 1, of the rules which are as follows:

> "Section 5. There shall not be implied in any contract for the carriage of goods by sea to which this Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship.
>
> "Article III, r. 1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:—(a) make the ship seaworthy . . . (c) make the holds . . . and all other parts in which goods are carried, fit and safe for their reception, carriage and preservation.
>
> "Article IV, r. 1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy . . . and to make the holds . . . and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of para. 1 of art. III.
>
> "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section."

The question, then, is whether the respondents discharged this burden, and it is conceded that they did unless they are to be held responsible for the negligence of the fitter employed by Alexander Stephen & Sons, Ltd. This is the single issue in the case. It was decided in favour of the respondents by McNAIR, J., and the Court of Appeal. Its solution depends on the meaning of the words occurring in art. III, r. 1, and repeated in art. IV, r. 1, "due diligence to make the ship seaworthy". To ascertain their meaning, it is, in my opinion, necessary to pay particular regard to their history, origin and context, and, as I think the courts below have not paid sufficient regard to this aspect of the case, I must deal with it at some length. The Hague Rules, as is well known, were the result of the Conferences on Maritime Law held at Brussels in 1922 and 1923. Their aim was broadly to standardise within certain limits the rights of every holder of a bill of lading against the shipowner, prescribing an irreducible minimum for the responsibilities and liabilities to be undertaken by the latter. To guide them, the framers of the rules had, amongst other precedents, the American

Harter Act of 1893, the Australian Sea Carriage of Goods Act, 1904, the Canadian A Water Carriage of Goods Act, 1910, and, though they had no British Act as a model, they had decisions of the English courts in which the language of the Harter Act had fallen to be construed by virtue of its provisions being embodied in bills of lading. In all these Acts the relevant words " exercise due diligence to make the ship seaworthy " are to be found. It was in these circumstances that these words were adopted in the Hague Rules. B

My Lords, the question how far their meaning should be governed by previous decisions in the courts of America or this country has been more than once discussed in this House. Notwithstanding some apparent qualification of the proposition which is to be found in the speeches of LORD ATKIN and LORD MACMILLAN in *Stag Line, Ltd.* v. *Foscolo Mango & Co., Ltd.* (1), I think I am at liberty to adopt emphatically what was said by VISCOUNT SUMNER and LORD C HAILSHAM in *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine Ltd., The Canadian Highlander* (2). The former of them said (3):

> " By forbearing to define 'management of the ship' . . . the legislature has, in my opinion, shown a clear intention to continue and enforce the old clause as it was previously understood and regularly construed by the courts of law ": D

the latter said (4):

> " I am unable to find any reason for supposing that the words as used by the legislature in the Act of 1924 have any different meaning from that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date, and I think that the decisions E which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion."

Mutatis mutandis these statements apply to the words we have to construe, and that is why I think, with great respect to the Court of Appeal and to WILLMER, L.J., in particular, that it is a wrong approach to our problem to say that " any F examination of the Hague Rules must begin with *Angliss*' case (5) ". To that case I must refer in detail later. I would only now observe that, whatever it decided, it is only a link—an important one, no doubt—in the chain of authority which starts at an earlier date.

First I would refer to *Dobell & Co.* v. *S.S. Rossmore Co.* (6), a case often referred to in the courts of this country and of the United States and never so far as I G am aware dissented from. In that case, the ship was unseaworthy owing to the negligence of the ship's carpenter. Into the bill of lading the words of the Harter Act were introduced, " which " said LORD ESHER, M.R. (7) " I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading ". Then he proceeds:

> " In the 3rd section of the Act so incorporated the exception which is to H relieve the shipowner is made to depend on the condition that the owner of the ship . . . shall exercise due diligence to make the vessel in all respects seaworthy. If he does not do that the exceptions in his favour do not take effect. It is contended that the meaning of the clause is that if the owner personally did all that he could do to make the ship seaworthy when she left America, then, although she was not seaworthy, by the fault of some I agent or servant, the owner is not liable."

And the learned Master of the Rolls, after rejecting this contention, went on (7):

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(1) [1931] All E.R. Rep. 666; [1932] A.C. 328.
(2) [1928] All E.R. Rep. 97; [1929] A.C. 223.
(3) [1928] All E.R. Rep. at p. 103; [1929] A.C. at p. 237.
(4) [1928] All E.R. Rep. at p. 100; [1929] A.C. at p. 230. (5) [1927] 2 K.B. 456.
(6) [1895] 2 Q.B. 408. (7) [1895] 2 Q.B. at p. 413.

> " It is obvious to my mind . . . that the words of the 3rd section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port."

So, also, KAY, L.J. (8):

> " It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent."

I have cited from these judgments at some length because they determine decisively the meaning attached by the courts of this country to the relevant words. It is true that the negligence was that of a servant of the shipowner, but the reasoning and the language of the judgments embrace any agent employed by him. These are wide words.

I turn now to a case decided two years later in the District Court, S.D. New York, *The Colima* (9), and I quote at some length from the judgment of BROWN, D.J. In that case, the vessel was unseaworthy owing to negligent loading by the stevedore which was done under the supervision and direction of the master and first officer of the ship. The learned judge said (10):

> " This section [i.e., the 3rd section of the Harter Act] had been in several cases adjudged to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea. The Act requires in other words, due diligence in the work itself "

and, after referring to American cases which amply bear out his reference, *The Mary L. Peters* (11), *The Flamborough* (12), *The Alvena* (13), *The Rossmore* (14) which I have already cited, he continues (10):

> " On any other construction, owners would escape all responsibility for the seaworthiness of their ships, by merely employing agents of good repute, whether any diligence and care to make their vessels seaworthy were in fact exercised or not. On reason and sound policy no such intent in the statute can be supposed. The context and the pre-existing law indicate that the intent of the Act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact and to substitute for that warranty a warranty only of diligence, to make the ship seaworthy. The difference is of great importance, as it avoids responsibility for latent and undiscoverable defects. But the warranty of diligence remains; and this requires the application of the usual rule, that the acts and negligences of the agent are deemed those of the principal."

He had already made it clear (10) that " agents " meant to him persons whom the shipowner " may employ, or to whom he may have committed the work of fitting the vessel for sea ". My Lords, I have without reluctance ventured on this long quotation because I can find no words more apt to express my own view as to the meaning of words taken from the Harter Act and embodied in the Hague Rules. To one thing in particular I call attention. The Harter Act did not in terms, as did the Australian Act, by s. 5, relieve the shipowners of the absolute warranty of the seaworthiness of the ship on sailing. But, in my

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(8) [1895] 2 Q.B. at p. 416.
(9) (1897), 82 Fed. Rep. 665.
(10) (1897), 82 Fed. Rep. at p. 678.
(11) (1895), 68 Fed. Rep. 919.
(12) (1895), 69 Fed. Rep. 470.
(13) (1896), 74 Fed. Rep. 252; *affd.* (1897), 79 Fed. Rep. 973.
(14) [1895] 2 Q.B. 408.

A opinion, this cannot affect the meaning of the relevant words. Here I may quote words of MacKinnon, L.J., in *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* (15):

> "The limitation and qualification of the implied warranty of seaworthiness, by cutting it down to use 'due diligence on the part of the shipowner to make the ship seaworthy' are a limitation and qualification more apparent B than real, because the exercise of due diligence involves, not merely that the shipowner personally shall exercise due diligence, but also that all his servants and agents shall exercise due diligence, as is pointed out in a note in Scrutton on Charterparties (14th Edn.), pp. 110, 111, which says that this variation will not be: '. . . of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the C vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness, but of so latent a nature that due diligence could not have discovered it) are not likely to occur often.'"

In the same case on appeal to this House, Lord Wright said (16): D

> "The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect, such an exception can excuse only against latent defects. The overloading was the result of overt acts." E

See also *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* (17), per Lord Wright. I have found no sufficient reason for the omission or alteration of the passage in Scrutton on Charterparties which was approved by MacKinnon, L.J., in later editions of that work.

My Lords, I have gone too far ahead in order to deal with a particular point. F But before I come to *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (18), on which the respondents rely, I would observe that the law as expounded in *The Colima* (19) has been consistently followed from that day more than sixty years ago to this in the United States, and I would remind your Lordships of what Atkin, L.J., said in *Brown & Co., Ltd.* v. *Harrison, Hourani* v. *Harrison* (20): G

> "Those are words which were found, and no doubt are still found, in old bills of lading and charterparty exceptions, and they are words that are found in legislation which preceded this Act and on which this Act was founded, and especially, it is to be noted, are to be found in the Harter Act, which was the forerunner of all Acts of this kind, in relation to the carriage of goods by sea. I think it is very important in commercial interests that H there should be uniformity of construction adopted by the courts in dealing with words in statutes dealing with the same subject-matter, and it is a matter of great satisfaction to me to find that the decisions of these courts seem to correspond with the decisions given by the courts of the highest authority in the United States."

I It would, in my opinion, be a grave departure from the prevailing harmony if, on, as I think, a false view of the decision in *Angliss* (18) currency is given to the interpretation of the rules which commended itself to the Court of Appeal in the present case.

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(15) [1939] 2 All E.R. at p. 857.
(16) [1940] 3 All E.R. at p. 408; [1940] A.C. at p. 1001.
(17) [1934] All E.R. Rep. at p. 486; [1934] A.C. at p. 547. (18) [1927] 2 K.B. 456.
(19) (1897), 82 Fed. Rep. 665. (20) [1927] All E.R. Rep. at p. 202.

I come then to *W. Angliss & Co.* (*Australia*) *Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (21), which is said to be the first case in which the Hague Rules were discussed in an English court since the passing of the Australian Sea Carriage of Goods Act, 1924, which, as I should have mentioned, is in the same terms as the English Carriage of Goods by Sea Act of the same year. It is important to note what was the point of decision. It was whether, when the carrier has contracted for the building of a ship, he is liable for lack of due diligence on the part of the ship-builders or their workmen if he has engaged builders of repute and has adopted all reasonable precautions, such as requiring the builders to satisfy one of the recognised classification societies and engaged skilled naval architects, who advise him, and skilled inspectors, who supervise the work with due intelligence. The learned judge, WRIGHT, J., held that, in such circumstances, the carrier was not liable. I see no reason to question the correctness of this decision, and need say no more about it, for it does not in the present appeal fall to be reviewed. Of greater significance is that, except in a single passage where the learned judge was dealing with the employment of an inspector to supervise the work, no mention is made of the employment of agents to repair a ship. That passage is as follows (22):

> "Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects."

It is not possible to extract from this somewhat speculative dictum that the learned judge thought that the carrier would not in any case with or without inspection be liable for negligence on the part of those to whom (in the words of BROWN, D.J., in *The Colima* (23)) "he may have committed the work of fitting the vessel for sea". It was not a matter for his decision and he did not, in my opinion, purport to decide it. But it is on this authority that the whole fabric of the respondents' case appears to rest. It is a reasonable construction of the words, which once again I quote, "to exercise due diligence to make the ship seaworthy", to say that, in the case of a ship built for the carrier, or newly come into his hands by purchase, the carrier fulfils his obligation if he takes the precautions which the learned judge suggests. Until the ship is his, he can have no further responsibility. I am aware of no case either in the United States under the Harter Act or in this country when its words fell to be construed in which the contrary has been suggested. But it is far otherwise where the shipowner puts his ship in the hands of third parties for repair. To such a case, the words that I have cited from *The Rossmore* (24) and *The Colima* (25) are precisely applicable. An attempt was made to draw a distinction between negligence shown by the shipowner's servants, his agents and independent contractors. But this could but fail. For no sensible reason could be found for such a distinction. To take a relevant example: repair work might equally be entrusted by a shipowner to his own servants or to an independent contractor. To fasten him with liability for negligence in the one case but not in the other would wholly defeat the purpose of the Act. The holder of the bill of lading is only secure if (to use once more the words of BROWN, D.J. (23)) due diligence is shown in the work. That the shipowner is not safeguarded by the fact that the negligence is that of an independent contractor is indorsed by *Paterson S.S., Ltd.* v. *Robin Hood Mills, Ltd.* (26), where LORD ROCHE (in delivering the judgment of the Judicial Committee of the Privy Council, consisting of LORD ATKIN, LORD THANKERTON and himself) held that a carrier was liable for the failure of a compass adjuster to exercise due diligence. As the Court of Appeal recognised in its judgment in the case under appeal, a compass adjuster can fairly be regarded as belonging to the category of independent contractor.

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(21) [1927] 2 K.B. 456.

(22) [1927] 2 K.B. at p. 462.

(23) (1897), 82 Fed. Rep. at p. 678.

(24) [1895] 2 Q.B. 408.

(25) (1897), 82 Fed. Rep. 665.

(26) (1937), 58 Lloyd's Rep. 33.

I will not multiply examples, but will cite one more case which introduced yet another category of persons for whose negligence the shipowner must be held liable. In *Northumbrian Shipping Co., Ltd.* v. *E. Timm & Son, Ltd.* (27), the same words occurring in the Canadian Water Carriage of Goods Act, 1910, had to be construed, and LORD WRIGHT said (28):

> "The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants or agents."

It would be strange if the shipowner were liable for the negligence of an expert who is called in just because work is beyond the competence of the owner but was not liable for that of the independent contractor. It may, indeed, be asked whether the expert is not typically an independent contractor.

Two Canadian cases may also be mentioned in the interest of uniformity. In *Australian Newsprint Mills, Ltd.* v. *Canadian Union Line, Ltd.* (29), it was said by COADY, J., in the Supreme Court of British Columbia (30):

> "It seems to me that the due diligence imposed by the statute and as interpreted by the authorities is not made out by evidence that this duty someone else was engaged to perform on behalf of the defendants—someone on whom the defendants relied and in whom the defendants had confidence. The duty of the defendants was to exercise due diligence and this applies to their servants and agents and that duty is absolute, except as to latent defects not discernable by the exercise of due diligence."

The learned judge supports this proposition by reference to numerous authorities, many of which I have cited. The other case is *The City of Alberni* (31), which contrasts the liability of the shipowner under the Water Carriage of Goods Act and his right to limit his liability under the Canada Shipping Act, 1934.

The plea that the shipowner is not liable for the negligence of an independent contractor failing as a general proposition, as it was bound to fail, it was then urged that it was a question of fact in each case and that, on the facts of the present case, the respondents were not liable for the negligence of the fitter employed by the ship repairers. It was for this reason that I stated the facts fully at the beginning of this opinion. Having done so, I must say at once that I find it impossible to distinguish between one independent contractor and another, or between one kind of repair and another. I have no love for the argumentative question "Where is the line to be drawn?", but it would be an impossible task for the court to examine into the facts of each case and determine whether the negligence of the independent contractor should be imputed to the shipowner. I do not know what criterion or criteria should be used, nor were any suggested. Take the case of repair. Is there to be one result if the necessary repair is slight, another if it is extensive? Is it relevant that the shipowner might have done the work by his own servants but preferred to have it done by a reputable shipyard? These and many other questions that will occur to your Lordships show that no other solution is possible than to say that the shipowners' obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done. In the course of the argument, some reliance was placed on the fact that the work of repair, or some of it, was inspected by a competent and experienced surveyor. In fact, the negligent work of the fitter was not supervised or inspected by anyone. But this was excused on the ground that it was work that was in practice left to the fitter—a distinction which, in my opinion, illustrates how impossible it is to draw the necessary line. But, supposing that the surveyor had inspected all that he should have inspected, what follows? If there has been no negligent work, there is nothing for him to discover. If there has been and he does not discover it, what does it avail the shipowner that a negligent inspection follows negligent workmanship? I find nothing to help the shipowner in this plea.

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(27) [1939] 2 All E.R. 648 ; [1939] A.C. 397.

(28) [1939] 2 All E.R. at p. 651; [1939] A.C. at p. 403.

(29) [1952] 1 D.L.R. 850.

(30) [1952] 1 D.L.R. at p. 854.

(31) [1947] 2 D.L.R. 647.

I come now, my Lords, to a matter which I should dispose of very shortly but for the weight attached to it in the Court of Appeal. I refer to the reference to the English Carriage of Goods by Sea Act, 1924, by Lord Wright in his speech in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (32), and the comments made on that reference by some of the noble Lords who took part in *Davie* v. *New Merton Board Mills, Ltd.* (33). In the earlier of these cases, the first point decided was (I quote from the headnote to the report) that the provision of a safe system of working in a mine is an obligation of the owner, who, if he appoints an agent to perform it, remains vicariously responsible for the agent's negligence. Lord Wright concurred in this decision and, in the course of his speech, referred to the Carriage of Goods by Sea Act as an example of the creation of an absolute obligation which is not discharged by the shipowner taking reasonable care to appoint a competent expert. It was, as I have said before, and as Lord Wright himself described it, an " analogy or instance ". The obligation imposed by the Act is not, as he said it was (34), to " exercise due diligence . . . to *provide* a seaworthy ship " but " *to make the ship seaworthy* ". His own earlier decision in *Angliss* (35) had been that a shipowner, who had a ship built for him and could presumably be said to " provide " the ship, was not, due precautions being taken, liable for the negligence of the ship-builders' workmen. It was natural that his observations in *Wilson's* case (32) should be pressed on the House in *Davie's* case (33) and should be the subject of comment in the speeches of their Lordships, but in neither case was the construction of the Hague Rules in any degree relevant to the decision, and I must say with great respect to the Court of Appeal that they appear to have attached undue weight to what was said in them.

My Lords, I ought not altogether to neglect the argument that was urged with a wealth of illustration to the effect that, where a defendant has properly employed an independent contractor, particularly in relation to a matter which calls for technical or special knowledge or experience, he is not liable if the plaintiff has been injured by the negligence of the independent contractor or his servants, provided such negligence was not apparent to him. Such cases as *Searle* v. *Laverick* (36), *Phillips* v. *Britannia Hygienic Laundry Co.* (37), *Haseldine* v. *Daw & Son, Ltd.* (38) and *Green* v. *Fibreglass, Ltd.* (39), were cited to support the proposition. No one, I think, doubts that, in some circumstances, a defendant can escape liability for the negligence of an independent contractor; nor could he doubt that, in other circumstances, he cannot so escape, for he would be faced by such authority as *Grote* v. *Chester & Holyhead Ry. Co.* (40), *Wilkinson* v. *Rea, Ltd.* (41), *Francis* v. *Cockrell* (42). I do not think it necessary to try to reconcile all the cases on this subject. It is surely sufficient to say that, in the context of the Hague Rules, it is patent that the obligation of the shipowner is in the latter category. As I have already pointed out, it was ultimately on the facts of the particular case that the respondents were compelled to rely; for the authority was overwhelming that the broad proposition, that the shipowner was protected by the employment of a competent independent contractor, could not stand. With this aspect of the case I have already dealt, and I will say no more about it.

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(32) [1937] 3 All E.R. at p. 641; [1938] A.C. at pp. 80, 81.
(33) [1959] 1 All E.R. 346; [1959] A.C. 604.
(34) [1937] 3 All E.R. at p. 641; [1938] A.C. at p. 80.
(35) [1927] 2 K.B. 456.
(36) (1874), L.R. 9 Q.B. 122.
(37) [1923] All E.R. Rep. 127; [1923] 2 K.B. 832.
(38) [1941] 3 All E.R. 156; [1941] 2 K.B. 343.
(39) [1958] 2 All E.R. 521; [1958] 2 Q.B. 245.
(40) (1848), 2 Exch. 251.
(41) [1941] 2 All E.R. 50; [1941] 1 K.B. 688.
(42) (1870), L.R. 5 Q.B. 501.

Your Lordships were pressed with the argument that McNair, J., had said (43) A he had "no doubt that the innumerable disputes between shippers and cargo owners have been settled on the basis of this judgment", i.e., the judgment in *Angliss* (44). Such a statement coming from so experienced a judge must carry great weight. But my difficulty lies in knowing just what were the disputes which were thus settled. As I have already pointed out, the only dispute in *Angliss* (44) was in respect of a defect due to the negligence of the ship-builders' employees, B and it may well be that what the learned judge said in regard to such a dispute has been treated as authoritative; but I find it impossible to suppose that his judgment has, in the face of all this authority, English and American, that I have cited, been regarded as governing every case where work of repair was entrusted to an independent contractor. Assuredly it should not have been.

Finally, there have been since *Angliss* (44) a number of cases in which the shipowner C has successfully claimed exemption under the Hague Rules. I hope I shall not be thought wanting in respect to the learned judges who decided them if I do not traverse them one by one. So far as the question turned on negligence by the ship-builder or his employee, I say nothing more about it; so far as it turned on the negligence of an independent contractor in respect of work on the shipowner's ship, I do not think that the latter was rightly held to D be entitled to exemption.

I will end by categorically repelling the second and third formal reasons in the respondents' case (45). They did not on the facts of the case by entrusting the vessel to reputable ship repairers perform their duty to exercise due diligence. They were vicariously liable for negligence of a servant of an independent contractor, namely, the fitter of Alexander Stephen & Sons, Ltd. E

It follows that the appellants are entitled to recover from the respondents the sum of £974 0s. 3d., the admitted amount of damage. The respondents must pay the appellants' costs of this appeal and in the courts below.

LORD MERRIMAN: My Lords, since I prepared my own opinion I have had the advantage of reading that of my noble and learned friend on the Woolsack, F with which I might well have been content to say that I am wholly in agreement. But, out of deference to the members of the courts below, from all of whom I am differing, I think that I ought to express my reasons for doing so in my own words.

It being found that this ship was unseaworthy because of the negligence of the fitter in the replacement of the inspection covers, it might appear on the G face of it that there is some inconsistency in holding that there was lack of due diligence when it is found that it was in accordance with ordinary prudent practice to leave this task to a fitter unsupervised. Morris, L.J., said that the conclusion of the trial judge was succinctly expressed in the words (46):

> "... unless the [respondents] are in law responsible for the negligence of H the fitter, as I have found it, they have discharged the onus of proving the exercise of due diligence so far as concerns the inspection covers."

Ormerod, L.J., who was in full agreement with the views of the other lords justices, rightly accepted (47) that this was the sole question in issue in the appeal. Morris, L.J., was of opinion that the question was primarily one I of fact. He began his judgment by a detailed summary of the main conclusions of fact made by McNair, J. He quoted the judge as finding (No. 15), that the cause of admission of sea water was (48)

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(43) [1958] 3 All E.R. at p. 267; [1959] 1 Q.B. at p. 91. (44) [1927] 2 K.B. 456.

(45) These were as follows:—" 2. Because, on the facts of the case, by entrusting the vessel to reputable ship repairers, the respondents performed their duty to exercise due diligence and did not delegate that duty. 3. Because the respondents are not vicariously liable for negligence of the servant of an independent contractor, namely, the fitter of Alexander Stephen & Sons, Ltd."

(46) [1960] 1 All E.R. at p. 199; [1960] 1 Q.B. at p. 551.

(47) [1960] 1 All E.R. at p. 210; [1960] 1 Q.B. at p. 568.

> " that the fitter at Glasgow ' negligently failed to secure the nuts on the inspection cover evenly or sufficiently, with the result that the working of the ship on the outward voyage was sufficient to produce the condition, by the time the [appellants'] cargo was loaded at Sydney, that the nuts had been loosened to such an extent that with the vessel rolling and waves striking the sides of the ship sea water was forced through the interstices below the inspection covers.' "

Other material facts he stated as follows (49):

> " (8) The task of tightening up the nuts, when an inspection cover is replaced, is one that is well within the competence of a skilled fitter. It is ordinary and prudent practice to leave this task to a fitter and not to have the supervision either of Lloyd's surveyors or of the owners' superintendent.
>
> " (9) Once the nuts have been tightened up, no visual inspection would detect any unevenness in the positioning of the cover or any insufficiency in tightening up.
>
> " (10) Alexander Stephen & Sons, Ltd., are a ship repairing concern of the highest repute."

Morris, L.J., considered that the case fell to be decided according to whether the carriers delegated the performance of their duty or whether they themselves performed and discharged their duty. He expressed his own view as follows (50):

> " There was no delegation by them of their duty to exercise due diligence to make their ship seaworthy. There was a performance by them of that duty. They did exercise due diligence by taking steps which included employing Alexander Stephen & Sons, Ltd. The particular task in regard to the inspection covers was well within the competence of a fitter; no supervision of a fitter was either in prudence or according to practice called for."

He added in conclusion that the negligent fitter was not their servant and there was no room for the application of the principle respondeat superior. He saw no reason why, on the particular facts of this case, it was not proper to hold that the carriers did exercise reasonable care to make the ship seaworthy.

After saying that McNair, J., had referred to what Wright, J., said and decided in *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (51), and to the speech of Lord Wright in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (52), which I quote later, he pointed out that, subsequently to the decision of the judge in the present case, this House had decided *Davie* v. *New Merton Board Mills, Ltd.* (53). He said that the Court of Appeal, therefore, had the advantage of the authoritative guidance which was given in the speeches in *Davie's* case (53) and were relieved of the task of venturing to analyse the earlier pronouncements which were there considered. The lord justice then reviewed the speeches in *Davie's* case (53). That case was an action as between master and servant founded in tort, the accident to the workman being caused, it was said, by the negligence of the employers, their servants, or agents in failing to provide a suitable drift which could be hammered safely without the risk of pieces flying off.

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(48) [1960] 1 All E.R. at p. 198; [1960] 1 Q.B. at p. 551.
(49) [1960] 1 All E.R. at p. 198; [1960] 1 Q.B. at p. 550.
(50) [1960] 1 All E.R. at p. 199; [1960] 1 Q.B. at p. 552. (51) [1927] 2 K.B. 456.
(52) [1937] 3 All E.R. 628; [1938] A.C. 57.
(53) [1959] 1 All E.R. 346; [1959] A.C. 604.

A I venture to doubt whether that case would have received the attention that it did in the discussion of the present case in the Court of Appeal if it had not been for the fact that, in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (54), another case between master and servant, LORD WRIGHT had said in his speech:

> "But in truth the employer's obligation, as it has been defined by this House, is personal to the employer, and one to be performed by the employer per se or per alios. B If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable C care to appoint a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance."

It was the intrusion of that analogy into the law of tort as between master and servant which has, in my opinion, been responsible for the introduction of so much of this latter branch of the law into the consideration of the present D problem. I do not propose to pursue the discussion which took place in the *Davie* case (55) about whether what was said by LORD WRIGHT in the *Wilsons & Clyde Coal* case (56) was inconsistent with, or could be reconciled with, what he said as the judge of first instance in the *Angliss* case (57). Various cases of tort in which the employment of third parties is dealt with in connexion with the duty to take reasonable care have been discussed on the basis that the duty E to take reasonable care is the same as the duty to exercise due diligence. Much depends, however, on the context in which the duty is postulated. I am not convinced that cases of tort based on the relationship of master and servant, invitor and invitee, and the like, afford a sufficient basis for construing words embodied by statute in a bill of lading, the interpretation of which has been the subject of a long series of decisions. F

In the early part of his judgment WILLMER, L.J., dealt with many of the authorities on which the cargo owners relied in support of the contention that the shipowners are in law responsible for the negligence of the fitter. The following are the more important:—In *Dobell & Co.* v. *S.S. Rossmore Co.* (58), the Court of Appeal was concerned with a bill of lading which incorporated s. 3 of the Harter Act, which had been passed by Congress in 1893. By that clause, it was enacted G that, if the owner of any vessel shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held to be responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel; or from other perils, to which it is unnecessary to refer. LORD ESHER, M.R., said of this section (59): H

> "It is obvious to my mind, from a consideration of the facts of this case, that the words of the 3rd section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port." I

KAY, L.J., said (60):

> "It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate

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(54) [1937] 3 All E.R. at p. 641; [1938] A.C. at pp. 80, 81.
(55) [1959] 1 All E.R. 346; [1959] A.C. 604.
(56) [1937] 3 All E.R. 628; [1938] A.C. 57.
(57) [1927] 2 K.B. 456.
(58) [1895] 2 Q.B. 408.
(59) [1895] 2 Q.B. at p. 413.
(60) [1895] 2 Q.B. at p. 416.

A by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent."

A. L. SMITH, L.J., said (61):

> "To get himself within the exemption which is in his favour the ship-
> B owner must make out that he has by himself or his agents exercised the due diligence which is required."

American decisions were referred to which, as WILLMER, L.J., acknowledges in his judgment, show that the approach to the problem of construing the Harter Act was the same on both sides of the Atlantic. *The Irrawaddy* (62)
C decided that the purpose of the Harter Act was to relieve the shipowner from latent defects. In *The Mary L. Peters* (63), it was held that what was required was the diligence of the owner or those who represented him in the inspection and repair of the ship before sailing. In *The Colima* (64), it was held that the owner was responsible for such agents as he might employ, and that what was required was due diligence in the work itself. It was pointed out that, on any other construction, owners would escape all responsibility merely by employing
D agents of good repute. The decision in *Nord-Deutsche Lloyd* v. *President, etc., of Insurance Co. of North America* (65) was to the same effect.

In *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (66), a case on which much reliance was placed both in the argument for the shipowners and in the judgment appealed from, WRIGHT, J., said: "The question is: How wide is the category of agents or servants with
E reference to the obligation now being considered." Before returning to a closer examination of that case, I will refer to other cases which are in line with those already cited.

Paterson Steamships, Ltd. v. *Canadian Co-operative Wheat Producers, Ltd.* (67) was a case under the Canadian Water Carriage of Goods Act, 1910, by s. 6 of which the protection afforded to the shipowner is conditional on his having
F exercised due diligence to make the vessel seaworthy. Unlike the English Act of 1924 and the Australian Act under which the present case arises, but like the Harter Act, the Canadian Act does not contain an express abolition of the absolute warranty of seaworthiness which prevailed at common law. In the judgment it was pointed out (68) that the Canadian Act had a certain kinship with similar legislation in other countries on the same subject-matter, in particular, with the
G Harter Act, 1893, the New Zealand Sea Carriage of Goods Act, 1922, and the British Carriage of Goods by Sea Act, 1924, with which in substance the Australian Act of 1924 is identical. LORD WRIGHT said (68):

> "These Acts differ in general scheme and framework from the Canadian Act, but in certain respects decisions under them may be helpful in con-
> H struing the Canadian Act",

and added:

> ". . . all these Acts agree in this respect, that they superimpose statutory restrictions on the freedom possessed by the shipowner at common law to restrict his liability as carrier, and at the same time give him the benefit of
> I statutory provisions in his favour."

He went on:

> "These Acts accordingly cannot be understood or construed except in the

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(61) [1895] 2 Q.B. at p. 417.
(62) (1898), 171 U.S. 187.
(63) (1895), 68 Fed. Rep. 919.
(64) (1897), 82 Fed. Rep. 665.
(65) (1901), 110 Fed. Rep. 420.
(66) [1927] 2 K.B. at p. 460.
(67) [1934] All E.R. Rep. 480; [1934] A.C. 538.
(68) [1934] All E.R. Rep. at p. 485; [1934] A.C. at p. 544.

> light of the shipowners' common law liability and the usual methods of limiting that liability previously in vogue ", A

which he then proceeded to examine.

He noted (69) that what was meant in the British Act by due diligence to make the ship seaworthy was discussed in the *Angliss* case (70), saying: " it is not limited to personal diligence on the part of the owner ", and he concluded a full examination of the terms of the Canadian Act, as follows (71): B

> " The operative obligation to provide a seaworthy ship is thus under the Act reduced, even when unseaworthiness causes the loss, to an obligation which may be compendiously described as an obligation to use due diligence to make the ship seaworthy."

In *Northumbrian Shipping Co., Ltd.* v. *E. Timm & Son, Ltd.* (72), the wording C of s. 6 of the Canadian Act was again in question. Your Lordships' House dismissed the appeal from the Court of Appeal, which had upheld the decision of MACKINNON, L.J., sitting as a judge of first instance, that there had been a breach of the duty to exercise due diligence to make the ship in all respects seaworthy. In the course of his speech, with which LORD ATKIN and LORD THANKERTON expressed their agreement, LORD WRIGHT said (73): D

> " Whether the appellants could successfully rely on s. 6 depended on whether they could show that they exercised due diligence to make the vessel seaworthy, and thus fulfilled the condition imposed by the section. This issue turned solely on the sufficiency of the bunkers on leaving Vancouver. As already stated, MACKINNON, L.J., held that they had not fulfilled the condition. E The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants or agents."

In *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* (74), the relevant provision in the charterparty was that the shipowner should not be liable for loss or damage resulting from unseaworthiness unless caused by F want of due diligence on the part of the shipowner to make the vessel seaworthy. In delivering the leading judgment in the Court of Appeal, MACKINNON, L.J., said (75):

> " The limitation and qualification of the implied warranty of seaworthiness, by cutting it down to use ' due diligence on the part of the shipowner to make the ship seaworthy ' are a limitation and qualification more apparent G than real, because the exercise of due diligence involves, not merely that the shipowner personally shall exercise due diligence, but also that all his servants and agents shall exercise due diligence, as is pointed out in a note in SCRUTTON ON CHARTERPARTIES (14th Edn.), pp. 110, 111, which says that this variation will not be: ' . . . of much practical value in face of the dilemma that must constantly arise on the facts. H In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness, but of so latent a nature that due diligence could not have discovered it) are not likely to occur often '."

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MACKINNON, L.J., was quoting from SCRUTTON ON CHARTERPARTIES (14th Edn.) published in 1939. The same view is expressed in the text of the 12th and 13th

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(69) [1934] All E.R. Rep. at p. 486; [1934] A.C. at p. 547.
(70) [1927] 2 K.B. 456.
(71) [1934] All E.R. Rep. at p. 488; [1934] A.C. at p. 550.
(72) [1939] 2 All E.R. 648; [1939] A.C. 397.
(73) [1939] 2 All E.R. at p. 651; [1939] A.C. at p. 403.
(74) [1939] 2 All E.R. 855.
(75) [1939] 2 All E.R. at p. 857.

A Editions, edited by LORD PORTER and MCNAIR, J. MACKINNON, L.J., had very great experience in this class of case, and had himself edited the 5th to the 11th Editions of that work. Of the decision of your Lordships' House, affirming the decision of the Court of Appeal (76), it is sufficient to say that LORD WRIGHT, with whose judgment VISCOUNT MAUGHAM and LORD ATKIN concurred, says this (77):

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> " The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner ",

and added: " In effect, such an exception can only excuse against latent defects "; C and he said (78) that he agreed with MACKINNON, L.J.'s statement of the law. No disapproval of this statement of the law was expressed in any of the other speeches.

As there has been no finding that this was a case of latent defect, it is unnecessary to discuss the question whether careless work which could obviously have been detected by competent supervision while the work was proceeding could be D described as a " latent defect " merely because subsequent inspection would not necessarily detect it.

The *Angliss* case (79) concerned a bill of lading incorporating the Australian Sea Carriage of Goods Act, 1924, which is in all material respects identical with the English Act. It raised the question of the liability for unseaworthiness resulting from negligence of a workman in the employ of ship-builders of repute, E whom the shipowner had employed to build the ship in question. WRIGHT, J., said (80):

> ". . . the Acts have expressly abolished the previous absolute obligation to provide a seaworthy ship and have substituted an obligation to use due diligence to that effect."

F The ratio decidendi can be found in the passage that follows. He pointed out that the carrier might not be the owner of the ship, but merely the charterer; he might not have contracted for the building of the ship, as in the *Angliss* case (79), but merely have purchased her, possibly years after she had been built, and added (80):

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> " In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier and it is illogical that there should be such difference in the carrier's obligations merely because he has bought the ship by the method of contracting with the builders to build it for him. In addition, if the carrier were held liable for the bad workmanship of the builders' men, he might equally be held liable H for bad workmanship by the men employed by the various sub-contractors who supply material for the builders, such as steel-workers in furnaces and rolling mills, or who supply special articles such as castings, pumps or proprietary machines, which would involve an almost unlimited retrogression."

Whatever retrogression may be involved in an attempt to fix the shipowner with liability for bad workmanship before the ship comes into existence as a ship, I or before an existing ship comes into his possession at all, there is, in my opinion, no question of undue retrogression in attaching to the shipowner responsibility for a person in the employ of those to whom he has entrusted the repair of his own ship.

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(76) [1940] 3 All E.R. 405; [1940] A.C. 997.
(77) [1940] 3 All E.R. at p. 408; [1940] A.C. at p. 1001.
(78) [1940] 3 All E.R. at p. 409; [1940] A.C. at p. 1003.
(79) [1927] 2 K.B. 456.
(80) [1927] 2 K.B. at p. 461.

Paterson S.S., Ltd. v. *Robin Hood Mills, Ltd.* (81), was another case under the Canadian Act of 1910. Two cases had been tried, the action of the cargo owner against the ship and an action by the shipowner to limit his liability. The latter alone was the subject of an appeal to the Privy Council. In the other action, the lack of due diligence alleged was in connexion with the adjustment of the compass, and the important point is that this involved the alleged neglect of a compass adjuster, who might be regarded as an independent expert, as well as of the master who had checked his adjustment. In giving the judgment of the Board in the limitation action, Lord Roche said (82) that, in the other action, the question was whether the condition of the exercise of due diligence to make the vessel seaworthy had been fulfilled, as it was necessary that it should be fulfilled to bring into operation the protective provisions of s. 6 of the Act. He added (82):

> " The condition is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose—see *Dobell & Co.* v. *S.S. Rossmore Co.* (83) "

and he added (82):

> " Therefore, with regard to the Thordoc in the cargo action, want of diligence in the compass adjuster who adjusted the compasses or in the captain who said he checked or verified the adjuster's work would be material, and a finding adverse to the shipowner could be arrived at upon the ground of want of diligence in these persons."

This statement of the law was followed by the Privy Council in *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (84), a case under the Canadian Water Carriage of Goods Act, 1936. Lord Somervell of Harrow, who delivered the judgment, also repeated what had been said by Lord Macmillan in *Stag Line, Ltd.* v. *Foscolo Mango & Co., Ltd.* (85), about the importance of remembering that the Act was the outcome of an international conference, and the rules in the schedule having an international currency, and about the desirability of uniformity of interpretation. See also Atkin, L.J., in *Brown & Co., Ltd.* v. *Harrison, Hourani* v. *Harrison* (86), and Lord Hailsham, L.C., in *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (87), where, of the words " management of the ship " in art. IV, incorporated in the English Act of 1924, he said that they first appeared in an English statute in that Act, but nevertheless they had a long judicial history in this country. The same words were to be found in the well-known Harter Act and had often been incorporated in bills of lading which had been the subject of judicial consideration in the courts of this country. He was unable to find any reason for supposing that the words used in the Act of 1924 had any different meaning from that which had been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; adding (87):

> " and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion."

The same considerations apply, in my opinion, to the words in question in this appeal.

It seems to me to be impossible to resist the conclusion that, when those words were chosen by international convention as being the test of the carrier's liability, and at the same time of his rights and immunities, the words were selected because they had already acquired a known connotation. Equally, it is impossible, in my opinion, to ignore the desirability of preserving the uniformity of interpretation which has been given to these words in American, Canadian and New Zealand authorities, as well as in decisions of the courts of this country.

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(81) (1937), 58 Lloyd's Rep. 33. (82) (1937), 58 Lloyd's Rep. at p. 40.
(83) [1895] 2 Q.B. 408. (84) [1959] 2 All E.R. at p. 744; [1959] A.C. at p. 602.
(85) [1931] All E.R. at p. 677; [1932] A.C. at p. 350.
(86) [1927] All E.R. Rep. at p. 202.
(87) [1928] All E.R. Rep. at p. 100; [1929] A.C. at p. 230.

Again, in *Australian Newsprint Mills, Ltd.* v. *Canadian Union Line, Ltd.* (88), a case in which a defect would have been obvious if care had been exercised in the course of overhaul and repairs, the judge (COADY, J.), said (89):

> " It is my view on the authorities, that the defendants cannot avoid liability to the plaintiff by attempting to cast upon the shoulders of some third party, engaged by them to do work upon this ship, the duty which the Act places upon the defendants."

To the same effect was the decision in the New Zealand case, *B. J. Ball (New Zealand), Ltd.* v. *Federal Steam Navigation Co., Ltd.* (90), and in *American Linseed* v. *Norfolk and North American Steamship Co.* (91). Finally, in *International Packers, Ltd.* v. *Ocean S.S. Co., Ltd.* (92), a case under the Australian Act of damage to cargo by the entry of sea water through the hatch covers, MCNAIR, J., said:

> " The obligation imposed by art. III, r. 2, like the obligation imposed by art. III, r. 1, to exercise due diligence to make the ship seaworthy, is an obligation imposed upon the shipowner himself which he cannot escape on proof that he employed a competent independent contractor who was in fact negligent."

Counsel for the respondents admitted—quite rightly, as I think—that the point is in no way affected by the learned judge's emendation in the present case of " surveyor " for " contractor " (93).

Great reliance was placed by counsel for the respondents on the decision of HILBERY, J., in *Cranfield Bros., Ltd.* v. *Tatem Steam Navigation Co., Ltd.* (94). This was a case under the Canadian Act of 1936 concerning damage to a cargo of wheat by unseaworthiness owing to the leakage of sea water through a rivet hole, held by the judge to have been in a defective condition caused by corrosion. HILBERY, J., while recognising that the shipowner does not discharge his duty to exercise due diligence to make the ship seaworthy merely by establishing that she passed her classification survey, or merely by showing that he has appointed someone who by qualification should be a skilled person to examine it, said (95) that both these things were elements to be taken into account in considering whether the shipowner had exercised due diligence to make the ship seaworthy. He found that there had been no lack of diligence about the ship's surveys for her classification, or about the frequency with which she was dry docked, and he held that the graving dock company concerned were highly skilled, experienced and competent people to examine the vessel and to report on any disrepair that might be found, and that their representative was a highly experienced and responsible man, suitably skilled to make such an examination and to report, and that he did, when the vessel was docked in 1937, make a proper and thorough examination of her with a view to ascertaining anything that required to be done in the way of repairs, and that he saw this very rivet, but noticed nothing the matter with it then. The judge called attention to the evidence that the only way of finding that defective rivet would have been to scale the plating, and that it had been said that it would have been prudent to scale the plating, in the way of the collision bulkhead particularly. But he said (96) that it was one thing to say in court that it would have been prudent, but he had to consider the question in the circumstances that obtained in the graving dock at Barry or at Vancouver before the ship set out on her homeward voyage. He was not satisfied that a reasonably careful owner would have scaled the plating round the area of this particular rivet, and was satisfied that a reasonable examination was made. Hilbery, J., however, having been referred to *The Dimitrios N. Rallias* (97), doubted, though he did not think it necessary to decide, whether this was a latent defect within the strict meaning of art. IV, r. 2 (p).

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(88) [1952] 1 D.L.R. 850.

(89) [1952] 1 D.L.R. at p. 854.

(90) [1950] N.Z.L.R. 954.

(91) (1929), 32 Fed. Rep. 292.

(92) [1955] 2 Lloyd's Rep. at p. 236.

(93) [1958] 3 All E.R. at p. 268; [1959] 1 Q.B. at p. 94.

(94) (1939), 64 Lloyd's Rep. 264.

(95) (1939), 64 Lloyd's Rep. at p. 267.

It is, however, worth noting that the industry of counsel for the appellants brought to our attention the fact that this case was decided on July 3 and 4, 1939, and that, so far as the report shows, MacKinnon, L.J.'s judgment, already quoted, in the *Smith, Hogg* case (98), which had been given on May 12, 1939, was not cited to Hilbery, J. It may well be that, if Hilbery, J., had been aware of what had been said by MacKinnon, L.J., six weeks earlier, he might have approached the question of the responsibility of the shipowner differently, and might have felt himself obliged to come to a definite decision whether the case was truly one of latent defect, on which the shipowner could escape the consequences of that recent judgment in the Court of Appeal.

Of the argument for the cargo owners, based on what he described as " a consistent stream of authority " for the principle contended for by the cargo owners, Willmer, L.J., said (99) that he certainly appreciated its force, but came to the conclusion that it was not well founded. I confess that I am not convinced by the reasons for this decision. In the first place he adopts the criticism of McNair, J., that the construction sought to be put on art. III, r. 1, would be, in effect, to substitute for the new qualified obligation something barely distinguishable from the old absolute undertaking, except in the necessarily rare cases of true latent defect. But that is precisely what MacKinnon, L.J., had said in *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* (98). Incidentally, although the point must not be pressed too far, it is the interpretation put on the words of art. III, r. 1, by the learned judge himself as editor of the 12th and 13th Editions of Scrutton on Charterparties.

Next, while Willmer, L.J., recognises that the words are wide enough to render the carrier liable for lack of due diligence on the part of his own servants and, possibly, of an independent contractor engaged by the carrier to perform on his behalf any part of the ordinary business of carrying goods (e.g., a firm of stevedores employed to load cargo), he could well understand that failure on the part of such contractor to exercise due diligence could be held to be a failure on the part of the carrier. Similarly, the shipowner might become liable for want of due diligence on the part of some independent person to act as his representative, such as a firm of ship's agents, or surveyor or engineer appointed to supervise the building or repair of a ship, as being the equivalent of his own want of due diligence, on the ground that such persons could properly be regarded in law as his servants, pro hac vice, although not in his regular employment. But the lord justice says (100) that this is far removed from saying that, every time a shipowner engages some outside person or independent contractor to perform some work on a ship which goes outside the carrier's own business of carrying goods, he renders himself liable for any lack of due diligence on the part of such person or contractor. For my part, I doubt whether putting a ship in dry dock for a periodical survey combined, as in this case, with her load line survey, could properly be described as going outside the carrier's own business of carrying goods.

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(96) (1939), 64 Lloyd's Rep. at p. 269. (97) (1922), 13 Lloyd's Rep. at p. 366.
(98) [1939] 2 All E.R. 855.
(99) [1960] 1 All E.R. at p. 219; [1960] 1 Q.B. at p. 580.
(100) [1960] 1 All E.R. at p. 220; [1960] 1 Q.B. at p. 582.

A This leads the lord justice to the conclusion that, where the matter in question is one of the building, re-building or repairing of a ship, or of the supply of equipment or spare parts, there is no reason in principle why the court cannot be invited to conclude, as a jury question, that the carrier has exercised due diligence, on proof (a) that he has engaged a reputable contractor or supplier; (b) that he has provided for the work to be properly superintended by his own B representative, and (c) that such representative has in fact exercised due diligence. I am not quite clear, as a matter of law, how conditions (b) and (c) fit the case of the negligence of a fitter of whom it is said, as a matter of fact, to be the ordinary and prudent practice to leave him unsupervised by anybody.

It is to be observed that, in the concluding passage of his judgment, WILLMER, L.J. (101), utters the caution that, on future occasions, the shipowner who C entrusts the performance of his duties to a negligent and unsupervised fitter may find that he is held responsible. The question is whether there is any reason why the responsibility should not attach in this case.

The lord justice goes on to draw a distinction between employing someone else to carry on one's own business, and engaging someone else to perform something which is his business. It seems to me that the same operation may D well be the business of both. How is it less the business of the shipowner to have some particular repair done than it is the business of the repairer whom he employs to do the repair? The conclusion reached by WILLMER, L.J., is that, in so far as the shipowner can be said to delegate to the repairers at all, he delegates the performance of the actual job of doing the repairs and making the ship seaworthy. Just so. The authorities already quoted make it clear that what is E required is due diligence in the work itself, and that this is the personal responsibility of the shipowner.

This brings me to the lord justice's review of the *Angliss* case (102). For reasons which will be apparent from what I have already said, I disagree with his statement that any examination of the authorities must begin with that case. On the contrary, it is implicit in the statement already quoted from the judgment F of MACKINNON, L.J., in the *Smith, Hogg* case (103), and is expressed by LORD HAILSHAM in the *Gosse Millerd* case (104), that one must begin with the Harter Act and the authorities under that and similar Acts which substituted a statutory obligation for the absolute warranty of seaworthiness at common law. Much reliance was placed on a short passage of the judgment of LORD WRIGHT, when he said (105):

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> " Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects."

This passage was relied on by WILLMER, L.J., and in the argument, as authority H for the proposition that, in respect of the protection of the shipowner by the employment of a specialist of repute, there is (106) no

> " distinction in principle between bad workmanship on the part of the original builders' men and bad workmanship on the part of the repairers' men at a later period in the ship's history.

I In my opinion, this ignores the ratio decidendi of *Angliss* (102), which is based on the consideration that, whether a ship is built for, bought by, or chartered to the carrier, he should not be held liable for bad workmanship for which he had no

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(101) [1960] 1 All E.R. at p. 226; [1960] 1 Q.B. at p. 592.

(102) [1927] 2 K.B. 456.

(103) [1939] 2 All E.R. at p. 857.

(104) [1928] All E.R. Rep. at p. 100; [1929] A.C. at p. 230.

(105) [1927] 2 K.B. at p. 462.

(106) [1960] 1 All E.R. at p. 220; [1960] 1 Q.B. at p. 583.

A responsibility before the ship came into his possession. There is no doubt that the judgment in the *Angliss* case (107) covers wider ground. But, when it is said that the decision in *Angliss* (107) has been repeatedly followed with approval, it is important to remember how limited was the extent of the actual decision. From this it follows that, valuable as was the survey of what, in this country, was new legislation dealing with the carriage of goods by sea, much of what was said was obiter, and it must be recalled that LORD WRIGHT, as he had meanwhile B become, in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (108), said what has already been quoted by way of illustrating the duty of an employer to provide a safe system of working in a mine.

Finally, WILLMER, L.J., found that the work done by the fitter was well within the competence of one of the engineer members of the ship's crew, and, as such, was something within the ordinary course of the carrier's business, rather than a C matter calling for the exercise of any specialised technical skill. In fact, the work was done in this very way after the defect had been discovered. Nevertheless, he held that the case must be approached on the basis that the replacement of the inspection covers of the storm valves was part of the specialised and technical work which Alexander Stephen & Sons were properly engaged to do. On this point, it was argued that it would be wholly artificial and unreasonable to isolate D work which was plainly incidental to the specialised operation of repairing the ship because it was in itself the type of work which required no specialised or technical knowledge or experience. I am not convinced by this argument, but, assuming it to have some force, it seems to me that a much more unreasonable breach is made in the duty of the carrier to the cargo owner if the carrier can escape responsibility for negligent performance of work which is well within the E scope of his own business and the competence of his own servants by entrusting the whole operation to a ship repairer of repute.

I would allow this appeal, and enter judgment for the appellants for the amount claimed.

F **LORD RADCLIFFE:** My Lords, I have no doubt that this case is important in its implications and that it has merited the full consideration that it has received at all its hearings. Nevertheless, it appears to me that the answer to be returned to the problem it raises depends on a very short question, what kind of obligation is imported by the words "shall be bound . . . to exercise due diligence to . . . make the ship seaworthy" that appear in art. III, r. 1, of the rules scheduled to the Australian Sea Carriage of Goods Act, 1924. As we G know, these are in fact the Hague Rules. Read them in one way, the answer must necessarily be for the appellants, the cargo owners; read them in another, it must be for the respondents, the carriers. The relevant facts are of the simplest. Cargo has been damaged in the course of a voyage, and it was damaged because the ship on which it was carried was unseaworthy. The unseaworthiness was caused by the carelessness of a fitter employed by skilled repairers working for H the carriers. The work that they were doing was in connexion with the ship's No. 2 special survey and annual load line survey, in other words, work which was reasonably required in order to keep the ship in a seaworthy condition.

Now I am quite satisfied that, treating the carriers as a legal person, a limited company whose mind, will and actions are determined by its officers and servants, they did nothing but what they should have done as responsible and I careful persons in the carrying business. They were not themselves in the repairing business, and there is no reason why they should have been, but they were mindful of their duty to have their ship in good order for its voyage or voyages, and they not only entrusted her to a ship-repairing company of repute for reception in dry dock but also employed an experienced and competent marine superintendent to act on their behalf. He, in his turn, acted with more than usual caution in requiring all the ship's storm valves to be opened up for inspection and, although it was the carelessness of one of the repairers' fitters that left one of these valves ineffectively closed, it was ordinary prudent practice to entrust the work of closing up to a fitter and not to subject such work to an independent inspection. I see no ground, therefore, for saying that the carriers themselves were negligent in anything that they did. If the content of their obligation is that they should, as a legal person, observe the standard of reasonable care that would be required at common law in a matter of this sort, which involves skilled and technical work, and if there is nothing more in their obligation than that, then I should not regard them as in default, or consequently, as liable to the cargo owners. Full and instructive as are the several judgments of the members of the Court of Appeal, I do not think that, in the end, they amount to more than an acceptance of this standard of obligation and a drawing of the necessary conclusion from the facts.

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(107) [1927] 2 K.B. 456.

(108) [1937] 3 All E.R. at p. 641; [1938] A.C. at pp. 80, 81.

But there is, on the other hand, a way of looking at the intrinsic nature of the obligation that is materially different from this. It is to ask the question, when there has been damage to cargo and that damage is traceable to unseaworthiness of the vessel, whether that unseaworthiness is due to any lack of diligence in those who have been implicated by the carriers in the work of keeping or making the vessel seaworthy. Such persons are then agents whose diligence or lack of it is attributable to the carriers. An inquiry on these lines is not concerned with distinctions between carelessness on the part of officers or servants of the carriers or their supervising agents on the one hand and carelessness on the part of their contractors or those contractors' contractors on the other. The carriers must answer for anything that has been done amiss in the work. It is the work itself that delimits the area of the obligation, just as it is the period " before or at the beginning of the voyage " that delimits the time at which any obligation imputed to the carriers can be thought to begin. If these last points are borne in mind, I think that the difficulties about " an almost unlimited retrogression " (see *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (109)) tend to disappear; for there is a point in each case at which defective work is not the work of any agent of the carrier and the duty to be diligent is no more than a duty to be skilled and careful in inspection. But the inspection that is relevant in such a case is not merely the carrier's inspection of his contractor's work; it is inspection on the part of anyone working for the carrier who is concerned to make sure that he does not accept defective materials or use defective tools.

If one had to choose between these two alternatives without any background in the way of previous authority or opinion with regard to the interpretation of this section of the Hague Rules, I think it would be very difficult to know which way one ought to turn. The natural meaning of the words does not seem to me to accord well with either reading. Whatever the responsibility is, it is imposed on the carrier and no one else—that is clear—but it is equally clear that no one would regard the carrier as being in the wrong merely because he gets whatever requires to be done, inspection, survey or work, done for him by someone else. If the respondents' reading is adopted, the one that has commended itself to McNAIR, J., and the Court of Appeal, one must treat the words " due diligence to make the ship seaworthy " as if they were equivalent to " due diligence to see that the ship is made seaworthy ", and that is not the same thing. On the other hand, the reading for which the appellants contend is not in truth consistent with the grammatical meaning of the words they have to rely on, for the exercise of due diligence to which the carrier would be held would include the performance or omission of acts that were not in law the acts A of the carrier at all.

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(109) [1927] 2 K.B. at p. 461.

Such general considerations as occur to me appear to favour the cargo owner's claim. He is not in any sense behind the scenes with regard to what is done to the vessel or how or when it is done. His concern with it begins and ends with the loading and discharge of his goods. The carrier on the other hand must have some form of ownership of the vessel and some measure of responsibility B for seeing that it is fit and in proper condition for the carriage undertaken. He may qualify that responsibility by stipulation, if the law allows him to; or the law may write out the terms of his responsibility for him; but, within those limits, the responsibility is there. I should regard it as unsatisfactory, where a cargo owner has found his goods damaged through a defect in the seaworthiness of the vessel, that his rights of recovering from the carrier should depend C on particular circumstances in the carrier's situation and arrangements with which the cargo owner has nothing to do; as, for instance, that liability should depend on the measure of control that the carrier had exercised over persons engaged on surveying or repairing the ship, or on such questions as whether the carrier had, or could have, done whatever was needed by the hands of his own servants or had been sensible or prudent in getting it done by other hands. D Carriers would find themselves liable or not liable, according to circumstances quite extraneous to the sea carriage itself.

What I think should determine this appeal, however, is what we know of the history of these words "due diligence to make the ship seaworthy" in connexion with sea carriage of goods, and what I regard as the settled interpretation of their significance which has been alluded to from time to time in the English E courts. These sources seem to me to be wholly in favour of the appellants' claim. We have, to begin with, the common learning that the words in question were adopted by international convention in the Hague Rules at a time when they had been for many years familiar in the Harter Act of the United States. We know what content successive decisions of American courts had given those words; that the carrier was responsible to the cargo owner unless due diligence F in the work had been shown by every person to whom any part of the necessary work had been entrusted, no matter whether he was the carrier's servant, agent or independent contractor. "Merely employing agents of good repute" was not enough. There is no point in lengthening this opinion by citing the individual cases which have already been mentioned in the opinion of my noble and learned friend on the Woolsack and to which reference can be found in our own text- G books on carriage of goods by sea.

I regard *Dobell & Co.* v. *S.S. Rossmore Co.* (110) as affirming for English courts the same view of the significance of these words in the Harter Act, and I ought to say in passing, since the point was raised, that I cannot see why the meaning of the particular words "exercise due diligence" should be affected by the circumstance that the Harter Act was brought into force in the United H States at a time when a carrier's absolute warranty of seaworthiness was still implied. It is true that the act of negligence in the *Dobell* case (110) was that of the ship's carpenter, who was probably the carrier's servant in the ordinary sense, but there is no warrant for treating the decision of the Court of Appeal as turning on that point. On the contrary, all three lords justices agreed in I rejecting the idea that the diligence to be exercised is merely that of the owner himself and in insisting that his responsibility extends to the acts of anyone who may be his agent for the purpose of putting the ship in order. I will quote a passage from the judgment of KAY, L.J. (111), which is crucial to this issue, for, if it is correct, it strikes at the root of the respondents' argument in the present case. He says:

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(110) [1895] 2 Q.B. 408.

(111) [1895] 2 Q.B. at p. 416.

> "The essential question then is, Was there want of due diligence on the part of the owners? It is said that they did all that they could by providing proper equipment and appointing proper agents. It was the duty of the ship's carpenter to close this porthole, and they appointed a carpenter to whose competence no one makes any objection. It is said, therefore, that they personally exercised diligence, and thereby fulfilled the condition. I do not agree with this contention. It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent. It is obvious that the shipowner cannot himself with his own hands make the ship seaworthy; he must act through other persons; but I do not read the contract as exempting him from liability in the case of the negligence of the agents whom he employs to act for him in this respect."

This is not the doctrine of respondeat superior, or of a limited company's liability for the acts of its servants.

It was in 1924 that the Hague Rules were adopted into the English law of carriage of goods by sea, the same year as that in which they became law in Australia. It appears to me that, since then, there has been in this country a steady current of judicial and expert opinion to the effect that art. III, r. 1, of those rules is to be understood in the sense explained in *Dobell & Co.* v. *S.S. Rossmore Co.* (112) or, to put it in another way, in the Harter Act sense. With great respect to the judgments that have been given in the High Court and the Court of Appeal, I think that, if they were to stand, they would be the first diversion of that current on a different course. Again, it is not necessary that I should make a detailed citation of what is already before your Lordships. What is stressed throughout is that the obligation of the carrier is "not limited to his personal diligence" (see the *Angliss* case (113)). The carrier's responsibility for the diligence of all those whom he employs to discharge his own primary duty has been stated and recognised by such eminent commercial lawyers as Lord Roche in delivering the opinion of the Judicial Committee in *Paterson S.S., Ltd.* v. *Robin Hood Mills, Ltd.* (114), by Lord Somervell of Harrow (see *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (115)), by Lord Wright (see *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* (116), *Wilsons & Clyde Coal Co., Ltd.* v. *English* (117)), and by MacKinnon, L.J., in *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* (118). The learned lord justice there summarises the practical effect of art. III, r. 1, in words avowedly drawn from the then current edition of Scrutton on Charterparties. The 13th edition of that work, published in 1931 and edited jointly by Mr. (later Lord) Porter and Mr. (now Mr. Justice) McNair, makes the following comment on that article (119):

> "In appearance the undertaking to use due diligence to make the ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no great gain to the shipowner by the substitution. For . . . the relief to the shipowner by the substitution will occur only in cases where the unseaworthiness is due to some

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(112) [1895] 2 Q.B. 408.

(113) [1927] 2 K.B. at p. 460.

(114) (1937), 58 Lloyd's Rep. at p. 40.

(115) [1959] 2 All E.R. at p. 744; [1959] A.C. at p. 602.

(116) [1934] All E.R. Rep. 480; [1934] A.C. 538.

(117) [1937] 3 All E.R. at p. 641; [1938] A.C. at pp. 80, 81.

(118) [1939] 2 All E.R. at p. 857.

(119) At p. 513, note (*z*).

> cause which the due diligence of all his servants and agents could not discover, e.g., in the case of 'latent defects not discoverable by due diligence'."

I cannot see that there is anything to quarrel with in this analysis of the carrier's responsibility. But it is quite inconsistent with judgment for the respondents in this case. Here there was no latent defect that could not be detected. There was carelessness in completing the work of survey for the carriers, and no one corrected it.

The passage that I have just quoted vouches the *Angliss* case (120) as its authority. It is an odd feature of the present appeal that the argument for the respondents has, nevertheless, treated the same decision as its main support, and that the Court of Appeal's judgments were evidently very much influenced in their favour by what the learned judges regarded as the principle of that decision. In my opinion, there was in that a misconception. I do not consider that judgment for the cargo owners in this case would be inconsistent with anything that *Angliss* (120) decided. It becomes necessary, therefore, to see clearly what the decision was. *Angliss* (120) was a case about the liability of carriers for the bad workmanship of employees of ship-builders occurring during the construction of the carrying vessel. It was not about carelessness of ship repairers in carrying out survey or repairs. The analogy between builders and repairers is as delusive as it is attractive; it leads only to confusion to argue from the situation of the one to the situation of the other when the carrier's liability for diligence in making the ship seaworthy is in question.

The principle of the learned judge's decision in *Angliss* (121) is stated at the outset of his judgment. Premising that the obligation of the carrier is not limited to his personal diligence, he states the essential question to be:

> "How wide is the category of agents or servants with reference to the obligation now being considered"?

His answer is that, where unseaworthiness is due to a fault of workmanship on the part of builders which was committed in the course of constructing the ship, the builders were not agents of the carrier for the purpose of discharging the duty imposed by art. III, r. 1. As a general proposition, this must surely be true. The reasoning is based on the position of builders, what I may call their time situation. As he says (122):

> "The carrier may not be the owner of the ship, but merely the charterer; he may not have contracted for the building of the ship, but merely have purchased her, possibly years after she has been built. In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier and it is illogical that there should be such difference in the carrier's obligations merely because he has bought the ship by the method of contracting with the builders to build it for him."

It is plain to me that this conclusion turns on the consideration that the causative carelessness took place at a time before the carrier's obligation under art. III, r. 1, had attached and in circumstances, therefore, when the builders and their men could not be described as agents for the carrier "before and at the beginning of the voyage to . . . make the ship seaworthy". This is a tenable position for those who engage themselves on the work of bringing the ship into existence. The carrier's responsibility for the work itself does not begin until the ship comes into his orbit, and it begins then as a responsibility to make sure by careful and skilled inspection that what he is taking into his service is in fit condition for the purpose and, if there is anything lacking that is fairly discoverable, to put it right. This is recognised in the judgment. But if the bad work that has been done is "concealed" (123), and so cannot be detected by any reasonable care, then the lack of diligence to which unseaworthiness is due is not to be attributed to the carrier.

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(120) [1927] 2 K.B. 456.

(121) [1927] 2 K.B. at p. 460.

(122) [1927] 2 K.B. at p. 461.

It is, I think, impossible to transfer these considerations which are apposite to the building of ships to the case of the survey and repair of a ship which is already in the service of a carrier. There the duty to have the necessary work done is directly on the carrier from whatever moment of time is chosen as the date when the duty attaches and whatever is done is necessarily done by agents on his behalf. Any faults of such agents, therefore, are attributable to him, provided only that they are employed on the work. For this reason, I am of opinion that there would be nothing inconsistent between the *Angliss* decision (124), which exempted the carriers, and a decision in favour of the appellants in this case, which would hold the carriers to liability.

The *Angliss* judgment (124) contains a good many more observations than those that are essential to the actual conclusion, and I have no doubt that much of what the learned judge said there, though of a general and sometimes hypothetical nature, has from the first been found helpful and illuminating in expounding the significance of art. III. But I cannot treat these observations as having for that reason any special authority. The only one that matters for the present purpose is the sentence (123):

> "Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects."

I do not myself think it necessary to treat this as intended to lay down that, where repairs are in question, a carrier is automatically protected from liability once he has appointed the "special adviser" referred to. If it does mean that, it would be a return to that mistaken view that the carrier's liability is commensurate with his personal care and prudence which the learned judge had rejected at the outset of his judgment. It would be to say that it is enough for the carrier to appoint competent agents. This would be in conflict with other and later statements as to the nature of the liability which were made by the learned judge himself and by other authorities to whom I have referred. I prefer to treat it, therefore, rather as a general pointer to the sort of precautions which a carrier would be wise to take in his own interest than as a comprehensive definition of the circumstances in which his responsibility under art. III, r. 1, should be held to have been discharged.

We are dealing, of course, with the Australian, not the United Kingdom, Act. The purport of the two Acts is, however, the same and each is designed to adopt the international Hague Rules. In the absence of any decisions of courts in Australia dealing with this particular point, it is natural to found ourselves on English as well as American, Canadian and New Zealand decisions.

I would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, I agree. I would only add a few words out of respect to the judgment of the learned trial judge, well versed in this branch of the law, and the unanimous judgments of the Court of Appeal, supporting him, from which we differ.

The weight of authority, not only in this country but in other countries of the Commonwealth and in the United States of America, whose sea trade and commerce form no negligible part of their economy, as also the history of the origins of the Hague Rules and the desirability of uniformity in their construction as between different nations, all go, in my view, to support the contentions of the appellants. These aspects have already been so fully dealt with that I find it unnecessary to refer to them further. On practical considerations alone it is, I

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(123) [1927] 2 K.B. at p. 462.

(124) [1927] 2 K.B. 456.

A think, only reasonable that owners of ships should be responsible to shippers with whom they contract under bills of lading for the seaworthiness of their vessels at the start of a voyage, so far as that can be achieved by the exercise of due diligence whether by themselves and their servants, or by others to whom that task is specially entrusted. There may be cases where the owners can discharge this duty through members of the crew or other servants, but in other cases, B perhaps the majority of cases in these days of floating leviathans, the duty can only be discharged by the employment of persons who may conveniently be described as independent contractors. If the carrier's liability were not to subsist in all these cases, the shipper, now that the carrier's absolute warranty of seaworthiness has been abolished, would be dependent for a remedy, in respect of lack of seaworthiness, on the chance whether the owner had committed the seaworthiness of his ship to the care of an independent contractor, or had dealt with that C directly through his own servants. It would involve, I think, a considerable extension of the doctrine of *M'Alister* (*or Donoghue*) v. *Stevenson* (125) to say that he would have a remedy against the independent contractor for want of due diligence. Nor would he have a claim against an insurer, as insurance of goods for carriage by sea implies an absolute warranty by him of the seaworthiness of the carrying vessel at the commencement of the voyage, breach of which, apart D from waiver by the insurer, would avoid the policy of insurance.

Apart, however, from the consideration to which I have adverted, there are certain principles which, in my opinion, at once limit and fix the liability of a carrier, in a case such as the present. (i) He cannot, subject to a possible qualification to which I shall refer in a moment, be liable for unseaworthiness in a ship which results from lack of due diligence at a time when the ship was not E his to possess and control, and which could not be detected by due diligence after the ship came into his possession. This is implicit in the language of the Hague Rules themselves and was recognised by WRIGHT, J., in *W. Angliss & Co.* (*Australia*) *Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (126). Where due diligence of a carrier is concerned, there can be no liability for anterior failure of diligence by a previous owner or by someone with whom the carrier F had no previous concern. This, in my opinion, is the ratio of, and the only point decided by, *Angliss* (126). The point is, I think, plain enough in the case of a ship bought from a previous owner, or in the case of a ship chartered from the owner. Where a ship is built to the order of a purchaser, as was the case in *Angliss* (126), there is no material difference in principle, though special circumstances in such a case may introduce special considerations. As WRIGHT, J., G said (127), it would be illogical to make a distinction merely because the carrier had bought a ship by having it built for him. There may be ship-building contracts where the property in a ship passes in stages to the prospective owner, for various reasons convenient to the parties. But the ship as a whole cannot pass until it is completed, and it is impossible to say what defects may exist by the time it is completed. The vessel then comes into the possession of its owner H for the first time. No distinction can, in general, be made between this case and the case of a ship bought from a previous owner. Liability will attach to the owner, as in the other cases, from failure to discover defects making for unseaworthiness which he ought to have discovered by the exercise of due diligence on or after the transfer of possession. There is, however, one qualification, or rather, reservation, I would make in such a case. The prospective owner may have taken I some part in the project of the building of the ship, either in the matter of design, or by supervision in the course of building, or otherwise, and in such case it may well be that he is responsible for unseaworthiness of which he is the cause, or which he should have detected in the course of the building. It may be, indeed, that, in some circumstances, a measure of supervision is required.

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(125) [1932] All E.R. Rep. 1; [1932] A.C. 562.

(126) [1927] 2 K.B. 456.

(127) [1927] 2 K.B. at p. 461.

A These considerations were referred to by WRIGHT, J., in *Angliss* (128), and may give rise to specialties which stand apart from the general case and which will have to be dealt with when they arise. They stand quite apart, in my opinion, from the issue that is raised here. They do not, as I see it, make the carrier responsible for the negligence of the builders, as his agents, but, if at all, for his own negligence operating retrospectively from the time when he took over the B ship and put it into service for the carriage of goods. He then knew, or ought to have known, of defects occurring in the course of the construction of the ship. Something was said, I think, in the course of the argument about the carrier's duty to exercise due diligence to provide a seaworthy ship. But that is not what the statute says. The former common law implied an absolute obligation to provide a seaworthy ship. The qualified duty now is to make a ship seaworthy. C The distinction may be a fine one but a carrier cannot, in general, make a ship seaworthy unless he has first a ship to make seaworthy.

(ii) The obligation is a statutory obligation imposed in defined contracts between the carrier and the shipper. There is nothing novel in a statutory obligation being held to be incapable of delegation so as to free the person bound of liability for breach of the obligation, and the reasons for this become, D I think, more compelling where the obligation is made part of a contract between parties. We are not faced with a question in the realm of tort, or negligence. The obligation is a statutory contractual obligation. The novelty, if there is one, is that the statutory obligation is expressed in terms of an obligation to exercise due diligence, etc. There is nothing, in my opinion, extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed E his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure. The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory obligation. Perform it as you please. The performance is the carrier's performance. As was said in a corresponding case under the Harter Act: " The Act requires due diligence F in the work itself "—*The Colima* (129). Ample other authority in the same direction has already been cited by my noble and learned friends. I am only concerned here to say that it seems to me to proceed on sound principle. I should only add that, when I refer to repairers, I include sub-contractors brought on to the ship by the repairers to enable them to perform the work which they contracted to do. Their failure, in my opinion, must also be the failure of the carrier on G whom the statutory duty rests, unless in some very exceptional circumstances their employment can be said to be without any authority, express or implied, of the carrier, a case which can be considered if ever it arises.

(iii) The Hague Rules abolished the absolute warranty of seaworthiness. They substituted a lower measure of obligation. The old law no doubt worked hardly on shipowners and charterers, in the absence of exception or exclusion. H The change in the law, not confined entirely to England, operated to afford relief to shipowners, as well as some protection to shippers. It would, however, be a most sweeping change if it had the result of providing carriers with a simple escape from their new obligation to exercise due diligence to make a ship seaworthy. If this were the plain effect of the statute, cadit quaestio. But in dubio the courts should, in a change of the suggested dimensions, lean the other way. I The language of the Hague Rules does not, I think, lead to the result contended for by the respondents. The carrier will have some relief which, weighed in the scales, is not inconsiderable when contrasted with his previous common law position. He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence.

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(128) [1927] 2 K.B. 456.

(129) (1897), 82 Fed. Rep. at p. 678.

For these reasons, which I find it unnecessary further to amplify, I would allow the appeal.

LORD HODSON: My Lords, the contention of the respondents may be summarised in this way: It is a question of fact in each case whether due diligence has been exercised by a carrier, and the question is to be answered by deciding whether a prudent shipowner would have acted in the same way. If he would have so acted, the respondents say they are not liable. They do not contend that it is sufficient that they employed a competent shipyard to effect repairs. They do, however, maintain that, while the owner remains responsible for supervision and inspection where necessary, yet in the case of specialised work, which is to be regarded as within the competence of ship repairers rather than in that of owners of ships and their servants, this work and everything incidental thereto can properly be left to the ship repairers. The contention of the appellants is summarised effectively in a passage from a judgment of MacKinnon, L.J., in *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* (130), which reads as follows:

> " The limitation and qualification of the implied warranty of seaworthiness, by cutting it down to use ' due diligence on the part of the shipowner to make the ship seaworthy ' are a limitation and qualification more apparent than real, because the exercise of due diligence involves, not merely that the shipowner personally shall exercise due diligence, but also that all his servants and agents shall exercise due diligence, as is pointed out in a note in Scrutton on Charterparties (14th Edn.), pp. 110, 111, which says that this variation will not be: '. . . of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness, but of so latent a nature that due diligence could not have discovered it) are not likely to occur often.' "

At first sight the argument, which found favour with McNair, J., and the Court of Appeal, that the question is one of fact to which the standard of the prudent shipowner should be applied is an attractive one, for it can fairly be said that the obligation is indistinguishable from the obligation to exercise reasonable care to which the common law is accustomed to apply itself, so that, if a shipowner has done the sensible thing in employing competent repairers to do work on his ship, he ought not to be penalised because one of the servants of the repairers has been negligent. Article III and art. IV, however, cannot be construed in isolation, and regard must be had to the history of the obligation and the way in which the mandatory direction contained in art. III and other words to the like effect have been construed over the years not only in this country but elsewhere.

As was said by Lord Macmillan in *Stag Line, Ltd.* v. *Foscolo Mango & Co., Ltd.* (131) in relation to the Carriage of Goods by Sea Act, 1924:

> " It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their

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(130) [1939] 2 All E.R. at p. 857.
(131) [1931] All E.R. Rep. at p. 677; [1932] A.C. at p. 350.

> interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."

It is true that the possibilities of research are limited, and that we have had no citation of authority from European maritime countries but, so far as this country, Canada, New Zealand and the United States of America are concerned, it is clear that, subject to what may be said about the decision of WRIGHT, J., in *W. Angliss & Co.* (*Australia*) *Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (132), to which I will refer later, the authorities are all consistent with one another and are adverse to the contention of the respondents.

The authorities go back long before 1924, the date of the passing of the English and the Australian Acts which adopted the Hague Rules following on the Brussels Conference of 1922. The earliest Act to which our attention has been drawn was the Harter Act, an Act of Congress of the United States, passed in 1893, which has been called the forerunner of the Hague Rules. This Act was considered in this country by the Court of Appeal in *Dobell & Co.* v. *S.S. Rossmore Co.* (133): the words to be construed were contained in s. 3, which provides:

> "That if the owner of any vessel . . . shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss . . ."

It is true that the negligence therein which caused unseaworthiness was that of a ship's carpenter, the servant of the owners, and the argument was in no way addressed to the position of independent contractors. Nevertheless, wide language was used by all the members of the court. A. L. SMITH, L.J., in discussing the phrase: "if the owner . . . shall exercise due diligence to make the vessel in all respects seaworthy", said (134):

> "In my opinion, it does not mean by himself personally, but by himself and his agents; so that if by himself and his agents he exercises due diligence to make the vessel seaworthy, then he is not to be liable for loss or damage resulting afterwards from faults or errors in navigation or in the management of the vessel."

In 1897, in *The Colima* (135), where the negligence was that of stevedores acting under the direction of the ship's officers, BROWN, D.J., referred to diligence on the part of the agents he may employ and to whom he may have committed the work of fitting the vessel for sea, and said (136):

> "the Act [i.e., the Harter Act] requires . . . due diligence in the work itself. . . . On any other construction, owners would escape all responsibility for the seaworthiness of their ships by merely employing agents of good repute, whether any diligence and care to make their vessels seaworthy were in fact exercised or not."

This construction gives practical effect to the words of the Act, and the language used by the learned judge appears to me to be of great assistance in particular by reason of his emphasis on diligence in the work itself. It is true that in the Harter Act, as also in the Canadian Water Carriage of Goods Act, 1910, the absolute undertaking by the carrier to provide a seaworthy ship, implied at common law in any contract of carriage, is not expressly negatived. Contrast the English Act of 1924, which has expressly negatived the implied undertaking. This difference was noted by WILLMER, L.J., as it had been in earlier cases, but, in my opinion, no inference can properly be drawn for this reason in favour of the carrier so as to enable a more lenient interpretation to be given to the words of the statute under consideration.

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(132) [1927] 2 K.B. 456.
(133) [1895] 2 Q.B. 408.
(134) [1895] 2 Q.B. at p. 417.
(135) (1897), 82 Fed. Rep. 665.
(136) (1897), 82 Fed. Rep. at p. 678.

Of the American cases in addition to *The Colima* (137), *The Irrawaddy* (138), *The Mary L. Peters* (139) and *Nord-Deutsche Lloyd* v. *President, etc., of Insurance Co. of North America* (140), all reflect the same view. The same is true of the Canadian cases. Of these *The City of Alberni* (141), was decided under the Canadian Act of 1936, whereby the warranty of seaworthiness was expressly negatived. There, dry rot in the ship was not discovered by surveyors employed by the owners; the dry rot was not latent and Sydney Smith, D.J.A., held that he should apply the law as found in the English authorities. In doing so, he referred to the current edition of Scrutton on Charterparties (14th Edn.) at pp. 494, 495, which contained a summary of the passage from the judgment of MacKinnon, L.J., in the *Smith, Hogg* case (142) which I have said summarises the contentions of the appellants. It is true that, in *The City of Alberni* (141), the negligence found to have been committed was that of surveyors employed by the shipowners and not that of ship repairers employed as independent contractors. In another Canadian case, however, namely, *Australian Newsprint Mills, Ltd.* v. *Canadian Union Line, Ltd.* (143) the owners had entrusted their ship to a dry-dock company for overhaul and repairs and it was held, applying the statement of the law to be found in the *Smith, Hogg* case (142), that they could not be said to have complied with the statutory duty by entrusting compliance to an independent contractor. There a cargo of wood pulp was damaged because storm valves had not been sufficiently screwed down and the ship was consequently unseaworthy. It was held that the owners could not avoid liability by attempting to cast on the shoulders of some third party, engaged by them to do work on the ship, a duty which the act placed on them. The learned judge (Coady, J.) said (144):

> "It seems to me that the due diligence imposed by the statute and as interpreted by the authorities is not made out by evidence that this duty someone else was engaged to perform on the behalf of the defendants—someone on whom the defendants relied and in whom the defendants had confidence."

The statute referred to is the Canadian Act of 1936.

I will not refer in detail to the cases decided in the Privy Council and to the passage in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (145), where Lord Wright himself and other members of this House have repeatedly stated the law in terms virtually indistinguishable from those employed by MacKinnon, L.J., in the *Smith, Hogg* case (142). The stream of judicial dicta and of such direct authority as there is flows only in one direction, and lends support to the contention of the appellants.

The respondents have argued, however, that the point is not expressly covered by authority, and that, in nearly all the cases where the question of liability for failure to exercise due diligence to make a ship seaworthy has arisen, the failure has turned out to be that of the owner or his servant or representative, not that of any independent contractor, so that there was in such cases sufficient ground for the strict application of the rule against the owner. The position of ship repairers, it is said, is so clearly analogous to that of ship-builders that repairers cannot fairly be distinguished from ship-builders.

This brings me to the *Angliss* case (146), the decision of Wright, J., given shortly after the passing of our Act and containing the dictum (147) about ship repairers which has been read and on which the respondents strongly rely. In that case, the decision was that the owners of a new ship specially built for them were not guilty of want of due diligence where the unseaworthiness complained of was caused or contributed to by bad workmanship in the construction of the ship on the part of the ship-builders' workmen. I do not propose to re-read the passages relied on, but observe that the passage about ship repairing is part of a paragraph in which the learned judge is dealing with the necessity of supervision on the part of the owner. It is true, as WILLMER, L.J., pointed out, that the learned judge would not have said what he did about the supervision of repair work unless he had been of opinion that the shipowner would not necessarily be responsible for want of due diligence on the part of repairers. I do not, however, regard repair work on the same footing as the building of a new ship to the order of owners. It could be argued that the *Angliss* case (148), in so far as it deals with ship-builders, was dealing with something outside the scope of art. III, for to make a ship seaworthy is not the same as to make a seaworthy ship, but the expression " to make a ship seaworthy " is, in my opinion, wide enough to cover the work of repair, however extensive those repairs may be.

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(137) (1897), 82 Fed. Rep. 665.
(138) (1898), 171 U.S. 17.
(139) (1895), 68 Fed. Rep. 919.
(140) (1901), 110 Fed. Rep. 420.
(141) [1947] 2 D.L.R. 647.
(142) [1939] 2 All E.R. at p. 857.
(143) [1952] 1 D.L.R. 850.
(144) [1952] 1 D.L.R. at p. 854.
(145) [1937] 3 All E.R. at p. 641; [1938] A.C. at p. 80.
(146) [1927] 2 K.B. 456.
(147) [1927] 2 K.B. at p. 462.

I recognise that the *Angliss* case (148) has been followed where the negligence of ship-builders is involved: see *The Australian Star* (149), and recognised as authoritative in later cases, including the recent decision of this House in *Davie* v. *New Merton Board Mills, Ltd.* (150), but all the noble and learned Lords who discussed the case were careful to notice that it was a case dealing with ship-builders and that the decision was limited to the subject-matter. It appears that LORD WRIGHT, in his subsequent utterances in the Privy Council and in this House, said nothing to support the proposition for which the owners now contend. I have in mind his dictum in *Northumbrian Shipping Co., Ltd.* v. *E. Timm & Son, Ltd.* (151) (a case on the Canadian Act of 1910) where he said:

> " The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants or agents ",

and the passage from *Wilson's* case (152), which has already been noticed. Compare also the dictum of LORD ROCHE, delivering the judgment of the Privy Council in *Paterson S.S., Ltd.* v. *Robin Hood Mills, Ltd.* (153), a case under the Canadian Act of 1910:

> " The condition is not fulfilled merely because the shipowner is personally diligent. The condition required that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose—see *Dobell & Co.* v. *S.S. Rossmore Co.* (154)—Therefore . . . want of diligence in the compass adjuster who adjusted the compasses or in the captain who said he checked or verified the adjuster's work would be material, and a finding adverse to the shipowner could be arrived at upon the ground of want of due diligence in those persons."

As WILLMER, L.J., pointed out (155), a compass adjuster could fairly be regarded as belonging to the category of independent contractor. This last dictum of the Privy Council was repeated in a later case where the judgment was delivered by LORD SOMERVELL OF HARROW—*Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (156).

The respondents, recognising that they cannot contend that it is an answer to an allegation of want of due diligence merely to say they have employed competent experts, seek to justify their contention in this case by saying that the work of repair and survey is of a specialised nature and of a kind proper, A subject to supervision, to be contracted out to a reputable yard. They seek to meet the difficulty on the facts of this case that the act and work of securing the valves was ultimately performed by the ship's crew and was well within their competence by saying that, once a ship has gone to repair, the whole job must in practice be done, and that it is impossible to reserve for the master and crew the sort of work which they can easily do. Although the owner of a car can B generally change a wheel himself, it is the kind of thing which is often and properly left to a garage. I find this argument about specialised work being properly handed out in appropriate cases unacceptable as a justification for excluding the owner from responsibility for want of due diligence. It is true that ships have become more and more complicated since the days of sail and complications have, no doubt, multiplied since the passing of the Act of 1924, but C this does not justify a more lenient construction being put on the Act in favour of shipowners. The obligation in art. III is not subject to any qualification, and it is generally recognised that the Act was not passed for the relief of shipowners but to standardise within certain limits the rights of the holder of every bill of lading against the shipowner. The position of the holders of bills of lading would be much worsened if the respondents were right in their contention that, given D the right conditions, a shipowner can perform his obligation by putting out repair work to competent experts and shelter behind them if the work is negligently done.

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(148) [1927] 2 K.B. 456.

(149) (1940), 67 Lloyd's Rep. 110.

(150) [1959] 1 All E.R. 346; [1959] A.C. 604.

(151) [1939] 2 All E.R. at p. 651; [1939] A.C. at p. 403.

(152) [1937] 3 All E.R. at p. 641; [1938] A.C. at pp. 80, 81.

(153) (1937), 58 Lloyd's Rep. at p. 40.

(154) [1895] 2 Q.B. 408.

(155) [1960] 1 All E.R. at p. 218; [1960] 1 Q.B. at p. 580.

(156) [1959] 2 All E.R. at p. 743; [1959] A.C. at p. 602.

Reliance was placed on common law cases in tort, not only master and servant cases like *Wilsons & Clyde Coal Co., Ltd.* v. *English* (157) but invitor and invitee cases like *Haseldine* v. *Daw & Son, Ltd.* (158) and *Woodward* v. *Mayor of Hastings* E (159). It is not necessary to discuss in detail those cases where the common law duty to exercise reasonable care in other relationships has had to be considered. It may be, however, that the distinction between the last two cases based on specialised work being necessary in the case of the repair of a lift and being unnecessary in the case of the cleaning of a school may have to be reconsidered. Whether this is so or not, I do not find such cases of assistance in reaching a F conclusion in the matter which the House has now to decide.

In my opinion, on the facts of this case, the respondents did not exercise due diligence to make their ship seaworthy.

I would allow the appeal.

Appeal allowed.

Solicitors: *Clyde & Co.* (for the appellants, the cargo owners); *Norton, Rose, Botterell & Roche* (for the respondents, the shipowners).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(157) [1937] 3 All E.R. 628; [1938] A.C. 57.
(158) [1941] 3 All E.R. 156; [1941] 2 K.B. 343.
(159) [1944] 2 All E.R. 565; [1945] K.B. 174.

Re BERRY (*deceased*). LLOYDS BANK, LTD. *v.* BERRY.

[CHANCERY DIVISION (Pennycuick, J.), January 18, 19, 25, 1961.]

Will—Rule in Howe *v.* Earl of Dartmouth*—Business owned and carried on by testator—Business sold as a going concern after testator's death—Whether profit made before death and loss made after death in business was attributable to capital or income—Whether rule excluded by the terms of will.*

A testator owned and carried on the business of an hotelier. By his will dated Mar. 17, 1955, he bequeathed the residue of his estate to his trustees on trust for sale with power to postpone sale and to hold the proceeds of sale on trust to invest the same and to hold his residuary estate and the investments representing the same on trust to pay the income arising therefrom to his wife for life and after her death to hold both capital and income on trust for his two daughters in equal shares. By cl. 7 thereof he declared that " . . . no part of any dividends rents interest or moneys of the nature of income shall be apportioned to or treated as capital of my estate and I declare that the whole thereof (whether the same be paid in respect of a period wholly or only partly prior to my death) shall belong to the person entitled under my will to the investment or property from which the same respectively arose and if there shall be a tenant for life of such investment or property such dividend rent interest or money shall be income payable to such tenant for life ". By cl. 9 he authorised the trustees to invest any moneys requiring investment under the terms of the will, in any investments that they should in their absolute discretion think fit, whether trustee securities or not. The trustees were not given express power to carry on the business. The testator died on Sept. 30, 1958, and was survived by his wife and two daughters. The trustees sold the business as a going concern on May 11, 1959. The accounts were made up for successive years ending on Mar. 31 and between Apr. 1, 1958 and Sept. 30, 1958, the business made a profit of £6,000 10s. 8d. Between Oct. 1, 1958, and May 11, 1959, the business made a loss of £1,398 6s. 6d. The question arose how the profit of £6,000 10s. 8d. (less a sum of £483 2s. 11d. withdrawn by the testator) and the loss of £1,398 6s. 6d. should be attributed between capital and income.

Held: the rule in *Howe* v. *Earl of Dartmouth* ((1802), 7 Ves. 137) was not excluded by cl. 7 of the testator's will (for its words did not extend to the profits of the testator's business), nor rendered inapplicable by the fact that the will contained a trust for conversion with power to postpone sale, and the business was not an authorised investment for the purposes of the rule, since the will conferred no power to carry on the business save for the purpose of winding-up; therefore, the tenant for life was entitled only to income at the rate of four per cent. per annum on the proceeds of sale of the business from the date of the testator's death until the sale of the business, and accordingly the loss of £1,398 6s. 6d. incurred in relation to the same period would not fall on capital.

[As to the rule in *Howe* v. *Earl of Dartmouth*, where there is a trust for conversion, see 16 HALSBURY'S LAWS (3rd Edn.) 382, 383, paras. 745, 747; and for cases on the subject, see 43 DIGEST 866-869, *3118-3142*.

As to the income of unauthorised investments pending sale, see 34 HALSBURY'S LAWS (3rd Edn.) 625, 626, para. 1087; as to sums liable to apportionment in respect of time, see ibid., 635, 636, para. 1100.]

Cases referred to:

Allhusen v. *Whittell*, (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest (Repl.) 475, *5450*.

Browne v. *Collins*, (1871), L.R. 12 Eq. 586; 36 Digest (Repl.) 558, *1177*.

Chancellor, Re, Chancellor v. *Brown*, (1884), 26 Ch.D. 42; 53 L.J.Ch. 443; 51 L.T. 33; 24 Digest (Repl.) 611, *6088*.

Chaytor, Re, Chaytor v. *Horn*, [1905] 1 Ch. 233; 74 L.J.Ch. 106; 92 L.T. 290; 40 Digest (Repl.) 735, *2237*.

Chesterfield's (Earl) Trusts, Re, (1883), 24 Ch.D. 643; 52 L.J.Ch. 958; 49 L.T. 261; 20 Digest 368, *1065*.

Cox's Trusts, Re, (1878), 9 Ch.D. 159; 47 L.J.Ch. 735; 40 Digest (Repl.) 740, *2277*.

Elford, Re, Elford v. *Elford*, [1910] 1 Ch. 814; 79 L.J.Ch. 385; 102 L.T. 488; 44 Digest 210, *377*.

Fisher, Re, Harris v. *Fisher*, [1943] 2 All E.R. 615; [1943] Ch. 377; 113 L.J.Ch. 17; 169 L.T. 289; 2nd Digest Supp.

Hey's Settlement Trusts, Re, Hey v. *Nickell-Lean*, [1945] 1 All E.R. 618; [1945] Ch. 294; 114 L.J.Ch. 278; 172 L.T. 396; 2nd Digest Supp.

Howe v. *Dartmouth (Earl), Howe* v. *Aylesbury (Countess)*, (1802), 7 Ves. 137; 32 E.R. 56; 43 Digest 869, *3142*.

Jones v. *Ogle*, (1872), 8 Ch. App. 192; 42 L.J.Ch. 334; 28 L.T. 245; 20 Digest 282, *412*.

Lambert v. *Lambert*, (1874), 29 L.T. 878; 36 Digest (Repl.) 558, *1175*.

Parry, Re, Brown v. *Parry*, [1946] 2 All E.R. 412; [1947] Ch. 23; [1947] L.J.R. 81; 175 L.T. 395; 2nd Digest Supp.

Rhagg, Re, Easten v. *Boyd*, [1938] 3 All E.R. 314; [1938] Ch. 828; 107 L.J.Ch. 436; 159 L.T. 434; Digest Supp.

Robbins, Re, Midland Bank Executor & Trustee Co., Ltd. v. *Melville*, [1941] 2 All E.R. 601; [1941] Ch. 434; 111 L.J.Ch. 83; 165 L.T. 421; 36 Digest (Repl.) 558, *1176*.

Adjourned Summons.

This was an application by the plaintiffs, Lloyds Bank, Ltd., and James Ridler Buchanan, the executors and trustees of the will dated Mar. 17, 1955, of Donald Dodgson Berry, deceased, for the determination of the questions whether on the true construction of the will of the testator (a) the profit of £6,000 10s. 8d. earned by the testator in his business as hotelier from Apr. 1, 1958, to Sept. 30, 1958 (being the period from the beginning of the then current financial year of the business to the death of the testator) less the sum of £483 2s. 11d. drawn out of the business by the testator during that period, (b) the income tax, surtax and estate duty paid or payable by the plaintiffs as executors and attributable to the undrawn profit, and (c) the loss of £1,398 6s. 6d. incurred by the plaintiffs as executors in carrying on the business during the period Oct. 1, 1958, to May 11, 1959 (when it was sold as a going concern), ought respectively as between the persons interested in capital and income of the testator's residuary estate to be attributed wholly to capital, or wholly to income or to be apportioned in some manner between capital and income. The defendants were Elsie Florence Berry, the testator's widow, who claimed to be beneficially entitled during her life to the income of the testator's residuary estate, Melanie Patricia Broadbent and Jocelyn Mary Price, daughters of the testator, who claimed to be interested in the capital of the residuary estate. The facts appear in the judgment.

E. I. Goulding for the plaintiffs.

R. Cozens-Hardy Horne for the first defendant.

Charles Sparrow for the second and third defendants.

Cur. adv. vult.

Jan. 25. **PENNYCUICK, J.**, read the following judgment: This summons raises a question as to the division between the life tenant and the reversioners of the profits earned, during the year in which the testator died, of a business which he carried on. The testator, Donald Dodgson Berry, was the owner of the Royal Hotel, Bognor, and he carried on there the business of an hotelier. He carried on that business alone and not in partnership with any other person. The accounts of the business were made up in respect of the accounting period ending on Mar. 31 in each year. At the date of the testator's death, according to the balance sheet, the value of the business was £30,805 14s. 2d.

The testator made his will on Mar. 17, 1955, and he died on Sept. 30, 1958, and it will be observed the date was exactly in the middle of one of the periods of account of the business, the year ending on Mar. 31, 1959. By his will the testator appointed executors and trustees and made certain specific and pecuniary legacies. He then went on by cl. 6 to deal with the residue of his estate in the following terms:

> "I give devise bequeath and appoint all the remainder of my estate whatsoever and wheresoever both real and personal unto my trustees upon trust to sell call in collect and convert into money the same or such part thereof as shall not consist of money with power at their discretion to postpone such sale calling in collection and conversion for so long as they shall think proper without being responsible for loss and to hold the proceeds of such sale calling in collection and conversion and my ready money after payment thereout of my just debts and funeral and testamentary expenses and the legacies given by this my will or by any codicil hereto and all death duties arising on my death (hereinafter called 'my residuary estate') upon trust to invest the same and to hold my residuary estate and the investments for the time being representing the same upon the following trusts namely:—(a) To pay the income arising therefrom to my wife the said Elsie Florence Berry during her life and after her death (b) To pay the following pecuniary legacies free of all death duties:—To each of my grandsons John and Michael Broadbent the sum of £500 on their attaining the age of twenty-one years, to my grandson Jonathan Price the sum of £100, to Caroline Kirby the daughter of my stepson the said Paul Kirby the sum of £100 (c) Upon trust as to both capital and income of the remainder of my residuary estate for such of them my said two daughters Melanie Patricia Broadbent and Jocelyn Mary Price as shall be living at the date of my death and if more than one in equal shares as tenants in common."

Then there is a proviso which is not material. Clause 7 provides:

> "I declare that no part of any dividends rents interest or moneys of the nature of income shall be apportioned to or treated as capital of my estate and I declare that the whole thereof (whether the same be paid in respect of a period wholly or only partly prior to my death) shall belong to the person entitled under my will to the investment or property from which the same respectively arose and if there shall be a tenant for life of such investment or property such dividend rent interest or money shall be income payable to such tenant for life."

Clause 8 provides:

> "I declare that no part of my estate not actually producing income shall be treated as producing income for the purposes of this my will."

Clause 9 provides:

> "Any moneys requiring investment under the provisions of this my will may be invested in any investments which my trustees shall in their absolute discretion think fit whether trustee securities or not."

The testator was survived by his wife, who is the first defendant, and by his two named daughters, who are the second and third defendants. The trustees carried on the business of the hotel for a few months with a view to sale, and on May 11, 1959, they sold the business at the net profit of £36,770 17s. 9d. An account was taken in respect of the period from Apr. 1, 1958, to the date of the death, Sept. 30, 1958, and that account showed a profit of £6,000 10s. 8d. of which the testator had drawn a few hundred pounds during his lifetime, the actual amount of the drawings being £483 2s. 11d. During the period from

A the date of the death to the sale in May, 1959, the business made a small loss of £1,398 6s. 6d. No account was in fact taken at Mar. 31, 1959.

The question which is asked in the summons is this:

> "Whether, on the true construction of the will of the testator and having regard in particular to the provisions of cl. 7 thereof, the following respective sums, namely: (a) the profit of £6,000 10s. 8d. earned by the testator in his business of an hotelier from Apr. 1, 1958, to Sept. 30, 1958 (being the period B from the beginning of the then current financial year of the said business to the death of the testator) less the sum of £483 2s. 11d. drawn out of the said business by the testator during that period, (b) the income tax, surtax, and estate duty paid or payable by the plaintiffs as executors and attributable to the said undrawn profit, and (c) the loss of £1,398 6s. 6d. incurred by the plaintiffs as executors in carrying on the said business during the period C from Oct. 1, 1958, to May 11, 1959 (when the same was sold as a going concern) ought respectively, as between the persons interested in capital and income of the testator's residuary estate:—(i) to be attributed wholly to capital, or (ii) to be attributed wholly to income, or (iii) to be apportioned in some and what manner between capital and income."

It will be observed that the actual trading surplus—I include in that expression D debits and credits—deducted in respect of the operation of the business during the period from Apr. 1, 1958, to Sept. 30, 1958, was in the hands of the testator before his death and was reflected in the assets and liabilities of the business at the death. The profit and loss account at Mar. 31, 1959, had one been taken, would have disclosed a trading profit for the whole year, but the whole of this E surplus, such as it was, was received by the executors after the death of the testator.

In support of the contention that the widow as life tenant is entitled to the whole of the profits earned by the business in respect of the year from Apr. 1, 1958, to Mar. 31, 1959, less the drawings made by the testator during his lifetime, counsel for the widow relied on the decision of SIMONDS, J., in *Re Robbins, Midland Bank Executor & Trustee Co., Ltd.* v. *Melville* (1), in the course of which F the learned judge states with approval the rule set out in GOVER, CAPITAL AND INCOME (3rd Edn.), at p. 30. In that case (1) a testator settled by his will his residue in equal half shares, his son, W., being tenant for life of one, and his brother, A., of the other. Clause 13 provided (2):

> "I declare that all income produced from every part of my residuary G estate previously to the sale and conversion thereof shall be applied in the same manner in all respects as if the same were income from investments hereby authorised . . . And I further declare that rents, dividends and other periodical payments in the nature of income current at the date of my death shall not be apportionable but that the same and also all such income accrued but not received at the date of my death shall be treated as income H and not as capital."

Clause 14 provided:

> "With regard to any business . . . in which I may be interested whether solely or jointly with anyone else . . . my trustees shall have all such powers as would be possessed by a single person absolutely entitled as regards the mode and time of realisation of any such business . . . or my share or interest I therein or otherwise in relation thereto . . . My trustees may . . . continue . . . any such business . . . with power to enter into any new arrangement or agreement with any person . . . with whom at my death I may have been carrying on any such business . . . either in partnership or otherwise . . . and to retain or employ in any such business . . . such part of my residuary estate . . . as my trustees may . . . think proper."

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(1) [1941] 2 All E.R. 601; [1941] Ch. 434.
(2) [1941] 2 All E.R. at p. 602; [1941] Ch. at p. 435.

The testator owned theatres in an oral partnership at will in equal shares with his brother, F., the accounts of the business being made up to Dec. 25 in each year, Dec. 26 to Dec. 25 thus being the conventional period for ascertaining the profits. The testator and F. left most of their shares of the profits in their capital accounts. The testator died on Feb. 28, 1937. At that date there were standing to his credit in the accounts sums representing undrawn profits from Dec. 26, 1935, to Dec. 25, 1936. After the testator's death his trustees carried on the business on the same terms with F., who died on Apr. 5, 1938, and thereafter with F.'s executors. A. died in March, 1938. W., the surviving tenant for life, claimed to be entitled to the profits for the periods from Dec. 26, 1935, to Dec. 25, 1936, and from Dec. 26, 1936, to Feb. 28, 1937. The children of A., the deceased tenant for life, claimed that the profits of the business as at A.'s death should be apportioned in respect of the share of income settled on A. for life. It was held (i) that, although the partnership ended when the testator died, the profits for the conventional period during which his death occurred were to be computed at the end of that period, namely, as at Dec. 25, 1937, and that, as the business was carried on after the testator's death in accordance with his directions, so that there was one continued business, all the profits for that conventional period were income and went to W.; (ii) that the undrawn profits for the conventional period from Dec. 26, 1935, to Dec. 25, 1936, were capital, as the will did not otherwise provide, and therefore did not go to W.; (iii) that A. was not entitled to any of the profits for the conventional period, during which he died, ending Dec. 25, 1938, all of which would go to W. In his judgment, SIMONDS, J., after stating the facts substantially as hereinbefore set forth, said (3):

> "For the period up to Dec. 25, 1936, he [the surviving tenant for life] founds himself solely on the language of the will, but, for the period from Dec. 26, 1936, to the death of the testator, [on Feb. 28, 1937], he founds himself, not only upon the language of the will, but also upon the general principle of law, for which he relies upon such cases as *Browne* v. *Collins* (4). I will deal first of all with the period from Dec. 26, 1936. The general law is conveniently stated in GOVER, CAPITAL AND INCOME (3rd Edn.), p. 30. The author is dealing with the Apportionment Act, 1870, and he says at p. 30: 'Profits of a private business or partnership are not apportionable under the Act (*Jones* v. *Ogle* (5)), but must be taken as having accrued entirely at the end of the period for which they are declared, and not before'. For that he relies upon *Browne* v. *Collins* (4) and *Lambert* v. *Lambert* (6). The paragraph continues: 'And if the life tenant dies before the expiration of that period, they belong to the next life tenant or remainderman then in possession'. He cites *Re Cox's Trusts* (7) for that, and continues as follows: 'Delay in ascertaining the profits does not affect the rights of the parties interested (*Browne* v. *Collins* (4)); but where the partners have power to capitalise profits, there may be a question whether the omission to divide the profits is due to an intention to capitalise'. As I have pointed out, the executors, availing themselves of the power given by the will, continued to carry on the business which their testator had theretofore carried on in partnership with his brother. So carrying it on, the accounting period was a period which ran from Dec. 26 in one year to Dec. 25 in the following year. Accordingly, the accounting period with which I am primarily concerned on this part of the case was the period from Dec. 26, 1936, to Dec. 25, 1937, which embraced two months or so of the testator's life and a period of ten months after his death. It appears to me that, applying the principle stated in the text-book which I have read, the line must be drawn, not at the death of the testator, as the accountants have drawn it, but at the end of the

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(3) [1941] 2 All E.R. at p. 604; [1941] Ch. at p. 439. (4) (1871), L.R. 12 Eq. 586.
(5) (1872), 8 Ch. App. 192. (6) (1874), 29 L.T. 878. (7) (1878), 9 Ch.D. 159.

> accounting period, for it is then, and then only, that it can be discovered whether the business made a profit for the relevant period. Therefore, I do not propose to declare that the tenant for life became entitled to the profits somewhat arbitrarily ascertained for the period from Dec. 26, 1936, to Feb. 28, 1937, but that he was entitled to the whole of the profits for the period from Dec. 26, 1936, to Dec. 25, 1937.
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> " It is suggested that in this case that is not a proper principle to apply, because here the partnership was a partnership at will, carried on under an oral agreement, so that, automatically it became dissolved under the Partnership Act, 1890, by the death of the testator, and, accordingly, there was no room for saying that anything which had in fact accrued by way of profits down to the testator's death could be regarded as a profit, but must be treated as part of the capital of the estate. I do not think that that is the correct way of looking at the situation where in fact the business is carried on under the direction of the testator, so that there is one continuous period wherein the business is carried on first by the testator and then by the executors under his directions. It seems to me proper in such a case to apply the principle which I have stated, and to treat the whole of the income for the conventional period as belonging to the person who is living at the expiration of that period."

The learned judge then goes on to deal with the profits for the last completed year of account before the realisation of the testator's estate, and I will come back to that part of his judgment in another connexion later on.

Counsel for the first defendant relied on that decision as showing that in a case such as the present, the life tenant is entitled to the whole of the profits earned by the business of the testator in respect of the period of account during which the testator died. Counsel relied on an earlier case cited there of *Re Cox's Trusts* (8), but I do not think that that takes the matter any further. In *Re Cox's Trusts* (8) the headnote is:

> " A testatrix bequeathed a newspaper to trustees upon trust to continue the publication thereof as long as they thought fit, and to pay one-fourth share of the net profits to J.C. during his life, and after his death to his widow during her life; and the testatrix declared that no person entitled to participate in the profits should have any right to interfere in the management of the publication or the mode or time of ascertaining and dividing the profits thereof, but the same should be wholly in the discretion of the trustees, except that they should every January draw up a balance-sheet showing the net profits during the year ending on the then preceding Dec. 31. The trustees carried on the paper, gave notice to J.C. and the other beneficiaries that they intended, until further notice, to divide the net accrued profits half-yearly up to June 30 and Dec. 31 in each year, and they did so divide the same up to June 30, 1877. On Dec. 23, 1877, J.C. died, and his widow claimed the one-fourth share of the net profits of the half-year ending on Dec. 31, 1877:—Held, first, that upon the terms of the will the person to take a share of the profits must be living at the time when it was ascertained that there were profits to be divided; secondly, that the profits in question were neither ' rents, annuities, dividends, or other periodical payments,' within the meaning of the Apportionment Act, 1870; and, consequently, that that Act did not apply, and the widow was entitled to the whole profits of the half-year in question."

It will be observed that there there was a specific bequest of the newspaper, and that the tenant for life concerned was only entitled to one-fourth share of the net profits, so that in no sense could the tenant for life be said to be entitled to receive any part of the profits until the dates of June 30 and Dec. 31 in each year at which the trustees determined to divide the profits.

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(8) (1878), 9 Ch.D. 159.

In answer to that contention on behalf of the widow, counsel for the reversioners has raised two quite independent contentions. The contention which he put in the forefront was that the rule cited by SIMONDS, J., with approval from GOVER, CAPITAL AND INCOME in *Re Robbins* (9) is not applicable where, as here, the testator was the actual owner of the business in contra-distinction to the case where the testator was a partner in the business. His second answer is that the rule generally known as the rule in *Howe* v. *Earl of Dartmouth* (10) is applicable to the will of this testator, and, accordingly, that the widow is not entitled to the actual income of the residuary estate at all. As I said, those two contentions are, I think, distinct and independent contentions, and it is perfectly logical to do what counsel has done, namely, to put the first of those two contentions in the forefront of his argument. I propose, however, to deal with the second of the two contentions first.

As regards the rule in *Howe* v. *Earl of Dartmouth* (10), I quote first a passage on p. 1223 of JARMAN ON WILLS (8th Edn.), which is in these terms. I think that this is the point to be considered:

> "Although strictly the rule in *Howe* v. *Earl of Dartmouth* (10) only applies to cases where there is no trust for conversion, the expression is frequently used to describe all those cases where, whether or not there is a trust for conversion, the tenant for life is not entitled to the actual income of a residuary estate but to a notional income which will do justice between tenant for life and remainderman."

Broadly, the rule in *Howe* v. *Earl of Dartmouth* (10) is, in fact, commonly applied, not only to cases where there is no trust for conversion, but to cases where there is a trust for conversion; so that if the residuary estate includes any item of property which is not an authorised investment, then, unless the will manifests a contrary intention, the life tenant is only entitled to a part of some notional fund and not to the actual income arising from that item of property. In a case where the unauthorised investment is sold within the period of one year from the date of the testator's death, the rule is as follows: I quote from JARMAN ON WILLS (8th Edn.), at p. 1210:

> "That in the case of unauthorised investments realised during the first year, the tenant for life is entitled to interest at the same rate [now four per cent.] on the net proceeds [that is the net proceeds of sale] from the date of death to the date of completion of the sale."

Unless there is something in the terms of the will from which there can be derived an intention to exclude the rule in *Howe* v. *Earl of Dartmouth* (10), it seems to me that the widow here is only entitled to income representing four per cent. on the proceeds of sale of the whole business during the period from the date of the death until the date of the sale and is not entitled to the actual profits earned from the business at all.

In answer to that contention counsel for the first defendant advanced three points with which I must now deal. The first point is that the rule in *Howe* v. *Earl of Dartmouth* (10) does not apply where the will contains a trust for conversion, or, alternatively, a trust for conversion with power to postpone. It seems to me that it is established by an overwhelming weight of authority that the rule does indeed apply where there is a trust for conversion and a power to postpone and nothing more. I refer first to JARMAN ON WILLS (8th Edn.), at p. 1216:

> "If the testator directs his residue to be converted and invested, and the income of his 'residuary trust moneys and the investments representing the same' to be paid to A for life, a mere power to postpone conversion does not entitle A to the whole income of unauthorised investments retained by the trustees."

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(9) [1941] 2 All E.R. at p. 604; [1941] Ch. at p. 439. (10) (1802), 7 Ves. 137.

He goes on to deal with the question of construction whether the trustees' power to postpone can be exercised for the benefit of the tenant for life or merely for the more convenient realisation of the estate. On that point it will be necessary for me to cite three authorities apart from the one relied on by counsel for the first defendant.

The first is *Re Chaytor, Chaytor* v. *Horn* (11). The headnote is:

> " The testator devised and bequeathed all his real and personal estate not by his will otherwise disposed of to trustees upon trust to sell and convert the same, with power to postpone conversion as long as the trustees thought proper and to retain any investments subsisting at his death, whether of the kind thereinafter authorised or not, and out of the proceeds to pay debts and legacies, and at the discretion of the trustees to invest the residue and to stand possessed of the residuary trust moneys and the investments for the time being representing the same (thereinafter called ' the residuary trust funds ') in trust to pay the income thereof to his wife during her life. At the time of his death the testator was possessed of preference and ordinary shares in a coal-mining company. The ordinary shares, although not of a wasting character, were not authorised by the investment clause in the will. The trustees therefore sold some of them, and proposed to sell more on a favourable opportunity. They declined to pay to the widow in the meantime the full dividends on the ordinary shares thus retained:—Held, that, in the absence of any express or implied gift of the income pending conversion, the widow was entitled only to interest at three per cent. on the value of the ordinary shares at the testator's death, and the rest of those dividends must be invested. This rule was well settled, and applied to unauthorised securities whether they were of a wasting character or not."

In the course of his judgment WARRINGTON, J., said this (12):

> " As regards the unauthorised securities, there is no express gift of the income of the funds or items of property forming part of the testator's estate during postponement of conversion; but I am invited by [counsel for Mrs. Chaytor] to find such a gift by construction in the will. In the first place, what is the general principle which is applied in such a case as this, where there is an express trust for conversion and a power to retain securities of every kind, authorised and unauthorised, and there is no express gift of the income pending conversion? As I understand it, the general rule is that the tenant for life is entitled to the income of authorised securities, but not entitled to the income of unauthorised securities. In the latter case he is only entitled to interest, which is now fixed at the rate of three per cent., on their value at the testator's death."

In my judgment, that is a correct statement of the principle to be applied.

Then in *Re Chancellor, Chancellor* v. *Brown* (13), which was a case in the Court of Appeal, the headnote is:

> " A testator devised and bequeathed his real and personal estate upon usual trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and, after her death, for his children. The will contained the usual power to postpone the sale and conversion of the real and personal estate, and the usual direction that until sale and conversion the rents, profits, and income thereof should be paid and applied to the same persons and in the same manner as the income of the trust estate. The will contained no reference whatever to the business of the testator, which comprised the bulk of his estate. The executors carried on the business for nearly two years with a view to its sale as a going concern, and the question arose whether the profits of the business during that period were to be treated as capital or income:—Held, that the executors had power to carry

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(11) [1905] 1 Ch. 233. (12) [1905] 1 Ch. at p. 238. (13) (1884), 26 Ch.D. 42.

on the business for a reasonable period with a view to its sale as a going concern; and that, as the testator had expressly directed that the profits of his personal estate until conversion were to be treated as income, the general rule laid down in *Howe* v. *Earl of Dartmouth* (14) did not apply, and therefore the widow was entitled to the profits of the business."

COTTON, L.J.—I will not read the whole passage—after quoting the direction that the profits of the personal estate, subject to conversion, were to be treated as income, says this (15):

> "If there had been no such direction here, no doubt the general rule would have applied, and the widow would only have been entitled to interest at four per cent. on the income of the business."

That is a view expressly directed to the case of a business.

Finally, I was referred to *Re Parry, Brown* v. *Parry* (16) where a testator, who died in 1936 leaving a large estate much of which was invested in securities not authorised by the investment clause of his will, gave his residue on trust for sale and conversion, but with the fullest discretion to postpone conversion for as long as should be thought fit, and, after directing the payment of an annuity to his wife, settled the trust funds on two tenants for life in succession, with remainders over. It was held that the rule in *Howe* v. *Earl of Dartmouth* (14) must be applied in the administration of the estate. ROMER, J., said (17):

> "In these circumstances, the first question raised by the present summons is whether the whole of the actual net income of the testator's residuary personal estate ought to be treated as income as between the persons interested in the income and the capital respectively of such estate or whether the rule in *Howe* v. *Earl of Dartmouth* (14), or the corresponding rule applicable where there is a trust for sale, ought to be applied. As to this, counsel for the first two defendants (the tenants for life), admitted that, in view of authority which is binding upon a court of first instance, they were unable to argue before me that the rule in *Howe* v. *Earl of Dartmouth* (14) did not apply to the present case. They reserved, however, the right to contend before a higher tribunal that the rule has no application, and ought not to have been applied in the past, to cases such as the present where a testamentary trust for sale is coupled with a power, exercisable in the discretion of the trustees, to postpone conversion for an indefinite period."

In that case leading counsel are all recorded as saying that the present argument of counsel for the first defendant is something which could not be argued in support of his present contention.

In support of his contention counsel for the first defendant has based himself on a decision of BENNETT, J., in *Re Fisher, Harris* v. *Fisher* (18). In that case the insurers undertook, by a policy of life assurance, to pay £500 with profits on the death of the assured or his attaining the age of sixty, and, if the assured should die within twenty years of the date of the policy, to pay £50 on death, £52 a year by monthly instalments for the remainder of the twenty years, and £450 at the expiration of the period. The assured died intestate three years and nine months after the date of the policy, without issue but leaving a widow surviving and next of kin. It was held that the monthly instalments paid and to become payable under the policy were capital and not income of the residuary estate, within s. 33 (4) of the Administration of Estates Act, 1925, and must be converted and invested as a wasting security under the rule in *Howe* v. *Earl of Dartmouth* (14); that past payments of the instalments ought to be apportioned as between capital and income on the principle of *Re Earl of Chesterfield's Trusts* (19); that the rule in *Howe* v. *Earl of Dartmouth* (14) did not apply where there was a trust for conversion and a power to postpone conversion duly exercised, but s. 33 (1) of the Administration of Estates Act, 1925, which imposed on an intestate's estate a statutory trust for conversion and a power to postpone, did not abolish the rule in cases of intestacy, and it would still apply where there had been no exercise of the power to postpone conversion. In the course of his judgment the learned judge, Bennett, J., did indeed say (20):

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(14) (1802), 7 Ves. 137.
(15) (1884), 26 Ch.D. at p. 46.
(16) [1946] 2 All E.R. 412; [1947] Ch. 23.
(17) [1946] 2 All E.R. at p. 413; [1947] Ch. at p. 28.
(18) [1943] 2 All E.R. 615; [1943] Ch. 377.
(19) (1883), 24 Ch.D. 643.

> " In the case of a residuary bequest of personalty to trustees upon trust for conversion with a power to postpone and a trust to pay the income of the subject of a bequest to a person for life with a gift over, the rule of administration formulated by Lord Eldon in *Howe* v. *Earl of Dartmouth* (21) never arises. It only arises in cases where there is a residuary bequest to persons in succession and no trust for conversion."

The learned judge also said (22)—" The rule cannot apply to a case where the trust is one to convert with a power to postpone ". In so far as the learned judge is saying that the rule in *Howe* v. *Earl of Dartmouth* (21), in strict terms, only applies where there is no trust for conversion, that may be right; but, where the learned judge in the course of his judgment is saying that the principle embodied in that rule and habitually applied to cases where there is a trust for conversion, does not apply where there is a trust for conversion with a power to postpone, what the learned judge is saying seems to me to be contrary to the whole current of authority, and I do not follow it.

Re Fisher (23) was referred to by Cohen, J., in *Re Hey's Settlement Trusts, Hey* v. *Nickell-Lean* (24), on another point, and I do not think that I can usefully quote that case. I also have been referred to *Re Elford, Elford* v. *Elford* (25), but in that case there was an express provision to exclude the rule in *Howe* v. *Earl of Dartmouth* (21), and I do not think that that case helps.

It seems to me, therefore, that on the overwhelming balance of authority the first point relied on by counsel for the first defendant fails.

His second point was that the business of the hotel was an authorised investment under the will of this particular testator. It is true that the expression in the will is in wide terms because the testator says in cl. 9:

> " Any moneys requiring investment under the provisions of this my will may be invested in any investments which my trustees shall in their absolute discretion think fit whether trustee securities or not."

That clause authorises an investment of trust moneys in any form of property which can be properly described as an investment according to any normal use of that word; but it seems to me that the question whether this business is an investment according to the normal use of that word can be distinctly tested by considering whether the trustees had power under this will to carry on the business except with a view to realisation. It is well established that trustees can only carry on a business if there is power in the will to do so. If authority is wanted for that proposition it will be found in Jarman on Wills (8th Edn.) on p. 1206:

> " Without such authorisation they [that is the executors or trustees] may not carry on the business or employ trust moneys in carrying it on, except so far as is necessary for the winding-up or disposing of the business."

The present will contains no power to the executors to carry on the testator's business except for the purpose of winding-up, and they had no power to do so. It would be impossible for them to retain this hotel business as an investment without carrying it on as a business, and, therefore, it seems to me that the hotel business cannot fall within the terms of cl. 9 of this will. That is the answer to that point.

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(20) [1943] 2 All E.R. at p. 620; [1943] Ch. at p. 385.

(21) (1802), 7 Ves. 137.

(22) [1943] 2 All E.R. at p. 620; [1943] Ch. at p. 387.

(23) [1943] 2 All E.R. 615; [1943] Ch. 377.

(24) [1945] 1 All E.R. 618; [1945] Ch. 294.

(25) [1910] 1 Ch. 314.

A The third contention advanced by counsel for the first defendant is that cl. 7 and cl. 8 of this will represent an express provision excluding the rule in *Howe* v. *Earl of Dartmouth* (26) altogether. Clause 8 is concerned only with items of property not actually producing income. Clause 7 is the provision directed to this point and I will read it again:

> " I declare that no part of any dividends rents interest or moneys of the B nature of income shall be apportioned to or treated as capital of my estate and I declare that the whole thereof (whether the same be paid in respect of a period wholly or only partly prior to my death) shall belong to the person entitled under my will to the investment or property from which the same respectively arose and if there shall be a tenant for life of such investment or property such dividend rent interest or money shall be income payable to C such tenant for life."

It is quite clear that that provision is not apt to exclude the rule in *Howe* v. *Earl of Dartmouth* (26) indefinitely because it is only related to some moneys which the testator received in respect of a period wholly or partly prior to the testator's death. It is said it does apply to the profits of this business for the year in question because those are indeed held in respect of the period partly prior to D the testator's death. It seems to me the answer to that contention is contained in a passage from the judgment of SIMONDS, J., in *Re Robbins* (27) which I have not yet read, going on from the passage that I have already cited, the learned judge says this (28):

> " In coming to that conclusion, I do not rely in the least upon the terms E of the will, but, for the period before the testator's death—namely, for the conventional period which expired on Dec. 26, 1936, there can be no doubt, upon general principles, that the profits undrawn for that period are capital of the testator's estate, unless there is something in his will which provides for a different destination. I therefore turn again to the terms of the will, in order to see whether there is anything which will affect the position. F Counsel for the tenant for life has founded his argument on a passage in cl. 13 which I have read: '. . . rents dividends and other periodical payments in the nature of income current at the date of my death shall not be apportionable, but . . . the same and also all such income accrued but not received at the date of my death shall be treated as income and not as capital '. Counsel says that the profits which accrued prior to Dec. 26, 1936, and which G were subsequently ascertained, but which had not been received by the testator at the date of his death, fall within that declaration. I think that it is quite clear that, unless there is some special context, the words which I have read are not apt to carry the profits of a partnership. That, indeed, is stated in the passage in GOVER, CAPITAL AND INCOME (3rd Edn.), p. 30, which I have already read, and is clear on the authority of *Jones* v. *Ogle* (29), the case there cited."

H The words in the will that the learned judge is there construing are almost identical with the words in cl. 7 of this will, and the learned judge is saying in effect that those words " are not apt to carry the profits of a partnership "; a fortiori they must not be apt to carry the profits of a business carried on by a testator alone. No doubt underlying that passage there is the Apportionment I Act, 1870, but again the Apportionment Act, 1870, has no application to the profits of a partnership or the profits of a business carried on by a testator alone.

For the reasons which I have endeavoured to give, it seems to me that there is nothing in this will which excludes the application of the rule in *Howe* v. *Earl of Dartmouth* (26): the consequence being that as regards this business, which was not an authorised investment, the widow is not entitled to the actual income arising from the business in respect of any period but is merely entitled to four per cent. on the proceeds of sale of the business in respect of the period from the date of death to the date of the sale.

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(26) (1802), 7 Ves. 137.
(27) [1941] 2 All E.R. 601; [1941] Ch. 434.
(28) [1941] 2 All E.R. at p. 605; [1941] Ch. at p. 440.
(29) (1872), 8 Ch. App. 192.

I now turn to the first point which was relied on by counsel for the reversioners. On this point the contention was that in *Re Robbins* (30), Simonds, J., stated the rule too widely, and that the rule which he stated was only properly applicable to a case where a testator carried on business in partnership, but that the rule was not properly applicable to a case where the testator was carrying on business alone, and that, in so far as Simonds, J., treated the rule as so applicable, what he said was obiter. On that point counsel quoted a passage from another judgment of the same learned judge in *Re Rhagg, Easten* v. *Boyd* (31). In that case a testator, by his will, bequeathed his business of a solicitor and the office furniture, law books, and other articles in the office to his managing clerk, and bequeathed the residue of his estate to charities. Some time after the date of the will the testator made the legatee his partner, giving him one half of the profits. On a summons taken out to determine the question what passed under the bequest it was held (i) that the bequest was not adeemed by the partnership agreement; and (ii) that all the assets and moneys employed in the business, including the office premises, undrawn profits, the testator's capital therein, and loans made to clients or prospective clients, and not merely the goodwill of the business, passed to the legatee. In the course of his judgment Simonds, J., said this (32):

> "Secondly, I must observe that somewhat different considerations may be involved where the business was that of the testator alone, and where he carried it on in partnership. In the former case, to speak of his 'capital' in the business, or his undrawn profits, may be wholly misleading. The substance of the bequest is the assets of the business, subject to its liabilities. There may be balancing figures in the accounts of the business which are called capital and undrawn profits, but in fact those figures are represented by the assets of the business, the stock-in-trade, cash at the bank, and so on. It is these items which constitute the business, and which will, in my view, ordinarily pass under a bequest of the business. Where, on the other hand, the testator carried on a business in partnership, and bequeaths his share in the business, the result can only be to put the legatee in his place in relation to his partner. The legatee will, subject to the partnership articles, become co-owner of the several assets of the business, but the right and the obligation to account are of the essence of the relation, and in that connexion it is sensible to speak of the capital and undrawn profits of the testator. They are things which have a real meaning, as distinct from the assets of the business, in the relation which exists between the partners. The distinction may be of no practical importance where the legatee is himself the sole surviving partner, but it would be vital if he were not."

That passage contains an analogy to the case of a testator who owns the assets of a business and a testator who has an interest in the assets of a partnership business, and for myself, while I see the force as a matter of principle of the argument advanced by counsel on that point, it seems to me that, having already decided this case in his favour on the other point, it is not necessary for me to express any concluded opinion on it, and it is better that I should not do so.

E. I. Goulding: Subject to what my learned friends may say, that disposes of the questions raised by the originating summons, because it is clear that income tax and surtax are debts or testamentary expenses to be dealt with as such. As to the loss in carrying on the business from the death to the sale, that does not fall on capital because in that period your Lordship has held that the residuary estate has an income at only four per cent.

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(30) [1941] 2 All E.R. 601; [1941] Ch. 434.
(31) [1938] 3 All E.R. 314; [1938] Ch. 828.
(32) [1938] 3 All E.R. at p. 318; [1938] Ch. at p. 836.

A **PENNYCUICK, J.:** So I understood.

E. I. Goulding: If your Lordship simply declares that the income tax and estate duty are attributable to the undrawn profit, that will exclude the rule in *Allhusen* v. *Whittell* (33).

B **PENNYCUICK, J.:** That is so.

Declaration accordingly.

Solicitors: *Woodcock, Ryland & Co.*, agents for *Preston & Redman*, Bournemouth (for the plaintiffs); *Stephenson, Harwood & Tatham* (for the first defendant); *Ford, Harris & Co.* (for the second defendant); *T. D. Jones & Co.* (for the third C defendant).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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E

PRACTICE DIRECTION.

QUEEN'S BENCH DIVISION.

F *Practice—List of authorities—List of authorities to which counsel propose to refer to be handed in before hearing—Queen's Bench Division.*

Counsel—List of authorities—List of authorities to which it is intended to refer in argument to be handed in before hearing—Queen's Bench Division.

On Feb. 9, 1961, during the hearing of the first case in the list of the Queen's G Bench Divisional Court (Lord Parker, C.J., Winn and Lawton, JJ.), LORD PARKER, C.J., directed that lists of the authorities to which counsel appearing in the Queen's Bench Division propose to refer should be handed in to the court usher by 10 o'clock in the morning of the day of the hearing of the case for which the authorities are required.

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(33) (1867), L.R. 4 Eq. 295.

SOLIHULL CORPORATION *v.* GAS COUNCIL AND OTHERS.

[Court of Appeal (Holroyd Pearce, Harman and Davies, L.JJ.), January 23, 24, 25, 1961.]

Rates—Rateable occupation—Occupation by servant or agent—Gas research station—Area gas board conducting research for Gas Council—Whether Gas Council were occupiers.

A gas research station was carried on by an area board on behalf of the Gas Council under statutory powers and an informal arrangement between the two bodies. It was owned by the board, the land was purchased by them and the buildings erected by architects and contractors employed by them, the staff were employed and paid by them, equipment and supplies were paid for by them, debts incurred in running the station were their liability, and the premises were insured by them. The arrangements between the council and the board contemplated that certain assets could be used partly for the board's own purposes and there was nothing to prevent the station being carried on by the board at their own expense. But the station's director was selected by the council subject to agreement by the board, who employed him, the research was in fact such as the council might specify, the right to patents arising from work at the station was assigned by the board to the council, the cost of the station was reimbursed by the council to the board (including interest on the cost of the land), letters and remittance advice notes were headed " Gas Council Midlands Research Station ", application for certain licences was made " on behalf of the Gas Council " and the name of the council (and no reference to the board) appeared in large letters on the station.

Held: the research station was in the rateable occupation of the board and not of the council, there being nothing to displace the prima facie presumption that the board as owners in possession through the control exercised by their servants were the occupiers and there being no evidence (the interest paid not being rent), if the question was one of fact, that there was any exclusive possession in the council.

Dicta of Buller, J., in *R.* v. *London Corpn.* ((1790), 4 Term Rep. at p. 27), and of Lord Herschell in *Holywell Union & Halkyn Parish* v. *Halkyn Drainage Co.* ([1895] A.C. at p. 121) approved by Lord Atkinson in *Winstanley* v. *North Manchester Overseers* ([1910] A.C. at p. 14), and of Vaughan Williams and Buckley, L.JJ., in *Liverpool Corpn.* v. *Chorley Union Assessment Committee* ([1912] 1 K.B. at pp. 283 and 286) applied.

Appeals allowed.

[As to rateable occupation by a servant or agent, see 32 Halsbury's Laws (3rd Edn.) 20, para. 22; and for cases on the subject, see 38 Digest (Repl.) 485, *70-76*.]

Cases referred to:

British Launderers' Research Assocn. v. *Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; [1949] 1 K.B. 462; [1949] L.J.R. 646; 113 J.P. 72; 38 Digest (Repl.) 583, *627*.

Clayton v. *Kingston-upon-Hull Corpn.*, [1960] 3 All E.R. 840; [1961] 2 W.L.R. 1.

Edwards v. *Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; [1955] 3 W.L.R. 410; 28 Digest (Repl.) 397, *1753*.

Farmers' Machinery Syndicate (11th Hampshire) v. *Shaw*, ante p. 285.

Holywell Union & Halkyn Parish v. *Halkyn Drainage Co.*, [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818; 59 J.P. 566; 38 Digest (Repl.) 470, 7.

Laing (John) & Son, Ltd. v. *Kingswood Assessment Area Assessment Committee*, [1949] 1 All E.R. 224; [1949] 1 K.B. 344; 113 J.P. 111; 38 Digest (Repl.) 496, *147*.

Liverpool Corpn. v. *Chorley Union Assessment Committee & Withnell Overseers*, [1912] 1 K.B. 270; 81 L.J.K.B. 426; 106 L.T. 205; 76 J.P. 161; *affd.* H.L., [1913] A.C. 197; 82 L.J.K.B. 555; 108 L.T. 82; 77 J.P. 185; 38 Digest (Repl.) 480, *40*.

R. v. *London Corpn.*, (1790), 4 Term Rep. 21; 100 E.R. 872; 38 Digest (Repl.) 476, *10*.

Westminster Corpn. v. *Southern Ry. Co., Railway Assessment Authority & Smith & Son, Ltd., Westminster Corpn. & Kent Valuation Committee* v. *Southern Ry. Co., Railway Assessment Authority & Pullman Car Co., Ltd.*, [1936] 2 All E.R. 322; [1936] A.C. 511; 105 L.J.K.B. 537; sub nom. *Re Southern Ry. Co.'s Appeals*, 155 L.T. 33; 100 J.P. 327; 38 Digest (Repl.) 634, *969*.

Winstanley v. *North Manchester Overseers*, [1910] A.C. 7; 79 L.J.K.B. 95; 101 L.T. 616; 74 J.P. 49; 38 Digest (Repl.) 506, *200*.

Case Stated.

The first appellant ratepayers, the Gas Council, were assessed as the occupiers of a hereditament comprising a gas research station, Wharf Lane, Solihull, assessed at £550 gross value, £455 rateable value for 1955-56, at £3,000 gross value, £2,497 rateable value for 1956-57 and £4,200 gross value, £3,497 net annual value, £2,798 rateable value for 1957-58 in the valuation list for Solihull Borough. The Gas Council, the West Midlands Gas Board and the valuation officer appealed by way of Case Stated against decisions of the Lands Tribunal (ERSKINE SIMES, ESQ., Q.C.), given on Jan. 28, 1960 ((1960), 6 R.R.C. 348) confirming these assessments and holding that the Gas Council were the rateable occupiers. They contended that the hereditament was in the occupation of the gas board, who were in physical control thereof by their servants and agents, and not of the Gas Council, and that the Lands Tribunal was wrong in law in holding that, because the board operated the hereditament on behalf of the Gas Council, the council were in occupation of the hereditament.

P. R. E. Browne, Q.C., and *N. C. Bridge* for the ratepayers, the Gas Council and West Midlands Gas Board.

Maurice Lyell, Q.C., and *D. G. Widdicombe* for the rating authority.

J. R. Phillips for the valuation officer.

HOLROYD PEARCE, L.J.: The hereditament with which these appeals are concerned is the Gas Research Station at Solihull. The issue is whether it is in the rateable occupation of the West Midlands Gas Board or the Gas Council. For the year to which the first appeal relates the result of it will merely decide which of these two financially interconnected corporations is liable to pay the rates. For the following years to which the other appeals relate, the matter is of more practical importance. For the premises of gas boards are, by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 6 (2), exempted from rating by annual payments in lieu of rates, but a hereditament occupied by the Gas Council is not so exempted.

The West Midlands Gas Board are owners of the hereditament in fee simple, and all those who work there are the board's servants. But the board are largely controlled by and are reimbursed by the Gas Council. The Lands Tribunal held that, by virtue of arrangements between the board and the council, the board were occupying merely as agents for the council, and that it is the council who are in rateable occupation. The nature and effect of these arrangements has been the subject of much argument before the Lands Tribunal and here. All figures and the relevant documents are agreed.

Before 1948 many gas companies and local authorities supplied gas. The Gas Act, 1948, nationalised gas companies and local authorities' gas undertakings. By s. 1 area boards were appointed to develop and maintain a co-ordinated gas supply to their areas, and they were given certain powers of manufacture and distribution and the like. By s. 1 (2) and (4) the boards had wide powers to carry on activities that should appear convenient in discharge of their duties; they had power to do anything, including borrowing and buying, that would facilitate performance of their functions. Section 2 established the Gas Council to advise and assist the efficient exercise and performance by area boards of their functions, and the Gas Council are given wide powers. Section 3 puts a duty on the Gas Council to settle a research programme. Section 3 (2) and (3) read as follows:

> " (2) It shall be the duty of the Gas Council to secure the carrying out of any general programme settled as aforesaid, and for that purpose they may themselves conduct research into any of the matters aforesaid and make arrangements with any other person, including an area board, for the conduct of such research by them.
>
> " (3) Any area board may conduct research in accordance with arrangements made with the Gas Council as aforesaid, and may also, after consultation with the Gas Council, conduct research into such matters affecting the functions of the board as are not included in the general programme settled as aforesaid."

Both the boards and the Gas Council are, by s. 5, bodies corporate. By s. 48 the council may require area boards to contribute to the council's expenses. Thus all the boards contribute indirectly to the expenses of a research station paid for by the council, and all the boards benefit by any discoveries.

There is no written agreement defining the respective positions of the board and the council in connexion with this research station. Both were working with the same object, viz., the betterment of the gas industry, and as between the council and this particular board it was clearly intended that the board should be neither in pocket nor out of pocket in respect of this research station. The cost of the research was to be borne by the council, who would ultimately recover it by contributions from all the boards. For that reason, instead of drawing up any comprehensive formal document defining the legal effect of their respective parts, the board and the council simply made resolutions and carried them into effect. It was, in a sense, a family arrangement.

The general effect of the working arrangements was this. The board financed the station in so far as they provided the cash to buy the land and buildings and various assets and the salaries of their employees who work at research. All these expenses were reimbursed by the council to the board. In the case of some expenses this was done quarterly. In the case of assets costing over £1,000, or with more than two years' life, it was done over a period. In the case of the land itself it was done by payment of interest (without any capital payment) described by the parties, erroneously from a legal point of view, as " rent ".

The main facts which the tribunal sets out in reaching its conclusion were these. The council appointed a permanent research committee, and on its advice decided to establish two research stations, one in London, and the other in the Midlands, such stations to be under the immediate control of the boards of the areas in which they are situated. The director of the station was selected by the council, and the appointment was to be offered to him subject to the board being agreeable to making the appointment. His duties were to be confined to conducting research into complete gasification processes, and such other research as the Gas Council might specify. The board assigned to the council the right to apply for patents arising from work in the research programme at the station. The board purchased the land and approved the construction of the buildings. A document headed: " Reimbursement of expenditure incurred by the boards in administering research stations on behalf of the council " sets out the method of accounting and reimbursement between the parties. Letters and remittance advice notes were produced on paper headed: " Gas Council Midlands Research Station ". Application by the director for certain licences was stated to be made " on behalf of the Gas Council ", and the name of the council was writ large on the research station with no reference thereon to the board.

The Lands Tribunal reached its conclusion in the following terms (1):

> " The decision in this case depends, I think, entirely upon the true construction of the arrangements made between the council and the board. The use of the words ' Gas Council ' on the building, on the notepaper and in applications for licences are, I think, material only in that they gave some evidence as to the construction which the parties themselves placed upon the arrangements. Any such evidence would be immaterial if the arrangements had been contained in a formal legal document, but it is, I think, clear that the documents in the present case are embodying, in informal language, terms which had been agreed by financial advisers.
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> " I am not satisfied that the use of the word ' rent ' justifies the assumption that a lease of the property to the council was intended, but the whole tenor of the arrangements is, I think, designed to make the board an agent of the council in operating the research station. The director was selected by the council, he works under the control of the research committee of the council and all the expenses are borne by the council. That the board and the council themselves took this view is, I think, shown by the evidence to which I have referred and in the brochure to which I have referred the position is, I think, correctly summed up in the words ' The Midlands Research Station which is administered by the West Midlands Gas Board on behalf of the Gas Council '. The beneficial occupation is, I am satisfied, in the Gas Council for whom and under whose direction the research is carried out and the board occupy merely as their agents."

Counsel for the ratepayers argues that the decision was wrong on the following grounds. There are four essential ingredients of rateable occupation. (a) There must be actual possession by the alleged occupier. (b) Possession must be exclusive for the particular purposes of the occupier. (c) Possession must be of some use or value or benefit to the possessor. (d) Possession must not be for too transient a period. The necessity for those ingredients is clearly established by *John Laing & Son, Ltd.* v. *Kingswood Assessment Area Assessment Committee* (2) where it was accepted by both sides and the court (3).

He relies on certain further facts which were set out in the Case Stated at the request of the ratepayers. They are to this effect: At all material times the ownership of the freehold of the hereditament was in the board. All the buildings comprised therein were erected by architects and contractors instructed, employed and paid by the board. All persons employed at the hereditament have at all material times been employed and paid by the board, and all equipment and supplies used at the hereditament have at all material times been paid for by the board. The premises have at all material times been insured by the board. All sums paid by the board in respect of those matters have been or will be repaid to the board by the Gas Council.

Counsel contends that the owner in possession of a hereditament is as a matter of law prima facie in occupation unless it is shown that someone else is in occupation. That proposition is established by dicta in *Winstanley* v. *North Manchester Overseers* (4). LORD ATKINSON says (5):

> ". . . owners in possession are prima facie occupiers, unless it be shown that the occupation is in someone else: per BULLER, J., in *R.* v. *London Corpn.* (6) and LORD HERSCHELL in *Holywell Union* v. *Halkyn Drainage Co.* (7)."

See also per VAUGHAN WILLIAMS, L.J., and BUCKLEY, L.J., in *Liverpool Corpn.* v. *Chorley Union Assessment Committee & Withnell Overseers* (8). It was suggested that those references applied only to cases where there was no other competing person who might be said to be occupying; but in *R.* v. *London Corpn.* (9) there were in fact two persons who might have been considered to be in some occupation. Lord Kenyon, C.J., there said (10): " Where there is no actual possession in another person, the possession follows the property ".

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(1) (1960), 6 R.R.C. at p. 352.
(2) [1949] 1 All E.R. 224; [1949] 1 K.B. 344.
(3) [1949] 1 All E.R. at p. 228; [1949] 1 K.B. at p. 350.
(4) [1910] A.C. 7.
(5) [1910] A.C. at p. 14.
(6) (1790), 4 Term Rep. at p. 27.
(7) [1895] A.C. at p. 121.
(8) [1912] 1 K.B. at p. 283 and p. 286.

The board, argues counsel for the ratepayers, are the owners in possession of these premises, and there is nothing in this case to discharge the onus of establishing that the occupation is that of the council and not of the board. The board, he urges, fulfil all the four requirements of rateable occupation set out above, but the council do not fulfil these requirements since they do not have actual possession or exclusive possession for their purposes. Clearly the board are, prima facie, in possession. The board decide when the door is to be locked at night. Therefore, it is said, one cannot displace them as occupiers until one can show that some other person is the real occupier.

It was sought by the rating authority to overcome that difficulty by the theory that the payment of interest on the purchase price of land constitutes rent which gives the council some right of occupation. But in my judgment the theory that payment of interest is rent cannot be supported. Such interest payments were described by the accountant as rent to explain that it is a reimbursement in respect of the land. But it is nothing more than a payment of interest on capital, and gives rise to none of the usual incidents of a tenancy or a licence. That being so, the council cannot show any right of possession in themselves unless they can make good the proposition that the board's possession is merely occupation on behalf of their master or principal, the council.

The Lands Tribunal, in finding that the board were the agents of the council, founded itself mainly on the facts that (i) the director was selected by the council, (ii) work to be done at the research station was under the control of the council, who in general directed what work should be carried on; (iii) all expenses are reimbursed by the council; (iv) research is carried out for and under the direction of the council. But in fact the director was an employee of the board. For any contractual purpose it is the board who are his masters and whom he can sue. Similarly the board are liable for debts incurred in the running of the research station. The system of reimbursement is inconsistent with any right in the board to pledge the council's credit. The premises are entirely controlled by servants of the board. The reimbursement of expenses does not alter the fact that the board are a corporate entity who, by their employees, are in possession of their own land, and have not divested themselves of their right of possession.

The tribunal did not approach the case from the fact that the board were owners in possession, and that in consequence a prima facie presumption arises from the cases to which I have referred. But it is fair to add that those cases were not cited to the tribunal. Even if the board could be regarded in some respects as the council's agents to carry out research, they are not in possession of the land as agents of the council to take possession. One may have occupation of premises by a master through the possession of his servant over whom he has a constant day-to-day control, but to have possession merely by an agent through such a loose form of control as exists in the present case is not, in my judgment, possible.

In *Laing's* case (11) the contractors making an aerodrome were in occupation of the site for that purpose, and put up certain buildings for their own use during the currency of the work. The question was whether the very stringent control imposed on them by the building owners (the Air Ministry) under the contract prevented them from being in exclusive occupation for the purposes of their business. It was held that the control exercised under the contract was with regard only to the performance of the contract, and was not such as to interfere with the exclusive occupation of the hereditament. Tucker, L.J., said (12):

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(9) (1790), 4 Term Rep. 21.

(10) (1790), 4 Term Rep. at p. 26.

(11) [1949] 1 All E.R. 224; [1949] 1 K.B. 344.

(12) [1949] 1 All E.R. at p. 232; [1949] 1 K.B. at p. 356.

A
> " The measure of control by the [Ministry] in carrying out the contract is a different thing from a control interfering with the exclusive occupation of the hereditament ";

and JENKINS, L.J., drew a similar distinction (13). The council in the present case had in fact a right to dictate as to the nature of the research, but no right to interfere with the board's occupation of their freehold land.

B *Farmers' Machinery Syndicate* (*11th Hampshire*) v. *Shaw* (14) decided in this court on Dec. 19, 1960, concerned a grain dryer bought by a syndicate, vested in trustees, and managed by a committee. In giving the first judgment HARMAN, L.J., said this (15):

> ". . . in my judgment these fourteen members, so to call them, are not the occupiers of this grain dryer. The occupiers, I think, are the management committee, who under the rules and regulations control the operations. The regulations provide: ' (1) Committee of management. The day-to-day running of the plant shall (subject to the regulations hereinafter contained) be under the control of a committee of management which shall consist of the chairman and secretary of the syndicate and two other members elected by the members '. Now the secretary does not farm any of these lands at all. It is obvious . . . that the whole control of this machine and the land on which it stands is in this committee of management. They are actively in control; they have two men during the season employed working there. The chairman of the committee himself visits it daily during the active season of the year and during the time when it is not in use the machine is in his possession because he has the key. It seems to me that the committee satisfy every qualification needed for rateable occupation. It is said that the committee are mere trustees having no beneficial interest and paramount to them are the members who, I suppose, by electing another committee can depose them. That does not seem to me to be anything to the point in a matter of this sort; they are much more clearly the controllers of this machine than were the trustees in *Clayton* v. *Kingston-upon-Hull Corpn.* (16) which was decided in November last, and in my judgment they are the rateable occupiers of this machine."
>
> C D E F

There the trustees who owned the land had no control. In the present case the board both own the land and control it by their servants and in particular by their servant, the director. The board, like the committee in the *Farmers' Machinery Syndicate* case (14), no doubt defer to the wishes of the council. I doubt if they have any contractual obligation to do so. The only sanction is that they might cease to be reimbursed if they insisted on going their own way. I see nothing to prevent their carrying on the station at their own expense on their own land. Under s. 3 (2) of the Gas Act, 1948, it is the board who are conducting the research and not the council. Moreover, the arrangements themselves expressly contemplate that there might be certain assets and certain expenditure used only partly for the council's purposes; see the research paper (exhibit G, cl. 4 and cl. 7); and therefore by inference partly for the board's purposes. Admittedly the board did not in practice so use any part of the assets; but in considering the purport of the arrangements it is significant that partial use for the board's own purposes was contemplated as a justifiable possibility.
G H

I Counsel for the rating authority relies forcefully on many points that were considered by the Lands Tribunal, such as the fact that both parties regard the station as administered by the board for the council; that the board are to derive no benefit for themselves; that the council pay for everything; that, where an asset is sold, the board have an equity in that any profit over the depreciated value already paid goes, not to the board, but to the council. It is a reasonable inference, he argues, that they were agreeing that the council should have the exclusive use of the assets for the purpose of discharging their statutory duty, A viz., their research programme; and the facts cumulatively justify the Lands Tribunal's finding. He argues that the question whether the board are bound to continue is irrelevant, since, so long as the council go on paying, they are entitled to have the research done; and, even if the board had a right to terminate, there is nothing in that to conflict with the finding that they are at present there as agents administering the council's station. B

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(13) [1949] 1 All E.R. at p. 232; [1949] 1 K.B. at p. 357.
(14) Ante p. 285. (15) Ante at p. 288. (16) [1960] 3 All E.R. 840.

But, in trying to ascertain the true effect of the arrangements, I think that it is important to consider what rights the board had, if they so wished, to run the station on their own, or to control the immediate management of it. I see no escape from the fact that the board were a corporation on their own land, and in control of it by their contractual servants. Nor do I see any evidence on which one can take the view that the board had so divested themselves of their independent C personality in managing the research station that they were acting merely as agents for the council in their occupation of their own land.

Finally, counsel for the rating authority contends that the tribunal's decision who is in occupation is one of fact, and that, even if we were not disposed to take the same view of the circumstances, yet we are bound by it. He relies on the passage from the speech of Lord Russell of Killowen in *Westminster Corpn.* D v. *Southern Ry. Co., Railway Assessment Authority & Smith & Son, Ltd.* (17):

> “ Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact, viz., whose position in relation to occupation is paramount, and whose position in relation to occupation is E subordinate . . .”

The form in which the Case Stated deals with the matter seems to indicate that the tribunal thought the matter was a question of legal inference, and it ends:

> “ The question upon which the decision of the honourable court is desired is whether upon the findings of fact I came to a correct decision in law in finding that the hereditament was in the beneficial occupation of the Gas F Council.”

The issue of occupation may be and often is a pure question of fact, but in this case it is a question of mixed law and fact or a question of legal inference from the facts. The Lands Tribunal, as it seems to me, has failed to give weight to the prima facie legal inference to be derived from the fact of the owner being in possession. If that inference is omitted, then an important substratum of the G decision is lacking, and thus what might seem on the surface a question of fact is really a mixed question of law and fact. Moreover, one can only decide the issue of occupation by deciding the effect in law of the arrangements between the parties. Under such an arrangement, does possession by A constitute occupation by B? That involves considerations of law. The process by which the tribunal decided that the presence of the board on their own land justified the H conclusion that the premises were occupied by the council entails consideration of the legal effect of the arrangements between them.

Denning, L.J., in *British Launderers' Research Assocn.* v. *Hendon Borough Rating Authority* (18) said:

> “ If and in so far, however, as the correct conclusion to be drawn from I primary facts requires, for its correctness, determination by a trained lawyer—as, for instance, because it involves the interpretation of documents, or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer—the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance.”

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(17) [1936] 2 All E.R. at p. 326; [1936] A.C. at p. 529.
(18) [1949] 1 All E.R. at p. 26; [1949] 1 K.B. at p. 472.

A That passage covers the deductions by which the Lands Tribunal arrived at the conclusion that the council were in occupation of the premises. But, even if I am wrong in thinking that the Lands Tribunal decision was a conclusion of law, this is a case where we should take a view contrary to that held by the tribunal. In *Edwards* v. *Bairstow* (19) there is helpful guidance to be found in the speeches of VISCOUNT SIMONDS and LORD RADCLIFFE. LORD RADCLIFFE B says this (20):

> "If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those C circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory D of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test."

LORD RADCLIFFE ends his speech with the words (21):

> "The court is not a second opinion, where there is reasonable ground for E the first. But there is no reason to make a mystery about the subjects that commissioners deal with, or to invite the courts to impose any exceptional restraints on themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado." F

In my judgment the tribunal—partly, it may be, through not giving sufficient weight to the additional facts which are found in the Case Stated—has, I think with all respect, come to a conclusion which cannot reasonably be supported on the evidence; and I would hold that in this case the only reasonable conclusion on the facts, starting with the prima facie inference from ownership and posses- G sion, is that the board, and not the Gas Council, are the occupiers. I would, therefore, allow the appeal.

HARMAN, L.J.: The not uncomplicated case with which we have been wrestling for the last three days is really a by-product of that particular piece of nationalisation found in the Gas Act, 1948, which produced two full-grown H corporations springing like Athena from the head of Zeus, fully armed with powers, one being, so to speak, the adviser of the other. The regional gas boards were the instruments designed to carry on the business of supplying gas to the public, and the Gas Council were a body set up to advise the Minister of Fuel and Power and to co-ordinate the efforts of the various boards. These several corporations were, of course, never at arm's length. The Gas Council derived their I finance by levying on the money earned by the gas boards: on the other hand, the Gas Council for certain purposes would reimburse one or other of the boards for expenditure that the board incurred. Everything came out of the public's pocket in the end, being either borrowed from the Treasury and coming from the general taxpayer, or extracted from the consumer of gas by way of payment for that commodity. So one starts with a position where the two corporations here involved are never at arm's length, nor do they ever deal with one another as if they were.

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(19) [1955] 3 All E.R. 48; [1956] A.C. 14.
(20) [1955] 3 All E.R. at p. 57; [1956] A.C. at p. 36.
(21) [1955] 3 All E.R. at p. 59; [1956] A.C. at p. 38.

The dispute here is which of them is in rateable occupation of the hereditament in question; but, as, owing to what is, I suppose, the accident of legislation, the board are immune from rates (22), and the Gas Council are not, both of them stand on the same side of the fence, and urge that the board be treated as the rateable occupiers, although in a more rational world they would be on different sides one arguing against the other. The outside party who wants the council to be treated as occupiers is the rating authority, who can then levy a rate (and a considerable rate) on this hereditament, which is a gas research station.

Now it is one of the statutory duties of the Gas Council to establish research stations for the purpose of research into the useful application of gas, which had previously been carried on by a body set up by various gas undertakings. The statute provides that one of the duties of the council is to conduct such research as seems good to them; and, as Holroyd Pearce, L.J., has pointed out, under s. 3 of the Gas Act, 1948, the council may either do the research themselves or make arrangements with, among other people, area boards to do it on their behalf. In this case one thing that is clear is that the council have made an arrangement, albeit a very vague and obscure one, with the board to conduct this particular piece of research into what are called "complete gasification processes" on their behalf, in return for which (so far as can be gathered from the various rather wordy and unsatisfactory documents before us) the Gas Council are to reimburse the board, albeit in the end out of the board's own money, for the expenses incurred or to be incurred. Under those arrangements the board have bought some land on which they have erected this gas research station, and have, I suppose, agreed to have inscribed on it the name of the Gas Council, as if the object of the research station is to conduct research by the Gas Council themselves. From this fact and certain notepaper headings and the like, the Lands Tribunal has reached the conclusion that the council and not the board are in occupation of this hereditament.

In my judgment that is entirely contrary to the facts as revealed to us. I have found myself at a loss to appreciate how the Lands Tribunal could reach its conclusion; but I think perhaps Holroyd Pearce, L.J., hit on the explanation when he said that it came to that conclusion because it started with a wrong premise. The premise which it should have started from was that this was a building to which the board not only had a title, but of which they were, in fact, in possession. Title, of course, in matters of rating, is from one point of view quite unimportant; one can occupy if one has no title at all; but, where there is a competitor, matters of title often become extremely important. The subject is, I think, very well dealt with in Ryde on Rating (10th Edn.), at pp. 84 and 85, and I do not think that I need go into that. So far as I can see, the only theory now put forward in order to show that the council are occupiers does not rest on any point of licence or tenancy—the contentions which were put forward below—but is that in some way the very fact of the board's occupation is the occupation of the council.

That appears to me to be entirely contrary to all the facts found in the Case. The station is owned and controlled by the board. The people who work there are the servants of the board. The controller of research is the board's servant, and no one else's. There are no indications of possession on the part of the council except their name on the façade. As to the board being the alter ego of the council, there is no evidence to support that either. The board are a separate corporation with which the council have made this arrangement to carry out this research on their behalf; but why the fact that it is being done on the council's behalf puts the council in occupation of the research station I am entirely unable to follow.

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(22) See the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 6 (2).

With all respect, therefore, to the tribunal and to the able argument of counsel for the rating authority, in my view this is a tolerably plain case; there was no ground on which the tribunal could draw the inference which it drew on the facts put before it. If that be a true description of the position, then, like HOLROYD PEARCE, L.J., I think that an appellate court is not debarred from putting its own opinion in the place of that of the tribunal. I agree that the appeal should be allowed.

DAVIES, L.J.: I agree. Substantially the whole of the evidence which was before the Lands Tribunal was documentary evidence, and we have had the advantage of seeing and reading all the material parts of it, and HOLROYD PEARCE, L.J., has mentioned the outstanding factors on either side. When that is considered, one poses the question which is the question at issue: During the three relevant years, who was the occupier of this hereditament? It seems to me that on the evidence there is only one possible answer, and that is that the board were the occupiers. No doubt the board occupied the premises at the behest or instance of the council, and largely at the expense of the council. No doubt that occupation was for the purpose of carrying on research for the benefit of the council, and, for that matter, for the benefit of all the other area boards. But when one asks who it was that was occupying the premises and who it was that was carrying on the research, the answer appears to me to be quite plain. It was the board.

The arrangements between the parties were very loose arrangements. But without quoting the two categories to which HOLROYD PEARCE, L.J., has referred in exhibit G, cl. 4 and cl. 7, it is perfectly clear that the structure of the arrangements was one which permitted the board to some extent to make use of the building and the assets there for purposes other than those of the council's research. It seems to me, therefore, that the loose arrangement between these parties was an attempt to carry out that passage in s. 3 (2) of the Gas Act, 1948, to which both my Lords have referred, in the second line:

> ". . . for that purpose the [Gas Council] may themselves conduct research into any of the matters aforesaid and make arrangements with any other person, including an area board, for the conduct of such research by them."

It is quite clear what was the effect of the arrangement. Under the latter part of s. 3 (2), instead of the council carrying out the work of research themselves, it was the board who were to carry out the research for the council. That seems to me perfectly plain on the evidence. For the reasons given by my Lords, I agree that this appeal should be allowed.

Appeals allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Sherwood & Co.* (for the ratepayers, the Gas Council and West Midlands Gas Board); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Solihull (for the rating authority); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

DALEY AND OTHERS *v.* HARGREAVES.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Salmon and Winn, JJ.), January 17, 18, 1961.]

Road Traffic—Motor vehicle—Dumpers—Use of dumpers on road in housing estate in course of construction—Dumpers not equipped with horns and did not display identity certificate—Whether dumpers intended or adapted for use on roads—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 53), *s.* 36 *—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 1.

Judgment—Judicial decision as authority—Scottish decision—Conformity.

The appellants D. and H. were each the driver of a Muir Hill 10 B.D. dumper, a four-wheeled mechanically propelled vehicle with pneumatic tyres and reversible seats to enable it to be driven backwards or forwards and with mechanically operated scoops or shovels in which the material collected was carried; the dumpers were not equipped with windscreens, lamps, reflectors, horns, wings, number-plates, direction indicators, speedometers or driving mirrors. On Sept. 12, 1959, D. and H. drove the dumpers, laden with rubble, along a lane to which the public had access which formed part of a housing estate in the course of construction by the appellants, V., Ltd. who were the employers of D. and H. and the owners of the dumpers. Informations were preferred against all the appellants that they used the dumpers in contravention of the Motor Vehicles (Construction and Use) Regulations, 1955, reg. 19, in that neither dumper was fitted with an instrument capable of giving audible and sufficient warning of its approach contrary to s. 3 of the Road Traffic Act, 1930, and a further information was preferred against V., Ltd., that, being holders of a "C" carrier's licence granted under the Road and Rail Traffic Act, 1933, they failed to comply with reg. 12 (2) of the Goods Vehicles (Licences and Prohibitions) Regulations, 1952, in that they did not cause a "C" identity certificate to be affixed to the vehicle then being used under the licence contrary to reg. 2. Evidence for the prosecution was confined to the one occasion of user of the dumpers on the lane and did not show, e.g., how the dumpers reached the site. The appellants were convicted and appealed on the ground that the dumpers were not intended or adapted for use on roads, within the meaning of s. 36 of the Road and Rail Traffic Act, 1933, and s. 1 of the Road Traffic Act, 1930, and thus were not motor vehicles within the regulations.

Held: there was no evidence sufficient to show that the dumpers were "intended or adapted for use on roads" within s. 1 and s. 36 (1) above mentioned, and, the present case being indistinguishable in substance from the Scottish decision in *MacDonald* v. *Carmichael* (1941 S.C. (J.) 27), which the court would follow for conformity, it had not been established that the dumpers were motor vehicles to which the regulations applied; the convictions, therefore, would be quashed.

MacDonald v. *Carmichael* (1941 S.C. (J.) 27) followed.

Dictum of LORD GODDARD, C.J., in *Cording* v. *Halse* ([1954] 3 All E.R. at p. 291) applied.

Appeal allowed.

[As to the meaning of "motor vehicle", see 31 HALSBURY'S LAWS (2nd Edn.) 797, para. 1251.

As to construction and use of vehicles, see 31 HALSBURY'S LAWS (2nd Edn.) 770-773, paras. 1198-1204; and for cases on the subject, see 42 DIGEST 865-867, *165-180*.

For the present definition of "motor vehicle", see Road Traffic Act, 1960, s. 253 (1).

For the Road Traffic Act, 1930, s. 1, s. 3, and for the Road and Rail Traffic Act, 1933, s. 25, s. 36, see 24 HALSBURY'S STATUTES (2nd Edn.) 572, 574 and 699, 707.

For the Vehicles (Excise) Act, 1949, see 21 Halsbury's Statutes (2nd Edn.) 1433.

For the Goods Vehicles (Licences and Prohibitions) Regulations, 1952, see 22 Halsbury's Statutory Instruments 151.]

Cases referred to:

Cording v. *Halse*, [1954] 3 All E.R. 287; [1955] 1 Q.B. 63; 118 J.P. 558; [1954] 3 W.L.R. 625; 3rd Digest Supp.

MacDonald v. *Carmichael*, *Orr* v. *Carmichael*, 1941 S.C. (J.) 27; 2nd Digest Supp.

Case Stated.

This was an appeal by Peter Daley, Donald Hutchinson and Vessey, Ltd., by way of Case Stated by the justices for the county borough of Stockport before whom an information had been preferred on Nov. 25, 1959, by the respondent, Clifford Hargreaves, superintendent of police for the county borough of Stockport, against the appellant Daley. The information charged that he on Sept. 12, 1959, used a motor vehicle, a Muir Hill dumper (unregistered) on the road called Lapwing Lane in contravention of reg. 19 of the Motor Vehicles (Construction and Use) Regulations, 1955, made pursuant to the Road Traffic Act, 1930, in that the vehicle was not fitted with an instrument capable of giving audible and sufficient warning of approach, contrary to s. 3 of the Road Traffic Act, 1930. The justices heard this information on Jan. 18, 1960, and, on Feb. 1, 1960 (at the request of the parties) together with another information in identical terms against Donald Hutchinson, two other informations in identical terms against Vessey, Ltd., the employers of Daley and Hutchinson, and a further information against Vessey, Ltd. that at the same time and place they, being the holders of a licence granted under the Road and Rail Traffic Act, 1933, failed to comply with reg. 12 (2) of the Goods Vehicles (Licences and Prohibitions) Regulations, 1952, made pursuant to s. 25 of the said Act, in that they did not cause a valid identity certificate in a waterproof container to be affixed to a vehicle then being used under the above-mentioned licence in Lapwing Lane, in one or other of the places prescribed, contrary to reg. 2 of the Goods Vehicles (Licences and Prohibitions) Regulations, 1952. The following facts were found. At 11.45 a.m. on Sept. 12, 1959, Daley and Hutchinson were each driving a Muir Hill 10 B.D. dumper, laden with rubble, in Lapwing Lane, Brinnington, Stockport. Lapwing Lane formed part of a housing estate in course of construction, on which a number of buildings had been erected and occupied, and was a road to which the public had access. The dumpers were owned, and their drivers employed, by Vessey, Ltd., the contractors engaged on the estate, which was in the ordinary course of construction. The dumpers were four-wheeled mechanically propelled vehicles fitted with pneumatic tyres and with reversible seats so as to be capable of being driven backwards or forwards with equal facility, and were equipped with mechanically operated scoops or shovels in which the material collected was carried, but they were not equipped with windscreens, head, side or rear lamps, reflectors, horns, wings, number-plates or direction indicators, speedometers or driving mirrors. Vessey, Ltd. were the holders of a "C" carrier's licence under the Road and Rail Traffic Act, 1933, but only one dumper was authorised to be used under such a licence, and did not carry the "C" identity certificate as prescribed by the Goods Vehicles (Licences and Prohibitions) Regulations, 1952. Neither dumper was registered under the Vehicles (Excise) Act, 1949.

It was contended by the appellant that these dumpers were not motor vehicles within the definitions given in s. 1 of the Road Traffic Act, 1930, and s. 36 (1) of the Road and Rail Traffic Act, 1933, as they were neither intended nor adapted for use on roads; and in consequence, neither s. 3 of the Road Traffic Act, 1930, nor any of the regulations made thereunder or under s. 25 of the Road and Rail Traffic Act, 1933, had any application and the informations should be dismissed. The fact that the vehicles were not equipped in the manner A prescribed by the Motor Vehicles (Construction and Use) Regulations, 1955, by the manufacturers was adduced as evidence that the manufacturers did not intend the vehicles to be used on the road, and that, as the vehicles had admittedly not been adapted for such use, their intention was the sole criterion.

It was contended by the respondent that the admitted fact that the vehicles were used on a road was sufficient evidence of an intention so to use them by B someone, and that the vehicles therefore came within the Acts. It was contended that, should the appellants' argument succeed, an object of the Acts, in promoting road safety, would be defeated, as all sorts of unsuitable contrivances could be used on the roads without fear of prosecution under Acts expressly passed to regulate such use.

The justices were of opinion that the owners of the vehicles intended to use C them on the road, thus bringing them within the Acts mentioned above and that the offences were proved; but in view of the fact that the appellants in the case of Vessey, Ltd., believed they were acting within the law and that Daley and Hutchinson were merely obeying orders, the justices gave an absolute discharge to all the appellants.

The question for the opinion of the court was whether the justices came to a D correct determination of the law.

C. F. Dehn for the appellants.
J. M. Collins for the respondent.

SALMON, J., at the request of LORD PARKER, C.J., gave the first judgment and, after stating the facts, continued: I will read s. 1 of the Road Traffic Act, E 1930: "This Part of this Act shall apply to all mechanically propelled vehicles intended or adapted for use on roads . . ." I should also read s. 3 (1) of that Act, which is as follows:

> "Subject as hereinafter provided, it shall not be lawful, to use on any road a motor vehicle or trailer which does not comply with the regulations applicable to the class or description of vehicles to which the vehicle belongs, F as to the construction, weight and equipment thereof . . ."

Then sub-s. (3) provides:

> "If a motor vehicle or trailer is used on a road in contravention of this section, any person who so uses the vehicle or causes or permits the vehicle to be so used shall be guilty of an offence." G

Section 36 (1) of the Road and Rail Traffic Act, 1933, defines "motor vehicle" as "a mechanically propelled vehicle intended or adapted for use on roads."

The case for the respondent was based on the proposition that the intention referred to in s. 1 of the Road Traffic Act, 1930, and in s. 36 (1) of the Road and Rail Traffic Act, 1933, was the intention of those using the vehicle on the road H at the moment of the alleged offence, and that accordingly once it was proved that the appellants were using the vehicle on the road it followed that at that moment they must have had the necessary intent, and were therefore guilty of the alleged offences. No doubt it is because the prosecution was based on the proposition to which I have referred that the evidence called by the respondent was confined to the use on one occasion of these dumpers on a short stretch I of road in the immediate vicinity of the works of construction. There was no evidence before the court of any use of these dumpers on any road other than in the immediate vicinity of the construction works. There was no evidence to show how the dumpers reached the site nor any evidence as to their performance, e.g., in relation to speed, which might indicate whether or not they were suitable to be driven along roads in transit or to carry materials from one building site to another. For all we know the maximum speed of which they were capable may not have exceeded five miles per hour. There is nothing to show that these dumpers are not in reality items of plant which occasionally are driven very slowly along short stretches of road in the immediate vicinity of the construction works on which they are used rather than road vehicles capable of being used in works of construction.

The justices accepted the proposition put forward by the respondent and convicted the appellants. The case for the appellants both in this court, and before the justices, was that these dumpers were not intended or adapted for use on the road within the meaning of those words in the relevant sections. They contended that the intention referred to in the sections was the intention of the manufacturers and that since the vehicles were not equipped with lamps, reflectors, horns, wings, number-plates or direction indicators, the manufacturers could not have intended the dumpers to be used on roads.

The appellants strongly relied on the Scottish decision in the Court of Justiciary of *MacDonald* v. *Carmichael, Orr* v. *Carmichael* (1). Mr. Carmichael was the managing director of a company whose business it was to construct and repair roads. The company owned a number of dumpers similar to those in the present case, except that the driver's seat which faced the skip was not reversible, so that the driver's forward view was obscured when the skip was full. The managing director was prosecuted, amongst other things, for permitting the use of the dumpers on a road without third-party insurance. He was acquitted and his acquittal was approved by the Court of Justiciary on the ground that these dumpers were not intended or adapted for use on roads within the meaning of Part 1 of the Road Traffic Act, 1930. It is to be observed that the court's decision was based on these important findings of fact set out in paras. 10 and 11 of the Case (2):

> " (10) That [the dumpers] are solely used in connexion with road construction and are not constructed to carry goods on an ordinary highway. They are so constructed as to be capable of, and are in fact occasionally used for, carrying road-making material along short stretches of the public highway in the vicinity of the work of reconstruction. (11) That the usual practice is for a dumper to be taken to a part of a road which is being reconstructed and where an excavation has to be made. The material, usually earth and stones, which is being excavated is loaded into the dumper's ' skip ' and the dumper is then driven by its own power to another part of the road where an embankment is being formed and the material is dumped there."

In my judgment, the true effect of the Court of Justiciary's decision was that the very limited use of the dumpers on the road in that case did not establish that they were " intended or adapted for use on the road ", within the meaning of those words in the Road Traffic Act, 1930, s. 1.

In the present case there is no finding that the dumpers were used on roads by the appellants for any more general purpose than the dumpers in the Scottish case. Indeed, there is nothing to distinguish this case in any material particular from the Scottish case. It is true that in para. 8 of the Case, which paragraph incidentally does not purport to record the justices' findings of fact, it is said that:

> " A manufacturer could make, as we think he has done in this case, a vehicle which could be used on a road or elsewhere, and for a variety of purposes."

This, however, appears to be pure speculation, for we have been told by counsel that the only evidence before the justices was that to which I have already alluded. There is nothing here which could justify a finding that the dumpers were used or might practicably be used on roads otherwise than in the limited fashion in which they were used in *MacDonald* v. *Carmichael* (3). Had there A been any such evidence before the justices, I, for my part, would have thought it proper to remit the case to them for further findings on this point.

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(1) 1941 S.C. (J.) 27.

(2) 1941 S.C. (J.) at p. 30.

This case, therefore, is, as I have already said for all practical purposes, indistinguishable on its facts from *MacDonald* v. *Carmichael* (3). As LORD GODDARD, C.J., observed in *Cording* v. *Halse* (4): B

> "It is very desirable that, with statutes of this nature, the same interpretation should be given on either side of the Border. It would be very unfortunate to have, on a similar set of facts, a conviction in England and no conviction in Scotland, or vice versa, and, in this class of case dealing with this class of subject-matter, this court always tries to follow the decisions of the Court of Session if they can, and I think the Court of C Session always pays the same respect to decisions in this country, so that one may get uniformity, which is certainly very desirable."

I am aware, as pointed out by the Lord Justice-Clerk (LORD AITCHISON) in *MacDonald* v. *Carmichael* (3), that the respondent's contention that as the dumpers were being used on a public road to convey material along it, it cannot be maintained that in being so used they were being used for a purpose for which D they were not intended, may in strict logic appear to be convincing. Indeed, were it not for the principle enunciated by LORD GODDARD, C.J., in *Cording* v. *Halse* (4), to which I have referred, I am by no means certain what conclusion I should have reached in this case. For my part, however, I would follow the decision in *MacDonald* v. *Carmichael* (3) and hold that the convictions cannot stand on the ground that the dumpers were not intended or adapted for use on E roads within the meaning of s. 1 of the Road Traffic Act, 1930, or s. 36 (1) of the Road and Rail Traffic Act, 1933.

The view that I have reached is based strictly on the particular facts of this case and is not intended to apply to dumpers generally. My conclusion might, and probably would, have been different if the findings had shown that the F dumpers were reasonably suitable for being driven along the public roads in transit or for the purpose of carrying material from one site to another. Nor must it be thought that I am acceding to the appellants' submission that the intention referred to in the relevant sections is the manufacturer's intention alone. It may be that the legislature had no particular person's intention in view, whether manufacturer's, wholesaler's, retailer's, owner's or user's. "Intended . . . for use on roads" may mean no more than suitable or apt for use. G I prefer, however, to express no concluded view on this point but to base my decision, following *MacDonald* v. *Carmichael* (3), on the ground that in no event does the evidence of very limited user in this case establish that the vehicles were intended for use on roads within the meaning of the statutes H concerned.

I would answer the question postulated by the justices by saying that they were wrong in their conclusion, and would accordingly allow the appeal and quash the convictions.

WINN, J.: I agree. I

LORD PARKER, C.J.: I agree. I would only like to emphasise that it must not be taken as the result of this decision that dumpers of the type used in this case are not motor vehicles intended or adapted for use on the road. For my part, I have come to the same conclusion as SALMON, J., merely because that was not proved in this case. It may well be that in another case on fuller

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(3) 1941 S.C. (J.) 27. (4) [1954] 3 All E.R. at p. 291; [1955] 1 Q.B. at p. 70.

A evidence the court will be able to say that dumpers of this kind were clearly motor vehicles intended or adapted for use on the road.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Westbrook, Ince & Co.*, Hyde, Cheshire (for the appellants); *Amery-Parkes & Co.*, agents for *Bell, Hough &* B *Hamnett*, Stockport (for the respondent).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

C

R. *v.* CLARKSON.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Salmon and Winn, JJ.), January 23, 30, 1961.]

Criminal Law—Sentence—Preventive detention—Scottish previous convictions— D *No evidence that previous offences punishable by law of Scotland on indictment with imprisonment for two years or more—Whether sentence of preventive detention valid—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6 *c.* 58), *s.* 21 (2) (*b*).

The appellant pleaded guilty to being found at night in a building with intent to steal therein. He was thirty-eight years of age and had had E eighteen previous convictions, all in respect of offences of dishonesty. Notice of previous convictions in 1954, 1955 and 1957 was given in accordance with s. 23 (1) of the Criminal Justice Act, 1948. The relevant previous convictions were three Scottish convictions. The appellant admitted that he had been convicted and sentenced to imprisonment on these occasions, the terms being each less than two years; but by an oversight, the certificate F of the Lord Advocate under s. 23 (3)* of the Act, which would have been evidence that the three offences to which the convictions related were each punishable on indictment in Scotland with a term of imprisonment of two years or more, was not put before the court. The court sentenced the appellant to seven years' preventive detention. On appeal on the ground that, as Scottish law was a question of fact, there should have been evidence G that the convictions were of offences punishable on indictment and were convictions on indictment, and that in the absence of such evidence the conditions laid down in s. 21 (2) (b)† of the Act of 1948 for passing sentence of preventive detention were not shown to have been satisfied.

Held: prima facie proof that the admitted convictions were for offences punishable on indictment with imprisonment for terms of imprisonment H of two years or more should have been given before sentence was passed; as this had not been done, the sentence of preventive detention could not stand and a sentence of imprisonment would be substituted.

[As to proof of previous convictions before sentence to preventive detention, see 10 HALSBURY'S LAWS (3rd Edn.) 513, para. 932 and p. 511, para. 928; and for cases on the subject, see 14 DIGEST (Repl.) 587, *5841* and 3rd DIGEST Supp.

I For the Criminal Justice Act, 1948, s. 21 (2), s. 23, see 28 HALSBURY'S STATUTES (2nd Edn.) 371, 374.]

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* Section 23 (3) is set out at p. 559, letter B, post.

† Section 21 (2) provides that preventive detention may be imposed if a person who is not less than thirty years of age—" (a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to borstal training, imprisonment or corrective training . . ."

Appeal.

This was an appeal by Peter Clarkson against a sentence of seven years' preventive detention imposed on him at the County of London Sessions on Sept. 14, 1960. He had pleaded guilty before the chairman and a jury to being found by night in a building with intent to steal therein. The prisoner then admitted the three previous convictions of which notice had been given pursuant to s. 23 of the Criminal Justice Act, 1948, being convictions in 1954, 1955 and 1957 in Scotland, and sentences of nine months, eighteen months and twenty-one months' imprisonment thereon. The facts appear in the judgment of the court. The statute, authorities and cases enumerated below* were cited in argument in addition to those in the judgment.

M. D. L. Worsley for the appellant.

H. J. Leonard for the Crown.

Cur. adv. vult.

Jan. 30. **LORD PARKER, C.J.**, read the following judgment of the court: This appellant pleaded guilty at the County of London Sessions to being found by night in a building with intent to steal therein and was sentenced to seven years' preventive detention. He now appeals against that sentence by leave of the single judge. He was found at about 10 p.m. on Aug. 13, 1960, on the fourth floor of the Globe Theatre standing by some clothes.

He is thirty-eight years old and has some eighteen previous convictions, all in respect of offences of dishonesty. It is unnecessary to enumerate them. It suffices to say that the court is satisfied that if it was shown that he qualified for preventive detention he fully deserved the sentence that was imposed.

The ground on which leave to appeal was given concerned the absence of proof that the convictions set out in the notice under s. 23 of the Criminal Justice Act, 1948, which were convictions in Scotland, were convictions which qualified the appellant for preventive detention.

Section 21 (2) of the Criminal Justice Act, 1948, provides that preventive detention may be imposed if a person who is not less than thirty years of age (a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to borstal training, imprisonment or corrective training.

There was no doubt that the appellant was shown to qualify under (a) above, but as regards (b) the position was this, that while he was undoubtedly over thirty all that was established was that he had been previously convicted as follows:—at the Inverness Sheriff Court on Mar. 2, 1954, of theft and previous convictions, and sentenced to nine months' imprisonment; at Glasgow Sheriff Court on July 28, 1955, of theft (two charges), on locked premises with intent, theft by house-breaking and previous convictions, sentenced to eighteen months' imprisonment; at Glasgow Sheriff Court on Nov. 28, 1957, of theft by house-breaking and previous convictions, sentenced to twenty-one months' imprisonment, subject to s. 22 of the Criminal Justice (Scotland) Act, 1949. In other words, there was no evidence before the learned chairman that those offences under Scottish law were (i) punishable on indictment, (ii) punishable with imprisonment for a term of two years or more.

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* I.e., Criminal Appeal Act, 1907, s. 9; Archbold's Criminal Pleading, Evidence and Practice (34th Edn.), paras. 899, 4227, 4238; *Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1932] All E.R. Rep. 571; [1933] A.C. 289; *R.* v. *McGrath*, [1949] 2 All E.R. 495; *R.* v. *Cameron* (unreported).

R. v. *Cameron* was heard before the Court of Criminal Appeal (Lord Goddard, C.J., Croom-Johnson and Parker, JJ.) on June 30, 1952. The appellant in that case had pleaded guilty at Bradford City Sessions to warehouse-breaking and other offences. He had twenty-one previous convictions. The recorder had sentenced him to eight years' preventive detention. The notice of previous convictions given, pursuant to s. 23 (1) of the Criminal Justice Act, 1948, stated three Scottish convictions; two of these, although before the sheriff, were summary convictions, and, as the Court of Criminal Appeal confirmed by inquiry, only one of them was a conviction on indictment. Thus, of the convictions stated in the notice which had been served only one was a conviction such as could qualify the appellant for preventive detention. Lord Goddard, C.J., delivering the judgment of the Court of Criminal Appeal, said that if this unfortunate oversight had not occurred the prisoner would have been properly sentenced to preventive detention; but, as it was, the court was bound to set aside the sentence of preventive detention and would alter the sentence to one of six years' imprisonment, dating from conviction, and there would be an order under s. 22 of the Criminal Justice Act, 1948.

It is to be observed that it is provided by s. 23 (3) of the Act of 1948 that

> " For the purposes of s. 21 (1) and (2) of this Act a certificate purporting to be signed by or on behalf of the Lord Advocate that an offence is punishable on indictment in Scotland with imprisonment for a term of two years or more shall be evidence of the matter so certified."

In fact such a certificate had been obtained by the prosecution and the validity thereof has been confirmed to this court but no such certificate was put in at the trial. In those circumstances it is said on behalf of the appellant that Scottish law being a question of fact in our courts the conditions precedent to a sentence of preventive detention were never established, that fresh evidence as to Scottish law cannot be received in this court and that accordingly the sentence of preventive detention must be set aside. As we have already said, such a sentence was fully merited and the point taken is a mere technicality, but, nevertheless, if good, the appellant is entitled to avail himself of it.

The point is a narrow one. It amounts to this: Is a sentence of preventive detention good if in fact the conditions in s. 21 (2) (b) turn out to have been fulfilled or must at any rate prima facie evidence that they are satisfied be given in the trial court before such a sentence can be imposed?

The court has with considerable reluctance come to the conclusion that the latter view is correct. While, if the former view were right, a sentence of preventive detention would be quashed should it turn out that the prisoner did not qualify for such a sentence, that would involve the initiation by the convicted person of an appeal. It seems to us that the correct view is that, whereas the fact of the convictions must be strictly proved in accordance with s. 23 (1) of the Act, at any rate prima facie proof must be given of the other matters laid down as qualifying conditions in s. 21 (2) (b). Indeed s. 23 (3) appears to have been inserted for this very purpose. Moreover, we are told that in practice a certificate under s. 23 (3) is put in and counsel for the prosecution concedes that this should have been done and states that in the present case failure to do so was a slip.

In these circumstances the court has no option but to set aside the sentence of preventive detention and to substitute a sentence appropriate in all the circumstances to the offence in question. The court will substitute a sentence of eighteen months.

Finally, the court would mention that a further point was taken on behalf of the appellant to the effect that it had also not been proved that the three convictions relied on were, in fact, convictions on indictment. In the circumstances the court finds it unnecessary to express any opinion on that point. Accordingly, the appeal will be allowed and a sentence of eighteen months' imprisonment will be substituted.

Appeal allowed in part. Sentence varied.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

NOTE.

R. *v.* CAVAN.

[Court of Criminal Appeal (Lord Parker, C.J., Salmon and Winn, JJ.), January 23, 30, 1961.]

Criminal Law—Sentence—Corrective training—Scottish previous convictions—No evidence that previous convictions punishable by law of Scotland on indictment with imprisonment for two years or more—Whether sentence of corrective training should stand—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 58), *s.* 21 (1) (*b*).

[As to previous convictions and sentences in determining whether a person qualifies for corrective training, see 10 Halsbury's Laws (3rd Edn.) 511, para. 928, and Supplement; and for cases on the subject, see 14 Digest (Repl.) 583, 584, *5808-5811, 5817.*

For the Criminal Justice Act, 1948, s. 21 (1) (b), s. 23, see 28 Halsbury's Statutes (2nd Edn.) 371, 374.]

Case referred to:

R. v. *Clarkson*, ante, p. 557.

Appeal.

This was an appeal by Michael Cavan against a sentence of three years' corrective training imposed on him by the acting chairman (Judge Lawson Campbell) at the Soke of Peterborough Quarter Sessions on Oct. 13, 1960. He had pleaded guilty to being found at night in a building with intent to steal contrary to s. 28 (4) of the Larceny Act, 1916. Notice was served on the appellant, in accordance with s. 23 of the Criminal Justice Act, 1948, of two previous convictions. These were Scottish convictions, viz.—(i) on Jan. 16, 1956, at Dumbarton Sheriff Summary Court for theft by house-breaking, etc., when he was fined £4 or twenty days' imprisonment; (ii) on May 30, 1959, at the same court for theft by house-breaking with previous convictions for which he was sentenced to four months' imprisonment. The prisoner admitted these convictions and sentences. The appeal was directed to be heard with that of *R.* v. *Clarkson.**

M. D. L. Worsley for the appellant.

Cur. adv. vult.

Jan. 30. **LORD PARKER, C.J.,** read the following judgment of the court: This appellant pleaded guilty at the Soke of Peterborough Quarter Sessions to being found by night in a building with intent to steal therein and was sentenced to three years' corrective training. He now appeals against that sentence by leave of the single judge on the ground that this case raises the same point in regard to the proof of qualifying conditions as was raised in *R.* v. *Clarkson* (1).

It is clear to this court that on the merits a sentence of three years' corrective training was the appropriate sentence, but in this case, as in *R.* v. *Clarkson* (1), the qualifying convictions were in Scotland and there was no prima facie evidence that the offences for which he was convicted were punishable on indictment with imprisonment for a term of two years or more as provided by the Criminal Justice Act, 1948, s. 21 (1) (b).

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* The Advocate Depute, on behalf of the Lord Advocate, certified by letter dated Dec. 31, 1960, in reply to a request of the Registrar, Court of Criminal Appeal, that the crime of theft by house-breaking was punishable on indictment in Scotland with imprisonment for a term of two years or more. Compare *R.* v. *Clarkson* (ante, p. 557) where the certificate was given before the date of trial but by inadvertence was not put in as evidence.

(1) Ante, p. 557.

Having regard to the decision of this court in *R.* v. *Clarkson* (2) the court has no option but to set aside the sentence of corrective training. The appeal, accordingly, will be allowed and the court substitutes a sentence of nine months' imprisonment.

Appeal allowed in part. Sentence varied.

Solicitor: *Registrar, Court of Criminal Appeal* (for the appellant).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

J. BOLLINGER AND OTHERS *v.* COSTA BRAVA WINE CO., LTD. (No. 2).

[CHANCERY DIVISION (Danckwerts, J.), November 29, 30, December 1, 2, 5, 6, 7, 16, 1960.]

Passing Off—Geographical name descriptive of particular district of France—Plaintiffs a class of producers within that district—" Champagne "—Wine produced in Spain offered for sale in England under the description " Spanish Champagne "—Whether calculated to deceive.

The plaintiffs sued for themselves and all other persons who produced wine in the Champagne district of France and supplied it in England and Wales. The wine so produced and supplied by them was known, and had been known for many years, as " Champagne ", and as such had acquired a high reputation. The defendants were a company incorporated in June, 1956, who imported and offered for sale in England a wine under the name of " Spanish Champagne ". This wine was alleged to possess the characteristics of the champagne produced in France, but was produced in Spain and had no connexion with the Champagne district of France or with France. The plaintiffs claimed (among other relief) an injunction to restrain the defendants from passing-off as champagne or as wine produced in the Champagne district of France wine not so produced. In substance the defence was that the use of the word " Spanish " showed that the defendants' wine was not a wine produced in France. It was also argued that " Champagne " was so well known that no more than a trifling minority of ignorant persons could be misled by the use of the description " Spanish Champagne ", and, further that the description " Champagne " described a type of wine and was a generic description. The court found on the evidence that the description " Champagne " in England and Wales in fact meant the product produced in the Champagne district of France by the plaintiffs and the other growers and shippers of that district, and had not come to mean a type of wine, whatever might be the situation of some other French wines in that respect (see p. 564, letter D, post).

Held: the plaintiffs would be granted the injunction that they sought against passing-off, because—

(i) a substantial portion of the public, being persons whose life and education had not taught them much about the nature and production of wine but who from time to time wanted to purchase Champagne as the wine with the great reputation, were likely to be misled by the description " Spanish Champagne " (see p. 567, letter I, post) and

(ii) the use of the description " Spanish Champagne " was intended to attract to the Spanish product the goodwill connected with the reputation of Champagne and was dishonest trading (see p. 568, letter F, post).

Per CURIAM: for the purpose of the question whether a name is calculated to deceive, close resemblance makes the counterfeit not less but more calculated to deceive (see p. 565, letter I, post).

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(2) Ante, p. 557.

Holmes v. *Pipers, Ltd.* ([1914] 1 K.B. 57) considered.

[As to when proceedings for passing off lie, see 32 HALSBURY'S LAWS (2nd Edn.) 652, para. 961; and for cases on the subject, see 43 DIGEST 288, *1166-1168*.

As to false trade descriptions, see 32 HALSBURY'S LAWS (2nd Edn.) 673, para. 985; and for cases on the subject, see 43 DIGEST 242, 243, *862-871*.]

Cases referred to:

Angus (George) & Co., Ltd.'s Application for Rectification of Register of Trade Marks, Re, (1943), 60 R.P.C. 29; 2nd Digest Supp.

Bedford (Duke) v. *Ellis*, [1901] 1 A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 16 Digest 489, *3718*.

Holmes v. *Pipers, Ltd.*, [1914] 1 K.B. 57; 83 L.J.K.B. 285; 109 L.T. 930; 78 J.P. 37; 43 Digest 242, *865*.

"*Singer*" *Machine Manufacturers* v. *Wilson*, (1876), 2 Ch.D. 434; *revsd.* H.L., (1877), 3 App. Cas. 376; 47 L.J.Ch. 481; 43 Digest 214, *592*.

Slazenger & Sons v. *Feltham & Co.*, (1889), 6 R.P.C. 531; 43 Digest 300, *1246*.

Action.

The plaintiffs, twelve companies, suing on behalf of themselves and of all persons who produced wine in the district of France known as the Champagne district and shipped such wine to England and Wales, claimed (i) an injunction to restrain the defendants from applying by their servants or agents or otherwise howsoever the trade descriptions champagne or Spanish Champagne to wine made in Spain and/or from grapes grown in Spain; (ii) an injunction to restrain the defendants from passing off by their servants or agents or otherwise howsoever as and for wine produced in the district of France known as the Champagne district wine not so produced by advertising, offering for sale or selling the same as Spanish Champagne or under any other name or description that included the name champagne; (iii) a declaration that the description Spanish Champagne and any other description that included the name champagne was a false trade description of wine made in Spain and/or from grapes grown in Spain; (iv) an inquiry as to damages and payment of the amount found due. The facts appear in the judgment.

Geoffrey Lawrence, Q.C., R. O. Wilberforce, Q.C., P. J. S. Bevan and *R. K. Kuratowski* for the plaintiffs.

Sir Milner Holland, Q.C., F. E. Skone James and *S. H. Noakes* for the defendants.

Cur. adv. vult.

Dec. 16. **DANCKWERTS, J.,** read the following judgment: This action concerns the sale in this country of a wine called by the defendant company "Spanish Champagne". The matter was the subject of a six-day hearing at the Central Criminal Court on charges under the Merchandise Marks Acts, which resulted in an acquittal on Nov. 24, 1958. In the present action, which was begun by writ dated Dec. 4, 1958, certain injunctions were claimed on the ground of passing off, and there was also a claim based on a civil remedy by reason of a false trade description under the Merchandise Marks Acts, 1887 to 1953. The action has already been before me on two occasions. On the first occasion I declined to strike out the plaintiffs' statement of claim as disclosing no reasonable cause of action. On the second occasion, three (or really two) points of law were argued, and these if decided against the plaintiffs would have disposed of the action. In my judgment (1) of Nov. 13, 1959, I held that no civil remedy was available under the Merchandise Marks Acts; but I held that, on the assumptions which had to be made for the purposes of that hearing, an action on the basis of passing off or unlawful competition was maintainable by the plaintiffs.

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(1) [1959] 3 All E.R. at p. 802; [1960] 1 Ch. at p. 272.

A The plaintiffs are twelve companies incorporated under the laws of the Republic of France which carry on business as producers of wine in the district of France known as the Champagne district and as suppliers of such wine to England and Wales. The plaintiffs claimed to sue on behalf of themselves and all other persons who produce wine in the Champagne district and supply it to England and Wales. The plaintiffs were authorised to bring the action by a resolution B of forty-six growers and shippers in the Champagne district and subsequently another eighty signed retainers authorising the plaintiffs' solicitors to act for them. The products of these represented 3,233,653 bottles of champagne out of a total of 3,234,594 bottles imported into England and Wales in 1958. But the point is not really important, as in my previous judgment I expressed the view that a passing-off action protected a property right of a trader in his good-C will (of which the name "Champagne" could form part), and it would appear that each of the plaintiffs is entitled to bring an action to protect such property right, so far as thereby affected: see *Duke of Bedford* v. *Ellis* (2).

The region in which the Champagne vineyards are found is about one hundred miles east of Paris around Reims and Épernay, where there is a chalky, flinty soil and the climate is subject to extreme variations of heat and cold. It appears D that these factors give to the wine its particular qualities. It is unnecessary to consider the details of the history of the limitations imposed on the use of the name "Champagne" in France. At any rate since 1927 the Champagne Viticole district has been strictly limited by law, and only certain vineyards are allowed in France to use the name "Champagne". Wines produced from these vineyards are sold under the name "Champagne", but goodwill has also become E attached to the names of the shippers, or "brand names", as they are called. The wine is a naturally sparkling wine made from grapes produced in the Champagne district by a process of double fermentation which requires a considerable amount of care. The claim of the plaintiffs that such wine is and has for a long time been known to the trade and the public in the United Kingdom as "Champagne", and as such has acquired a high reputation, is completely supported F by the evidence and could not be seriously contested. In particular, it appeared from the evidence that Champagne is a wine specially associated with occasions of celebration so that (in addition to sales to persons who regularly buy wine) it is purchased on such occasions from time to time by many persons who are not in the habit of buying wine for consumption and are not educated in the nature or qualities of different kinds of wine.

G The defendants are a company incorporated in England on June 27, 1956, which for a few years past only has been importing and offering for sale in England a wine under the name "Spanish Champagne". This is a wine which is alleged to possess the characteristics of the Champagne grown and produced in France, but it is produced in Spain, and has no connexion whatever with the Champagne district or even with France. In the face of these facts, it is plainly H not champagne, and has no right to be so described. The substantial defence of the defendant company is that the addition of the word "Spanish" shows that it is not a wine produced in France and so the description "Spanish Champagne" is not capable of being mistaken for Champagne which is produced in France.

This is a fairly specious argument, but possible difficulties are caused by the I fact that there are undoubtedly a large number of people in England who know what champagne is and would not be deceived by the description "Spanish Champagne" into thinking that the wine so described was the real thing. Any person who has been to France and has visited the Champagne district would, on being offered "Spanish Champagne", undoubtedly assume that it was an imitation of the true champagne (and probably inferior in quality) which was made in Spain and not France, and was called by that name because of the prestige value attaching to the word "Champagne". Moreover, when the case is tried in an atmosphere of educated persons, many of whom are well acquainted with the qualities of various wines, it may seem absurd that persons should be deceived by what may appear to be a transparent impersonation. It was argued indeed that champagne was so well known that everyone except a trifling minority of ignorant persons (who were not to be considered, especially in regard to what was termed a luxury article) would not be deceived. This argument was supported by the contention that many well known wines, such as burgundy, chablis, graves, sauterne and sherry had been used for so many years, in conjunction with a geographical adjective referring to the country where the substitute was produced, that the name had ceased to represent a wine produced in the original country from which its name was derived, and merely indicated a type of wine, or, as was sometimes said, a generic description. Such a situation has undoubtedly occurred in such cases. [His Lordship reviewed the evidence of witnesses and referred to certain books and writings concerning the usage and meaning of the term "Champagne", and, after noting that Germans were prohibited from calling their wine "Champagne" by the Treaty of Versailles and that the corresponding Australian wine and South African wine were not called "Champagne" in England but were sold as "Great Western" and "Dry Dominion", concluded:] In the result, it has plainly been established to my satisfaction that "Champagne" in this country means the product produced in the Champagne district of France by the plaintiffs and the other growers and shippers of that district; and "Champagne" in this country has not come to mean a type of wine, whatever may be the situation of some other French wines in this respect.

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(2) [1901] 1 A.C. 1.

The defendants' wine, therefore, is not Champagne, and it is untruthful to describe it as such. Not only is it untruthful, but also, if it was so described deliberately with the object of acquiring sales through the reputation of the world-famous and true Champagne, it is dishonest to call the Spanish wine by that name. On this subject, some pungent observations are to be found in the judgments of the Divisional Court in *Holmes* v. *Pipers, Ltd.* (3). The headnote of that case is as follows:

> "The respondents sold a bottle bearing the label 'Fine British Tarragona Wine'. The bottle did not contain Tarragona wine or anything like it, but a mixture composed as to eighty-five per cent. of a wine made and prepared in England from dried raisins, and as to fifteen per cent. of Mistella, a heavy form of Tarragona wine made and used solely for blending purposes and not suitable for consumption by itself. Held, that the label on the bottle was a false trade description within s. 3 of the Merchandise Marks Act, 1887."

The case was remitted to the magistrate, who had dismissed the information. Scrutton, J., said (4):

> "In these circumstances one is face to face with the question, does the fact that the word 'British' is used save the label from being a false trade description? I understand the magistrate's view to have been that, inasmuch as Tarragona wine is not made in England, the person who calls a thing 'British Tarragona' at once shows that it is something out of the common, and puts the buyer upon inquiry; and the buyer cannot expect to get anything like Tarragona wine. I feel great difficulty about adopting that view because it is not everyone who knows where Tarragona is, and it appears to me to be assuming too high a standard of knowledge to say that the use of the word 'British' puts the buyer upon inquiry. May a man sell a bottle of water and call it British champagne, and as no champagne is made in this country, can he say that the buyer is put upon inquiry?

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(3) [1914] 1 K.B. 57.

(4) [1914] 1 K.B. at p. 63.

> Faced with that [counsel for the respondents] replied that the contents of the bottle would be so unlike champagne that it would be a false trade description. I think that if a person calls a thing Tarragona wine he must supply that article or something so like it that it might be described as British Tarragona wine. If that is the test, the magistrate has found that this was not Tarragona wine or anything like it, and having found that, I am not pressed with his finding that the label does truly describe the contents of the bottle because there is some British wine and some Tarragona wine. I do not think that even ' British Tarragona wine ' is to be read as a mixture of British wine and Tarragona wine; I read it as Tarragona the genus, and British the species; and once I get that what is supplied is not the genus, the description of the species appears to me not to apply. For these reasons I think there was in this case a false trade description, and therefore that the magistrate should have convicted."

Bailhache, J., said (5):

> "The argument is frequently put forward in these cases that if, taking the whole of the description, a contradiction in terms is found, it is absurd to suppose that anyone can be deceived, and therefore the description cannot be a false trade prescription. It is said in this case that there is a contradiction in terms between the words ' British ' and ' Tarragona '. The vice of the argument, however, is that it assumes too much knowledge on the part of the purchaser of this class of article. It is quite true that a person who knows where Tarragona is knows that it is not in Great Britain or in any British possession; but these Acts are meant to protect persons who have not all this knowledge. If a man who has tasted Tarragona port, or had been told that it was a most excellent thing, and had not the smallest conception where Tarragona was, saw in the respondents' shop bottles labelled ' Fine British Tarragona wine ', the words ' British ' and ' Tarragona ' would be no contradiction in terms to him at all, and would not put him upon inquiry. He would think he was getting Tarragona which he had been recommended to buy. That sort of person is deceived by a label of this kind."

It is true that this was a case under the Merchandise Marks Act, 1887, and, even after the addition to the word " false " of the words " or misleading " by the Merchandise Marks Act, 1953, s. 1 (2), the point is not quite the same in a passing-off action, in which, as stated in Kerly on Trade Marks (8th Edn.), at p. 332, the question is " whether the defendant's use of such mark, name or get-up is calculated to deceive ". But the observations of the court are none the less very pertinent to the present case.

Counsel for the defendants naturally called attention to the magistrate's finding in that case that the mixture was not Tarragona wine or anything like it, and Scrutton, J., did say (6):

> " I think that if a person calls a thing Tarragona wine he must supply that article or something so like it that it might be described as British Tarragona wine."

The suggestion is, of course, that in the present case the Spanish wine is so like champagne that it is not improper to call it " Champagne " with the adjective " Spanish ". But for the purpose of the question which I have to decide—which is whether the name is calculated to deceive and which is concerned with unfair trading—it seems to me that close resemblance makes the counterfeit not less but more calculated to deceive, and so the argument fails.

Counsel for the defendants also referred to *"Singer" Machine Manufacturers* v. *Wilson* (7), a case concerning Singer sewing machines and nothing to do with wine, in which Sir George Jessel, M.R., illustrated his judgment (8) with an example based on the sale of German Rhine wine, in competition with Champagne. But in the example which he imagined, the Master of the Rolls put the case of a German manufacturer who was not pretending that his wine was Champagne—he was saying that it was a Rhine wine equal to or superior to certain well-known brands of Champagne. This is quite different from the present case.

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(5) [1914] 1 K.B. at p. 64.

(6) [1914] 1 K.B. at p. 63.

(7) (1876), 2 Ch.D. 434.

I have now to consider whether the defendants' methods of advertising and selling their wine, which is not champagne, is calculated to deceive the public or a substantial part thereof into thinking that it is champagne.

For reasons to which I have already referred, experts and many educated persons, and most persons engaged in the trade, and no doubt wine waiters and the like, know what champagne should be, and will not be deceived by the defendants' misdescription of their merchandise. It is not very easy to ascertain the amount of knowledge in regard to the nature of wines and their origin among other classes of persons who have perhaps no particular reason to know about such matters but have almost certainly heard of champagne as being the wine drunk at the gayest of parties and in distinguished circles and on occasions such as weddings and other celebrations. I must not base myself on my own speculations, but must be guided by the evidence which has been given before me. The class of persons to be considered is stated in Kerly on Trade Marks (8th Edn.), at p. 402, to be:

> "All of those who are likely to become purchasers of the goods upon which the marks are used, provided that such persons use ordinary care and intelligence."

And it has been said (at p. 403) that regard should not be had to "unusually stupid people, fools or idiots". Moreover,

> "if the goods are expensive and not of a kind usually selected without deliberation and the customers generally educated persons those are all matters to be considered."

Various other judicial statements are collected in the judgment of the Assistant Registrar in *George Angus & Co., Ltd.'s Application* (9), to which I was referred.

Bearing those observations in mind, I now turn to a consideration of the evidence on this point. Mr. Warner Allen, who had written books on wine, was asked—"Would you say that the public in general is well-informed about wine and its origins?" and he answered:

> "Generally speaking it is not. It cannot be, because we do not grow wine. It takes a time for the public to learn, but it does want to learn. People are very easily misled, and it really is a cruel thing, when people want to know about wine, to tell them that champagne comes from Spain. That is enough to put anybody off wine-drinking for life. They will drink it, think it nasty, and never drink any more wine."

Mr. Clarkson, chairman of the Champagne Association, after agreeing that some firms had placed "Perelada Spanish Champagne" in the section of wine lists dealing with champagne, said, on the question whether that description indicated that it came from Spain,

> "To me it does, but to anybody who does not know, I think that putting it in the section given over to champagne is conducive to make people think it is champagne."

He meant that this kind of thing is a likely result of the description used by the defendants for their wine. Another example of that tendency is the menu produced by the Mecca restaurants for the special lunch in which "Champagne (Perelada)" was offered at 2s. 6d. a glass. Moreover, some persons in the trade, like Mr. Blyth, considered that they had to put in their lists the names given to the wines by the suppliers and left it at that.

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(8) (1876), 2 Ch.D. at p. 447.

(9) (1943), 60 R.P.C. at p. 31.

Mr. Purchase did not think that people were quite as ignorant as perhaps had been alleged, but he did not stock " Perelada " because of the description " Spanish Champagne " on the label, and when he offered his customers sparkling wine, as an alternative to champagne, he was always careful to explain to his customer the nature of the wine which he was offering.

Mr. Munday, whose wine business was in Swansea, when asked—" How far do you think the class of customers that you deal with know the origin of champagne? "—replied:

> " Limited. Some would know. The first category I mentioned would know a fair amount about it. In the second category some. But there would be a considerable number in my area who would know nothing about it except that it was a wine they wanted for a special occasion or for something in their life they wanted to celebrate with. They would then want that. That is how much they would know about it—just a general outline."

A little earlier in his evidence, Mr. Munday had said:

> " The standard, of course, in off-licences generally, of labour is very low and very poor, particularly in my part of the country, and in my various shops the standard is also low because unskilled labour can pick up £16 to £18 a week. That is one point. The other point is that young people, or any people, are not anxious to work these days between 5.30 and 10.30, or 10, according to the season. It is extremely difficult to get staff. So what is happening is that self-service is now creeping into off-licences. Where I would like to talk to my customers, it just cannot be done in all the shops. With the standard of person I have, their knowledge of wine is very limited. So one has creeping in these display shelves on which the wine is displayed and people come along and pick out the various bottles they think they would like."

Mr. Munday's point obviously was that the new class of customers with money to spend on wine would not have sufficient knowledge to know the origin of champagne, and owing to the low standard of knowledge among the assistants in wine shops and the use of a self-service system, their ignorance would not be removed by explanations from the employees in the wine business. Mr. Munday, it may be noticed, had champagne shipped to him from France, bearing his own brand name, so there was obviously a market for champagne in his district. Mr. Rogers, who had been in the hotel and catering trade for many years, with his base at Cardiff, said much the same thing. His view was that the more ignorant type would know that champagne had a very high reputation and would simply ask for " Champagne ", without more knowledge than that. These were the witnesses who came more in touch with the less educated sections of the purchasing public. The wine waiters who gave evidence would usually be dealing with a more educated class, and, in dealing with less knowledgeable persons, would have an opportunity of guiding them. Even these came across a great number of persons who did not know from whence "Champagne" came. Mr. Willis, a wine merchant, both wholesale and retail in London, thought that the less informed members of the public knew that champagne comes from France, though not the area in which it is produced; but (as I have mentioned before) in his latest list he had ceased to put " Perelada " among champagnes " because it is not Champagne ".

There is thus, in my view, a considerable body of evidence that persons whose life or education has not taught them much about the nature and production of wine, but who from time to time want to purchase " Champagne ", as the wine with the great reputation, are likely to be misled by the description " Spanish Champagne ".

Something was said on the subject of the burden of proof. Burden of proof may shift in the course of an action. It appears to me that when the plaintiffs have shown that a description used by the defendants contains an untruthful statement that a wine which is not champagne is champagne, they have gone some way to establishing their case, and the court might require to be satisfied that such an untrue statement was so clearly qualified as to be not likely to mislead. However that may be, I am satisfied on the evidence that a substantial portion of the public are likely to be misled. And as LINDLEY, L.J., said in *Slazenger & Sons* v. *Feltham & Co.* (10):

> " One must exercise one's common sense, and, if you are driven to the conclusion that what is intended to be done is to deceive if possible, I do not think it is stretching the imagination very much to credit the man with occasional success or possible success. Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do? "

This brings me to some features of this case which impressed me considerably. First, apparently the defendants' wine is not sold in Spain under the name " Champagne ", but is sold as " Perelada ", selling there on its own legitimate reputation. Why was the word " Champagne " selected for the British market? Mr. Michael Grylls, who is, it seems, the moving spirit behind the defendant company, and was loquacious enough about his discovery of " Perelada " at the party held to celebrate the failure of the prosecution at the Central Criminal Court, did not give evidence at the hearing of this action. His evidence would have been interesting on this point. Moreover, the brochure, freely distributed by the defendant company, entitled " Giving a Champagne Party ", is plainly a blatant attempt to secure to the sale of the defendant company's wine the advantage of the goodwill connected with the word " Champagne " and the business of the plaintiffs and the other producers and shippers of champagne.

I am compelled to reach the conclusion that this is not an innocent case of passing off. I think that Mr. Grylls and his company intended by using the name " Spanish Champagne " to attract the goodwill connected with the reputation of " Champagne " to the Spanish product. I think that it was deliberate. This is dishonest trading; and the plaintiffs were fully justified in bringing this action to protect their goodwill and the action succeeds.

Judgment for the plaintiffs.

[HIS LORDSHIP granted an injunction in the terms of (ii) (see p. 562, letter E, ante) and granted a stay for forty-eight hours. On the question of costs, HIS LORDSHIP's attention was drawn to the fact that there had been various interlocutory proceedings. There had been an application, made by the defendants, to strike out the statement of claim (of which the costs were reserved), an application to have points of law tried separately, and the trial of the points of law. On behalf of the defendants it was submitted that the application to strike out and the preliminary points of law had chiefly been concerned with the Merchandise Marks Acts, a question which was decided in favour of the defendants. HIS LORDSHIP, while accepting that the defendants had succeeded on that matter, intimated that nevertheless the question had been one of law and that he did not agree that it followed that the defendants should have the costs of it. He awarded the costs of the action (including interlocutory proceedings) to the plaintiffs.]

Solicitors: *Monier-Williams & Keeling* (for the plaintiffs); *Summer & Co.* (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(10) (1889), 6 R.P.C. at p. 538.

ABATE *v.* CAUVIN (formerly ABATE otherwise CAUVIN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lloyd-Jones, J.), December 14, 1960, January 23, 1961.]

Nullity—Foreign decree—Domicil of parties in Italy—Residence in Switzerland—Swiss decree of nullity on ground of husband's impotence recognised by Italian courts—Recognition by English court.

The English court will recognise the validity of a decree of nullity pronounced by a foreign court if that decree is recognised by the court of the country where the parties were domiciled at the date of the decree.

The parties were married in England in 1952, the husband then being domiciled in Italy, the wife in England. They lived together in Italy but the marriage was never consummated. A child was born as a result of fecundatio ab extra and shortly thereafter the parties separated. In 1960 at a time when the parties were both resident in the same town in Switzerland, a Swiss court, on the husband's petition, found the husband to be permanently impotent and declared the marriage null and void. The husband now sought a declaration that the marriage had been annulled by the Swiss decree. At the date of the Swiss decree the husband was domiciled in Italy and it was proved that the decree would be recognised as valid by the Italian courts.

Held: the Swiss decree would be recognised as valid by English law.

Armitage v. *A.-G.*, *Gillig* v. *Gillig* ([1906] P. 135) applied.

[As to the recognition of a foreign decree of nullity where marriage was celebrated in England, see 7 HALSBURY'S LAWS (3rd Edn.) 117, para. 206; and for cases on the subject, see 11 DIGEST (Repl.) 485, 486, *1102-1106*.]

Cases referred to:

Armitage v. *A.-G.*, *Gillig* v. *Gillig*, [1906] P. 135; 75 L.J.P. 42; 94 L.T. 614; 11 Digest (Repl.) 483, *1094*.

De Reneville v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, *1075*.

Travers v. *Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; [1953] 3 W.L.R. 507; 3rd Digest Supp.

Petition.

This was a petition for a declaration that the declaration or decree of a Swiss court was a valid declaration or decree annulling the marriage. The husband, Andrea Amadis Giuseppe Abate, was Italian by birth and at all material times was domiciled in Italy. On Oct. 19, 1952, he went through a ceremony of marriage in London with the wife, Diana Sylvia Lola Cauvin, who was then domiciled in England. The marriage was never consummated but as a result of fecundatio ab extra a child was born on June 23, 1953. The parties lived together in Italy but some time towards the end of 1953 they separated. On July 16, 1958, the husband obtained a decree of divorce in the State of Chihuahua in the Republic of Mexico. The husband went to reside in Castaneda in Switzerland and in about September, 1959, he had his name struck off the population register of the commune of San Remo, Italy, where he had previously resided, and obtained inscription in the civil population register of Castaneda. The wife resided in Castaneda. On Oct. 15, 1959, the husband filed in the court of the district of Moesa in the canton of Grisons, Switzerland, a petition seeking an annulment of the marriage on the ground of his impotence. The wife entered an appearance and admitted the facts alleged in the petition. Medical evidence was adduced which showed that the husband was, and had been since before the marriage, permanently impotent. The tribunal decided that it had jurisdiction to entertain the suit by reason of the fact that the husband was domiciled in Switzerland for the purposes of the Swiss Civil Code, art. 24, para. 2 of which provided that the domicil of a person must be considered to be the place where such a person resides if it is proved that he or she has given up his or her domicil without having established another in Switzerland. The tribunal accepted the medical evidence and accordingly, on July 9, 1960, declared the marriage null and void. A

The husband now sought a declaration that the marriage had been annulled by the declaration or decree of the Swiss court.

The petition was not defended. On Dec. 14, 1960, Lloyd-Jones, J., granted the declaration sought and on Jan. 23, 1961, gave his reasons. B

Joseph Jackson for the husband.

Cur. adv. vult.

Jan. 23. **LLOYD-JONES, J.**, read the following judgment, in which, having stated the facts, he continued: The Grisons judgment has been proved before me. It is submitted in this court that there are three approaches to the recognition of the Grisons judgment. C

First, it is said there is a possibility that the husband was domiciled in the canton of Grisons at the time of the proceedings as stated in the Swiss judgment. In fact no reliance was based on this possibility, for from an English point of view it is patent on the evidence that no domicil of choice was acquired there. D Secondly, it is said that the husband was at all material times domiciled in Italy, that the courts of Italy recognise the Swiss decree, and that, on the analogy of the principle in *Armitage* v. *A.-G., Gillig* v. *Gillig* (1) recognition should be accorded to that decree. Thirdly, it is said that both the parties were resident in the canton of Grisons at the time of the decree, that residence in England of both parties gives an English court jurisdiction in nullity proceedings (see *De Reneville* v. *De Reneville* (2)), and that an English court ought to accord jurisdiction to other courts on the bases where it itself takes jurisdiction, as indicated in *Travers* v. *Holley & Holley* (3). E

I find that the husband, and, therefore, the wife, was domiciled in Italy at all material times. An expert in Italian law and an expert in Swiss law have both given evidence before me, and I am satisfied that the courts of Italy will accord recognition to the Grisons decree. It is not necessary to repeat their reasons for stating this, since the Grisons judgment sets out all the material facts and law. F

The first question to be decided is whether the *Armitage* principle (1) should be applied to nullity suits. There appears to be no reported authority on the matter, but the text-books all appear to warrant its application: see Dicey's Conflict of Laws (7th Edn.), p. 383; Rayden on Divorce (8th Edn.), p. 824; Jackson, Formation and Annulment of Marriage, p. 281. In my judgment, if the court of the domicil of the parties recognises a nullity decree, this court will recognise it, and I so hold. G

The question as to recognition of a decree founded on residence of both parties does not, therefore, fall to be decided in this case. I declare, therefore, that the declaration or decree of the tribunal of the district of Moesa in the canton of Grisons made on July 9, 1960, is a valid and effective declaration or decree annulling the marriage. H

Declaration accordingly.

Solicitors: *W. Timothy Donovan* (for the husband).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*] I

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(1) [1906] P. 135. (2) [1948] 1 All E.R. 56; [1948] P. 100.
(3) [1953] 2 All E.R. 794; [1953] P. 246.

O'NEILL *v.* BROWN.

[Queen's Bench Division (Lord Parker, C.J., Salmon and Winn, JJ.), January 26, 1961.]

Road Traffic—Motor vehicle—Construction and use—Trailer attached—Trailer insecurely attached but vehicle trailer and coupling in good repair—Whether in such condition that no danger likely to be caused—"Maintenance"—Motor Vehicles (Construction and Use) Regulations, 1955 (*S.I.* 1955 *No.* 482), *reg.* 73 (1).

A lorry and the trailer which it drew, including the tow-bar affixed to the trailer, were each of good construction and in good repair, but the person who coupled them together failed to ensure that the coupling was properly engaged. As a result the trailer became disengaged from the lorry while it was being driven along a road and struck a motor cycle on the road, killing the motor cycle driver and injuring his passenger. When the user of the lorry and trailer was charged with failure to comply with the requirement of reg. 73 (1) of the Motor Vehicles (Construction and Use) Regulations, 1955, that " every motor vehicle, every trailer drawn thereby and all parts and accessories of such vehicle and trailer shall at all times be in such condition . . . that no danger is caused or is likely to be caused to any person . . . on a road " it was contended on his behalf that, as both the lorry and the trailer and their parts were in good repair, he was not guilty of the offence charged.

Held: the regulation required the vehicle and trailer to be not merely in good repair but in efficient working order; as they were improperly joined together they were not in such order, and on this ground the offence charged was established.

Appeal dismissed.

[As to the maintenance of motor vehicles so as to avoid danger, see 31 Halsbury's Laws (2nd Edn.) 774, para. 1207.]

Case Stated.

This was an appeal by Case Stated by the appellant against his conviction by Portsmouth Magistrates' Court on Mar. 11, 1960, on an information preferred against him by the respondent. The facts are stated in the judgment of Lord Parker, C.J.

R. G. Rougier for the appellant.
Michael Lee for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the city of Portsmouth, before whom an information was preferred by the respondent against the appellant, for that he, the appellant, did unlawfully use on a road a trailer towed by a motor vehicle, to wit, a motor lorry, a certain part of such vehicle, namely the tow-bar, not being in such condition that no danger was likely to be caused to any person on the vehicle or on the road, contrary to reg. 73 (1) and reg. 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The justices convicted the appellant, and the question for this court is whether they came to a correct determination of law in so convicting him, a matter which really turns on the true construction of reg. 73.

The short facts were these: the appellant was a fairground showman, and on Nov. 18, 1956, he towed out of the fairground and along the road a trailer. The means of connecting the trailer to the lorry was a tow-bar affixed to the trailer, having at its end a socket which fitted over a metal ball-unit which was attached to the motor lorry. It was an automatic coupling device in that when the socket came fully down over the ball-unit a slot controlled by a spring with the handle on the top kept the ball-unit in position. To fix the tow-bar of the trailer on to the lorry it was necessary to move back the handle, thus allowing the ball-unit to fit into the socket, and when it did so and the handle was released it should have been firmly in position. After travelling some little distance along a bumpy patch of the fairground, then along a smooth surface of road and another bumpy road, the trailer became disengaged from the lorry and plunged across the road into a motor cycle being driven in the opposite direction. The driver of the motor cycle was killed, and the passenger injured.

How the accident came to happen was in many respects rather a mystery. There was evidence that there was no apparent defect in the tow-bar and the ball-unit. That was found by the justices to be so. Therefore, so far as construction was concerned, the two units forming the connexion were of good construction. So far as maintenance was concerned, in the sense of being in good repair, again there was evidence that the two units were in good repair. The only other two theories were either that there had been some unnatural force or bump which had caused the coupling to disengage, or that the appellant or his servant in fixing the tow-bar on to the ball-unit had somehow not caused the ball-unit to get home into the socket, but had merely caused a connexion sufficient to enable the trailer to be towed for some distance along the road. The police evidence was that in effect it was a mystery.

The justices found, albeit in part of their opinion, that it was the fault of the person who had effected or tried to effect the coupling. They said:

> "The demeanour and conflicting statements of the appellant and his witness, however (each maintained that he had personally performed the final act of coupling), viewed in the light of the evidence that the tow-bar was of common and obviously efficient design, of a type in daily use throughout the country and apparently in excellent condition, led us to the conclusion that its dangerous condition arose from the failure of the person who manipulated the parts to ensure that they were properly engaged and locked."

The first point taken in this appeal is that that was not a finding at which justices properly directing themselves could have arrived on the evidence. I find it unnecessary to go through that evidence. It is enough to say that, in my judgment, there was evidence on which they could properly come to that conclusion of fact, and I see no ground on which the court could possibly interfere with that finding.

The next question is whether in those circumstances there has been a breach of reg. 73 of the Motor Vehicles (Construction and Use) Regulations, 1955. Part 2 of those regulations, which contains regs. 5 to 58, is headed: "Regulations governing the construction, weight and equipment of motor vehicles and trailers", and those regulations apply primarily to the manufacturer or, if the vehicle is altered or reconstructed, the adapter. Regulations 59 to 105 are in Part 3, which is headed: "Regulations governing the use on roads of motor vehicles and trailers", and regs. 73 to 79, in Part 3, deal with "Maintenance of vehicle". Regulation 73 (1) provides:

> "Every motor vehicle, every trailer drawn thereby and all parts and accessories of such vehicle and trailer shall at all times be in such condition, and the number of passengers carried by, and the weight, distribution, packing and adjustment of the load of, such vehicle or trailer shall at all times be such that no danger is caused or is likely to be caused to any person on the vehicle or trailer or on a road."

Pausing there, it is clear in this case and, indeed, is so found, that if the condition of the motor vehicle or the trailer or the parts or accessories thereof were at fault, there clearly was a condition of affairs where danger was likely to be caused to a person on the road. The sole question, therefore, is what is meant by

> "Every motor vehicle, every trailer drawn thereby and all parts and

accessories of such vehicle and trailer shall at all times be in such condition . . . that no danger is caused or is likely to be caused to any person . . ."

Counsel for the appellant has submitted in this connexion that the word "maintenance", as used in this group of regulations, is really dealing with repair, that it is merely providing that vehicles and their parts should be kept in good repair. On that basis, it is undoubtedly true that both the trailer and its parts and the motor vehicle and its parts were at all times in good repair. The contention on the other side is that there is no reason in this connexion to give "maintenance" that narrow meaning, and that it should be given a meaning, which is certainly not inapt in many connexions, of providing that the vehicle should not merely be in good repair but in efficient working order or in an efficient state. That is the meaning given to "maintenance", albeit by definition, in the Factories Acts (1), and when one is considering the mischief aimed at by this regulation it is proper, so runs the argument, that it should be given this wide meaning. I see no reason why "maintenance" should be confined to keeping in good repair, and I would give it the wide meaning contended for.

Next it is said that once you find these two vehicles being used on the road, the motor lorry pulling the trailer, there were parts of each forming the coupling which were not in an efficient state, as the result, as the justices find, of the person who coupled them not making a secure coupling. It seems to me that that is something which comes within this regulation. If I may read the opening words once again and somewhat elaborate them, they read: "Every motor vehicle, every trailer drawn thereby and all parts and accessories of such vehicle and trailer [and I will interpose "drawn thereby"] shall at all times be in such condition". Once this motor lorry was drawing this trailer a state of affairs arose when, under this regulation, both the tow-bar of the trailer and the ball-unit on the motor lorry should have been in an efficient state or working order. Quite clearly, if they were improperly joined together each part was not in efficient working order. Accordingly, on that ground, and that ground alone, the justices were right in their determination. They decided this case on the basis that it did not in their view matter whether the dangers that then arose were as the result of construction or of undue force being exercised through the state of the road, or of failure to make a secure coupling. Their decision was justified on the ground that their finding of carelessness or failure to make a secure coupling is within the regulation, and it is unnecessary to deal with the other grounds on which they sought to justify the conviction.

SALMON, J.: I agree. I have come to the clear conclusion, as expressed by LORD PARKER, C.J., that the appeal should be dismissed.

WINN, J.: I also agree. In my view, reg. 73 of the Motor Vehicles (Construction and Use) Regulations, 1955, relates to the condition of the various articles referred to in it, and whether or not injury has arisen by lack of proper maintenance has no relevance when considering that. I am fortified in that view by the terms of para. (3) because it is quite impossible to refer those terms to any system of maintenance. One would have to read the paragraph as though there could be inserted such words as "through lack of proper maintenance". I agree with both the judgments which have been delivered and would dismiss this appeal.

Appeal dismissed.

Solicitors: *R. I. Lewis & Co.* (for the appellant); *Town clerk,* Portsmouth (for the respondent).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(1) See the Factories Act, 1937, s. 152 (1).

BUTTERLEY CO., LTD. *v.* TASKER (VALUATION OFFICER).

[COURT OF APPEAL (Holroyd Pearce and Harman, L.JJ., and Sachs, J.), January 16, 17, 1961.]

Rates—Rateable occupation—Rateable hereditament—Two properties in same occupation—Works and offices—Separation by occupier's agricultural land—Connexion by occupier's private road (150 *yards long*)—*Private road serving other properties of occupier—Separate hereditaments.*

A company owned and occupied several premises comprising works and buildings used for mining and making iron, which were separated by acres of agricultural land in its ownership and which were connected by its own system of private roads. These premises included a particular works which was connected by one of the private roads with offices 150 yards away, which were used in connexion with all the company's group of companies whose activities extended far beyond those of the works concerned. The Lands Tribunal found that the connecting private road was not part of either the particular works or the offices and was not a separate rateable hereditament and held, inter alia, that the works and the offices were therefore not contiguous and constituted two separate rateable hereditaments. On appeal,

Held: the works and the offices were correctly treated as separate rateable hereditaments, since the private road was not merely a link between them, but part of the system giving access to all the company's properties from which it could not be cut off, and there was accordingly evidence on which the tribunal's holding as to contiguity and separate rateability could be upheld.

Dictum of AVORY, J., in *A. E. Reed & Co., Ltd.* v. *Maidstone Revenue Officer* ((1931), 2 D.R.A. at p. 145) criticised.

Per HARMAN, L.J.: the claim to be treated as one hereditament would also fail if it were necessary to hold that the two areas were dedicated to the same purpose, as it probably would be, for one was a factory area and the other was entirely devoted to executive purposes (see p. 579, letter A, post).

Appeal dismissed.

[As to what constitutes a single hereditament for rating purposes, see 32 HALSBURY'S LAWS (3rd Edn.) 31, para. 38; and for cases on the subject, see 38 DIGEST (Repl.) 506-509, *202-215*.]

Cases referred to:

Gilbert v. *S. Hickinbottom & Sons, Ltd.*, [1956] 2 All E.R. 101; [1956] 2 Q.B. 40; 120 J.P. 288; [1956] 2 W.L.R. 952; 38 Digest (Repl.) 507, *207*.

Reed (*A. E.*) *& Co., Ltd.* v. *Maidstone Revenue Officer*, (1931), 13 R. & I.T. 305; 2 D.R.A. 141.

Case Stated.

The appellant ratepayers were the owners of a considerable area of land comprising works and buildings in their occupation and agricultural land partly in their occupation, including premises assessed as follows in the valuation list for Ripley Urban District under decisions of a local valuation court of Derby and South Derbyshire Local Valuation Panel given on July 7, 1958: (for 1955-56) new offices, Butterley Hall £250 gross value, £205 rateable value; forge and wagon shop, railway lines and stables, Butterley Works, Codnor Park, with pattern store (part) £4,765 net annual value, £1,191 rateable value: (for 1956-57) offices, garage and premises, £580 gross value, £480 rateable value; offices and premises £2,700 gross value, £2,247 rateable value; works and premises, pattern store (part) and premises £12,252 net annual value, £3,063 rateable value. On Nov. 16, 1959 ((1960), 6 R.R.C. 138) the Lands Tribunal (ERSKINE SIMES, Esq., Q.C.) determined issues on appeal by the ratepayers against these decisions and other decisions of local valuation courts relating to properties of the ratepayers in the same area, holding that they were properly assessed as separate rateable hereditaments except that the two offices separately assessed in the

1956-57 valuation list should be treated as a single hereditament as agreed between the parties. The ratepayers appealed by way of Case Stated to the Court of Appeal. They contended, inter alia, that the offices and works were contiguous to one another, that they were not used for distinct and separate purposes and that the functional necessity of one to the other was such that they should be treated as one single hereditament for rating purposes.

Maurice Lyell, Q.C., and *W. J. Glover* for the ratepayers.

The Solicitor-General (*Sir Jocelyn Simon, Q.C.*) and *J. R. Phillips* for the valuation officer.

HOLROYD PEARCE, L.J.: The Butterley Co., Ltd., the ratepayers, appealed to the Lands Tribunal in respect of various assessments on various parts of their undertaking sporadically situated on a large block of land some two miles wide which they own. The ratepayers contended on that appeal that the whole undertaking comprised one single factory and should be regarded as one hereditament. The Lands Tribunal rejected the contention.

The ratepayers' company started in the eighteenth century with the Butterley Works, which are at the west end of their land, for the purposes of mining under the land and making iron. The works now comprise in the main a foundry, a machine shop, a fitting shop, and a constructional department. A few years later the ratepayers acquired the land on the east side and erected works which are called Codnor Park Forge and Wagon Works. They later constructed a railway line about two miles long to connect the two works. They constructed private roads which run to various parts of their land and at certain points join up with public highways outside their land. These private roads have toll gates where they connect with the public highway, and notice boards inform the public that the roads are private. Tolls are collected from vehicles but there is no hindrance to foot passengers. Most of the land is used for agricultural purposes, but there are eight areas where buildings have been erected for the ratepayers' purposes. These areas have been separately assessed.

The respondent valuation officer conceded before the Lands Tribunal that s. 3 (3) of the Rating and Valuation (Apportionment) Act, 1928, applied to two areas, the Butterley Works, and the pattern store and cinder breaker, on the ground that they were joined together by a tunnel containing a footway and railway, and that therefore they should be assessed as one hereditament. With regard to all the other areas, the separate assessments were upheld.

The ratepayers now seek only to challenge that decision in respect of one area described on the plan and in the Case as the new offices. It is contended that they should be included as one hereditament with the Butterley Works and the pattern store and cinder breaker. The new offices are described in the Case as follows (1):

> "This area represents the old site of Butterley Hall and part of its grounds in which have been erected certain buildings. These buildings and Butterley Hall are used for the purpose of offices for the general administration of the whole group of companies connected with the Butterley Co., Ltd. [the ratepayers] a group whose activities extend far beyond the works concerned in this appeal. The offices deal with practically everything, except wages, for both Butterley and Codnor Park Works."

The new offices are about 150 yards distant from the works. A private road runs along the west side of the works, traverses agricultural land for 150 yards, runs alongside the west side of the offices and finally joins up with a coach road which is a private road terminating at one end on the public highway bounding the south of the ratepayers' land, and at the other end in a T junction with the private road that runs right across the ratepayers' land from east to west.

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(1) (1960), 6 R.R.C. at p. 141.

It is argued for the ratepayers that the works and offices, being connected together by this road, are a single geographical unit used for a common purpose and should, as a matter of law, be treated as one hereditament. The tribunal, it is said, erred in law in treating the decision in *A. E. Reed & Co., Ltd.* v. *Maidstone Revenue Officer* (2) as deciding that two pieces of land joined by a private road should not be treated as one hereditament or as contiguous properties. Further, the tribunal is said to have erred in law in that there was no evidence on which it could treat the works and offices as other than a single hereditament.

The Case does not specifically deal with the 150 yards of road now in question. It deals with the general contention that the roads linked all the areas as one hereditament, and specifically refers to the east-west road which was said to link the two areas furthest apart. It says this (3):

> "The private road link is, I think, clearly part of neither hereditament and is not indeed treated as a rateable hereditament. Whether it should be so treated is a question which I am not called upon to determine in this appeal, but it would at least appear possible that these ways may have become public highways for all purposes other than those of mechanically propelled vehicles and the question of their rateability may not be free from difficulty. It is, I think, at least clear that if rated they would be separate hereditaments from and could not be said to be part of either the Butterley Works or those at Codnor Park. It is, I think, also clear from the judgment of AVORY, J., in *A. E. Reed & Co., Ltd.* v. *Maidstone Revenue Officer* (4) that a mere connexion by a private road or private right of way will not result in contiguity . . . It follows from what I have already said that in my view, the new offices, the civil engineers, the estate department and the stables which can only be said to be connected with either of the works by the private roads must each be treated as separate hereditaments."

The evidence exhibited to the Case in reference to these roads, which a witness described as the Butterley private road system, points to the fact that they are still private roads, and that any suggestion of dedication derived from the free passage of pedestrians is negatived by the notices exhibited. The words "it would at least appear possible", I venture to think, should be more accurately expressed as "it would appear extremely unlikely". But this was not a deciding factor. The real ground on which the tribunal relied in coming to its decision was the fact that, if rated, they would be separate hereditaments from and could not be said to be part of either Butterley Works or Codnor Park Works. By parity of reasoning, the tribunal was also saying that they would be separate hereditaments from and could not be said to be part of the new offices. That is the ground on which the tribunal decided that the roads could not be an adequate link for making two hereditaments contiguous.

The subsidiary reason (and it is no more) founded on the judgment of AVORY, J., in *A. E. Reed & Co., Ltd.* v. *Maidstone Revenue Officer* (2) is open to some criticism. The court held in that case that an exclusive right of way over seventeen feet of intervening land did not make the properties contiguous. In an obiter dictum AVORY, J., seems not to have appreciated that in the case of Tovil Mill there was an intervening sixty yards of public highway, and, in discussing the matters which must have affected the recorder's mind, he says (5): "It cannot make any difference whether the private road or right of way is seventeen feet or seventy feet in length." With respect, I do not understand him to have gone so far as to say that the mere connexion by a private road on the land of the occupier of two neighbouring hereditaments will not result in contiguity. If he was saying that in no circumstances could it do so, I cannot agree with the statement.

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(2) (1931), 2 D.R.A. 141.

(3) (1960), 6 R.R.C. at p. 145.

(4) (1931), 2 D.R.A. at p. 144.

(5) (1931), 2 D.R.A. at p. 145.

A Counsel for the ratepayers founds himself on a passage from the judgment of DENNING, L.J., in *Gilbert* v. *S. Hickinbottom & Sons, Ltd.* (6) where in this connexion he classifies various sets of circumstances which may arise. The decision itself is not helpful. The court, not without some hesitation, affirmed as a question of fact the finding that two properties which lay on each side of the road formed one hereditament for very special reasons which do not apply in the B present case. DENNING, L.J., said (7):

> " Where two or more properties are within the same curtilage or contiguous to one another, and are in the same occupation, they are as a general rule to be treated for rating purposes as if they formed parts of a single hereditament."

C Counsel for the ratepayers admits, rightly, that, if the works and new offices are not contiguous, he cannot say that the tribunal must have found (to quote DENNING, L.J. (8)) that

> " the two properties on either side of the road are so essentially one whole—by which I mean, so essential in use the one to another—that they should be regarded as one single hereditament."

D His argument is that these properties are in truth contiguous; that they are, to use the phraseology of PARKER, L.J. (9), " a geographical unit. Can they be ringed round on a map? "

The works and offices are only a geographical unit if the part of the road that skirts the works and the offices can be treated as a separate rateable unit which is contiguous to both. But, though the roads as a whole, the Butterley private E road system, may be rateable, selected sections of the roads are not rateable hereditaments. That, as it seems to me, is the real basis of the tribunal's decision. I see no justification for cutting off from the rest the piece that lies between the offices and the works. If one was to perform that operation, the exact beginning and end of the section are open to doubt and cannot be marked with precision. For neither the offices nor the works are termini. The road merely F runs alongside them.

Counsel for the ratepayers contended that these 150 yards of road can only have come into existence as a link between the works and the offices. He admits that the evidence of this is scant. In my view, there is no such evidence. This road, like the rest of the system of private roads of which it was part, no doubt grew up or was constructed with an eye to the places which it passed or the places to G which it led. But it does not begin and end with the offices and the works. It skirts the works, it skirts the offices, but it does not end at either. In between them it runs unfenced amid the fields to which no doubt it provides useful access. In the absence of evidence incorporating the roads with the works or the offices or both, one cannot say that the tribunal must have found the road to be a link which would make the works and the offices contiguous. This was a question H of fact, and the tribunal was entitled to find as it did. I would dismiss the appeal.

HARMAN, L.J.: This matter, like Sir John Falstaff, has fallen away vilely since the last action. That was before the Lands Tribunal where there were ten appeals and a cross-appeal. Now they have dwindled to one appeal.

The only remaining question is whether two parcels of land shown on the map I before us, viz., the parcel called Butterley Works, being the site and buildings constituting the ironworks of the company, and that called Butterley Hall, consisting of the buildings occupying the site of the mansion and additions styled new offices, are contiguous so as to be rateable as one hereditament. The latter parcel comprises the administrative headquarters of the group and from it the whole enterprise is directed. There are eight parcels of land shown on the map on which various activities of the parent company, the ratepayers, are carried on. Outside the map are properties belonging to a number of wholly owned subsidiaries which, too, are directed from the office block. All the parcels shown on the map are included in one large area owned by the ratepayers. This area other than the pink parcels consists of agricultural land either in hand and cultivated by the ratepayers, or let to farmers. It is coloured yellow on the map. Each of the pink parcels is connected with the others by roads the property of the ratepayers and shown in brown on the map. These are private roads, at any rate as far as vehicular traffic is concerned, and simply consist of farm tracks made up by the ratepayers at their own expense. Vehicles not owned by the ratepayers or their employees can use these roads by paying tolls collected at various gates where the brown roads abut on the public highways outside the yellow area. Some of the several pink areas are situate in different rating areas, but it was contended before the tribunal that all were sufficiently parts of one enterprise to entitle them to be treated for rating purposes as a single hereditament. This the tribunal rejected.

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(6) [1956] 2 All E.R. 101; [1956] 2 Q.B. 40.
(7) [1956] 2 All E.R. at p. 103; [1956] 2 Q.B. at p. 48.
(8) [1956] 2 All E.R. at p. 104; [1956] 2 Q.B. at p. 49.
(9) [1956] 2 All E.R. at p. 107; [1956] 2 Q.B. at p. 54.

Before this court the claim was restricted to the two parcels first described, both situate in one rating area. This more modest plea was, we are told, advanced before the tribunal, but there is no sign of it in the decision.

The present appeal raises only one point, viz., that by reason of the stretch of brown road—some 150 yards in length—which connects the two parcels, they are contiguous and constitute one geographical area and should be rated as one hereditament. The basis of this contention is to be found in *Gilbert* v. *S. Hickinbottom & Sons, Ltd.* (10) cited by my Lord, by which it stands or falls. The hereditaments there, however, were not contiguous but on opposite sides of a highway, and the decision rested on a finding of fact by the tribunal that the two, though not contiguous, must be treated as one, as each was essential to the working of the other. No such plea was advanced here, so that the case is no direct authority. There are, however, observations by the members of the Court of Appeal in giving judgment which are said to be of assistance. Those have already been alluded to by my Lord and I do not think that I need discuss the case further.

As I said, the Lands Tribunal did not deal specifically with the connexion between the two parcels here under discussion, but it did decide that connexions by the brown roads in general did not make parcels so connected contiguous. In so deciding, the tribunal seems to have relied on some observations of AVORY, J., in *A. E. Reed & Co., Ltd.* v. *Maidstone Revenue Officer* (11), to which my Lord has already referred. Here, I think, the tribunal was mistaken, for the alleged connexion there was a right of way over land occupied by somebody else. The alleged connexion here is one over land belonging to the owners of the two severed hereditaments. The observations of AVORY, J., did not extend to a case where only one occupier is concerned, although when one looks at the report the words seem to have so extended.

It remains, however, to consider whether the existence of the brown connecting road makes the parcels contiguous or " a geographical unit ", as PARKER, L.J., put it in *Hickinbottom's* case (12). This is a question of fact and, in my judgment, they are not contiguous. They are two parcels of land separated by agricultural land which is crossed by a road. True it is that the agricultural land and the road are also occupied by the occupiers of the pink parcels, but it is idle to say that the two touch or are contiguous merely because there is a road connecting them which is the property of the occupiers of each. In my judgment that has only got to be stated to be seen to be erroneous. One can get from one to the other by road. Nobody would suggest that, if a man owns a road and two buildings at each end of it, the buildings are contiguous. They are connected no doubt by the road, but that is another matter.

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(10) [1956] 2 All E.R. 101; [1956] 2 Q.B. 40. (11) (1931), 2 D.R.A. at p. 144.
(12) [1956] 2 All E.R. at p. 107; [1956] 2 Q.B. at p. 54.

If it were necessary to hold that the two areas were dedicated to the same purpose, as I think it would probably be, that also would fail, for one is a factory area and the other is entirely devoted to executive purposes. I do not base my opinion on that, but on the facts which the tribunal found, though not expressly in connexion with these particular parcels. The two pink parcels of land do not in fact touch one another and are therefore not contiguous. That being the only prop to the appeal, when that is taken away it collapses and should be dismissed.

SACHS, J.: I agree, and for the reasons given.

Appeal dismissed.

Solicitors: *Thicknesse & Hull* (for the ratepayers); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

UNITED DAIRIES (LONDON), LTD. *v.* BECKENHAM CORPORATION.

UNITED DAIRIES (LONDON), LTD. *v.* E. FISHER & SONS, LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Salmon and Winn, JJ.), January 24, 25, 26, 1961.]

Food and Drugs—Proceedings against third party—Offence against regulations made under Act—Whether maintainable where regulations did not expressly incorporate section of Act—Food and Drugs Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 16), *s.* 113—*Milk and Dairies* (*General*) *Regulations*, 1959 (*S.I.* 1959 *No.* 277).

The right conferred by s. 113 (1) of the Food and Drugs Act, 1955, on " A person against whom proceedings are brought under this Act . . . to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings " is not conferred on persons charged with offences under regulations made under the Act (as opposed to offences under the Act itself) unless those regulations themselves specifically apply s. 113 to offences thereunder (obiter, see p. 584, letter F, and p. 585, letter D, post).

Food and Drugs—Milk—Unclean container—Milk bottled by producer—Bottle cleaned and supplied to producer by dealers—Whether dealers liable—Milk and Dairies (*General*) *Regulations*, 1959 (*S.I.* 1959 *No.* 277), *reg.* 27 (1).

A bottle of raw farm-bottled tuberculin tested milk sold by licensed milk dealers to a consumer contained ash. The milk had been bought by the dealers from a milk-producer; the bottle had been cleaned by the dealers and then transported fifteen miles by lorry to the producer, who, in accordance with the Milk (Special Designation) (Raw Milk) Regulations*, 1949 (S.I. 1949 No. 1590), Sch. 2, Part 1, para. A. 7, had placed the milk in the bottle and, in accordance with Sch. 2, Part 1, para. C. 1, had then capped the milk. The dealers then transported the bottle away and sold it. By para. B. 1, of Sch. 2, Part 1, " every licensed dealer who receives the milk in retail containers shall sell it in those containers with the seals or other fastenings unbroken ". An information was preferred against the dealers charging them with contravention of reg. 27 (1) of the Milk and Dairies (General) Regulations, 1959, which provided that " every dairy farmer or distributor shall

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* The relevant provisions of these regulations are set out at p. 581, letters C to H, post.

ensure that every vessel (including the lid) used for containing milk shall, A
immediately before use by him, be in a state of thorough cleanliness ".

Held: the dealers were not guilty of the offence charged because the obligation imposed by reg. 27 (1), which was an absolute obligation, rested on the person responsible for filling the bottle with milk, viz., the producer, and referred to the point of time immediately before the bottle was filled (see p. 582, letter G, post); moreover there was no delegation of the B
filling of the bottle to the producer by the dealers, since the producer was bound by para. A. 7 of Sch. 2, Part 1, to the 1949 regulations to fill the bottle.

Quality Dairies (*York*), *Ltd.* v. *Pedley* ([1952] 1 All E.R. 380) distinguished.

Appeal allowed.

[**Editorial Note.** The Milk (Special Designation) (Raw Milk) Regulations, 1949, C
cited in the headnote have been replaced by the Milk (Special Designation) Regulations, 1960 (S.I. 1960 No. 1542).

As to the defence that another person is responsible for an offence against the Food and Drugs Act, 1955, see 17 HALSBURY'S LAWS (3rd Edn.) 597, para. 1152; and as to the cleanliness of milk vessels, see ibid., 542, para. 1022.

For the Food and Drugs Act, 1955, s. 113, see 35 HALSBURY'S STATUTES D
(2nd Edn.) 194.]

Cases referred to:

Linnett v. *Metropolitan Police Comr.*, [1946] 1 All E.R. 380; [1946] K.B. 290; 115 L.J.K.B. 513; 174 L.T. 178; 110 J.P. 153; 30 Digest (Repl.) 105, *771*.

Mousell Brothers v. *London & North Western Ry. Co.*, [1917] 2 K.B. 836; 87 E
L.J.K.B. 82; 118 L.T. 25; 81 J.P. 305; 8 Digest (Repl.) 240, *1534*.

Quality Dairies (*York*), *Ltd.* v. *Pedley*, [1952] 1 All E.R. 380; [1952] 1 K.B. 275; 116 J.P. 123; 3rd Digest Supp.

Case Stated.

On Feb. 16, 1960, at a magistrates' court sitting at Bromley, Kent, United F
Dairies (London), Ltd., registered milk dealers, were convicted, on an information laid by Beckenham Corporation, of an offence against reg. 27 (1) of the Milk and Dairies (General) Regulations, 1959, in that, being distributors of milk they did fail to ensure that a bottle used for containing milk immediately before such use by them was in a state of thorough cleanliness, and were fined £20 and ordered to pay fifty guineas costs to the prosecutor. The distributors had G
laid an information against the producers of the milk in question, E. Fisher & Sons, Ltd., in pursuance or purported pursuance of s. 113 of the Food and Drugs Act, 1955, alleging that any such offence by the dealers was due to the act or default of the producers. The justices, having held that s. 113 was not applicable and having accordingly refused to call on the producers to plead to the information laid by the distributors, dismissed that information and ordered H
the dealers to pay thirty guineas costs to the producers.

The dealers appealed. The facts are stated in the judgment of LORD PARKER, C.J.

Stephen Chapman, Q.C., and *M. Ahern* for the dealers.

R. V. Cusack, Q.C., and *J. W. Miskin* for the prosecutor.

Christmas Humphreys, Q.C., and *B. L. Leary* for the producers. I

LORD PARKER, C.J.: This is an appeal by milk dealers, United Dairies (London), Ltd., by way of Case Stated from their conviction before justices for the county of Kent, sitting at Bromley, for an offence contrary to reg. 27 (1) of the Milk and Dairies (General) Regulations, 1959 (S.I. 1959 No. 277), and from the refusal of the justices to entertain an information preferred by the dealers against the milk producers, a company, E. Fisher & Sons, Ltd., under s. 113 of the Food and Drugs Act, 1955.

On or about Sept. 1, 1959, the dealers delivered a pint bottle of milk to a Mrs. Anderson. The milk was what is known as raw farm-bottled tuberculin tested milk. Within a day or two of delivery the bottle was found by Mrs. Anderson to contain some black granular material which was thought to be ash, probably cigarette ash.

The dealers, United Dairies (London), Ltd., as is well known, are distributors of milk, and apart from buying untreated milk in bulk and pasteurising it and bottling it themselves, they buy raw milk tuberculin tested from farmers, which milk is put into the dealers' bottles. It is firmly capped by the producers and is sold under the designation "Farm Bottled Milk". The bottle in question contained milk which the dealers had obtained from the producers, E. Fisher & Sons, Ltd., the third parties, who are farmers, and under another set of regulations, the Milk (Special Designation) (Raw Milk) Regulations, 1949 (S.I. 1949 No. 1590), (1), it was the obligation of the third parties to bottle and cap the milk on the farm. Since something turns on those regulations, I will refer to the relevant provisions (2). Regulation 4 (1) dealt with licences, and provided:

> "Any person who intends to use in relation to milk a special designation authorised by these regulations shall apply in accordance with the provisions of these regulations to the licensing authority for a licence to use such special designation."

Regulation 6 (1) provided:

> "Every licence granted under these regulations shall be subject to the general conditions set out in Sch. 1 to these regulations, and to such of the special conditions set out in Parts 1 and 2 of Sch. 2 to these regulations as are applicable thereto."

Part 1 of Sch. 2 dealt with tuberculin tested milk, and para. 7 of A., which dealt with conditions applicable to producers' licences, provided (3):

> "The milk in relation to which the special designation is used shall—(a) be placed in bottles by the licensed producer and the conditions of para. C. 1 of this part of this Schedule shall apply."

Paragraph C.1 provides (4):

> "Every bottle containing the milk in relation to which the special designation is used shall be tightly closed and shall be securely fastened either with a cap overlapping the lip of the bottle or in some other suitable manner approved by the licensing authority."

Paragraph C. 1 then provided that the cap should bear the address of the premises at which the milk was bottled and the words "Tuberculin Tested Milk". Section B., which dealt with conditions applicable to dealers' licences only, provided (5) in para. 1:

> "Every licensed dealer who receives the milk in retail containers shall sell it in those containers with the seals or other fastenings unbroken."

Accordingly, it will be seen that under these regulations it is the producer, the third parties in this case, who is made responsible for the bottling of the milk and that the dealer is forbidden to break the seals or other fastenings once the bottle has been filled and capped.

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(1) Since revoked and replaced by the Milk (Special Designation) Regulations, 1960 (S.I. 1960 No. 1542).

(2) Regulation 5 (1) and reg. 7 of the Milk (Special Designation) Regulations, 1960 (S.I. 1960 No. 1542), make provisions corresponding to reg. 4 (1) and reg. 6 (1) of the Regulations of 1949.

(3) Paragraph 6 of A in Part 1 of Sch. 2 to the Regulations of 1960 contains a comparable provision, but the wording is different.

(4) Paragraph 1 of C in Part 1 of Sch. 2 to the Regulations of 1960 makes similar provision.

(5) Paragraph 1 of B in Part 1 of Sch. 2 to the Regulations of 1960 makes similar provision.

At the close of the case for the prosecution a submission was made that there was no case to answer. The justices, who have evidently dealt with this case with the greatest care, decided that a prima facie case had been raised and accordingly the dealers, the appellants, then called evidence. They showed, first, that for over twenty-five years they had been buying milk in this way from the third parties which the third parties had put into the dealers' bottles and that the relationship between them was that of vendor and purchaser. The method in which the bottles were dealt with was also proved. It was shown that when empty bottles were collected from customers the dealers in fact themselves washed and cleaned them, that they were then put in open crates and stacked on a loading bay to await delivery to the producers. The bottles were at all times open to the air. They would then be transported in a lorry, the property of the dealers, for delivery to the producers, the lorry having a covered top but the sides being open and exposed. They would be transported to the producers' farm, some fifteen miles away. The crates were then stacked in the producers' yard and an equivalent load of full bottles was taken back by the lorry. The method of filling at the producers' premises was that there was a container which held about five gallons of milk with five nozzles, and a crate would be put under the nozzles in such a way that five of the empty bottles were under the five nozzles which were then filled. An employee of the producers would then cap those five. He would then move the crate so that the next five bottles came under and the process would be repeated. There was apparently no evidence that the producers themselves ever washed or cleaned the bottles.

It was in those circumstances that the justices held that there had been a breach by the dealers of reg. 27 (1) of the Milk and Dairies (General) Regulations, 1959, to which I must refer in a moment, which deals specifically with the cleaning of bottles. The justices, having found the offence proved, convicted the dealers and fined them. Thereupon the dealers sought to show in what I may call the third-party proceedings that the persons really to blame were the third parties, the producers, but the justices held that the third-party procedure, which is a procedure laid down in s. 113 of the Food and Drugs Act, 1955, did not apply where the offence found to be proved was an offence under the regulations.

Several questions are left for the opinion of this court, but the first and vital question concerns the true interpretation of reg. 27 (1) of these regulations. So far as it is material that regulation provides:

> "Every dairy farmer or distributor shall ensure that every vessel (including the lid) used for containing milk shall, immediately before use by him, be in a state of thorough cleanliness . . ."

Those words have a plain meaning. They are, in my view, dealing with the point of time immediately before a bottle is filled, and the obligation is placed on the person responsible for the filling of the bottle. I say that because in the ordinary way one would give the word "use" in connexion with "immediately before use" the same connotation as the word "used" appearing earlier in the sentence in the sense of used for containing milk. I should have thought that the natural meaning was that the farmer or distributor should ensure that every vessel used for containing milk shall immediately before use for that purpose by him be in a state of thorough cleanliness.

If that be so, in the circumstances of this case the only person on whom that obligation rests would be the third parties, and the dealers would have been wrongly convicted. As against that, however, it is said that the word "use" has a wider meaning than merely use for containing milk and that it applies to any point of time when the bottle is being used for whatever purpose. Thus, it is first submitted, as I understand it, that the dealers used it at all points of time from the moment when their driver collected the full crate containing the bottles from the third parties' yard until it was delivered to the customer, Mrs. Anderson, and that the obligation in regard to cleanliness persisted at every point of time during that period. I can see no warrant for such a construction, and, indeed, it seems to me that it is directly opposed to the sense of the provision, in particular the sense conveyed by the words " immediately before use ". It is then said that at any rate it applies to the point of time when the dealers' driver took the crate and the bottle from the yard; that collecting the bottle at the yard was use within this provision by the dealers; and that there arose a duty to ensure that, immediately before the time when the driver took up the crate, the bottles were in a state of thorough cleanliness. I cannot accede to that argument. It seems to me that " use " there is use for containing milk and that the provision applies at the point of time when the bottle is about to be filled; but if there be any ambiguity one is entitled to look at what would be involved in the rival construction. It would involve this, that at that point of time when the dealers had to ensure that the bottle was clean, it was impossible for them to do so not only because the bottle was firmly capped and sealed, but also because it was illegal for them to do so under the Milk (Special Designation) (Raw Milk) Regulations, 1949, reg. 6 (1) and Sch. 2, Part 1, B. 1, to which I have referred, which provided that dealers must not tamper with the seals. This provision is laying down an absolute duty, and clearly there may be cases where for the protection of the public an absolute duty is put on someone which it is impossible for him physically to perform; but here the public have their protection, because it is the producer, the third party, on whom this obligation is put. Accordingly, in considering this provision dealing amongst other things with tuberculin tested milk, it is relevant that it would be impossible and, indeed, illegal for the dealers to comply with it at the point of time when they take delivery. I come to the conclusion, therefore, that the provision should be construed in the sense which I have said, namely, as applying to the point of time when its use for containing milk is begun.

An alternative submission is made on behalf of the prosecution that in this case even if that meaning is given to the word " use ", the use for containing milk of which the bottle was made when it was filled was really a use by the dealers, in that the third parties were acting as their agents in filling the bottles. It is said that though there may have been a relation of vendor and purchaser in regard to the milk, yet in regard to the filling of the bottles the third parties were acting as the dealers' agents. I cannot accept that submission. It does not seem to me to represent the true position here. In any event it is difficult to see how the third parties could be acting as agents for the dealers when it was the third parties' responsibility under para. A. 7 of Part 1 of Sch. 2 to the Milk (Special Designation) (Raw Milk) Regulations, 1949, to do the bottling.

Finally, it is said that this case is governed by the decision of this court in *Quality Dairies* (*York*), *Ltd.* v. *Pedley* (6). The facts, so far as they are relevant, in that case were that the appellants, Quality Dairies (York), Ltd., were distributors of milk and had a contract with a hospital. They performed their contract with the hospital by getting York Producers, Ltd. to supply milk in bottles and deliver the same to the hospital. The question arose under reg. 26 (1) of the Milk and Dairies Regulations, 1949, dealing with cleanliness, and it was held by this court that Quality Dairies (York), Ltd. were responsible in effect for the failure of York Producers, Ltd., to ensure that the bottles were clean. It is to be observed that in that case, on the facts, York Producers, Ltd. were the agents of Quality Dairies (York), Ltd., but the judgment of this court, for which I fear I was responsible, went further than that and dealt with the matter on the basis of delegation. I said this (7):

> " [The Milk and Dairies Regulations, 1949] as it seems to us, were made to ensure, so far as possible, that milk delivered to the consumer should be

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(6) [1952] 1 All E.R. 380; [1952] 1 K.B. 275.
(7) [1952] 1 All E.R. at p. 382; [1952] 1 K.B. at p. 278.

> as clean as possible, and by this particular regulation an obligation is put, inter alia, on the distributor to ensure the thorough cleanliness of all vessels used in the preparation of milk for sale, including, of course, the bottles in which the milk is delivered. It seems to us, therefore, that, applying the principle referred to above, the legislation in question has the effect of imposing an absolute duty so that a principal would be liable for the acts of his servant or agent done within his authority. Further, as was pointed out by LORD GODDARD, C.J., in *Linnett* v. *Metropolitan Police Comr.* (8), the principle set out in *Mousell Brothers* v. *London & North Western Ry. Co.* (9), as applied in the various decisions thereon, does not depend on the legal relationship existing between master and servant or between principal and agent, but depends on the fact that the person who is responsible in law, as, for example, a licensee under the Licensing Acts, has chosen to delegate his duties, powers, and authority to another."

It may be that that passage is strictly obiter to that decision, but assuming that it is right, and nobody has sought to say that it is not, it seems to me that it cannot apply to the present case. Having regard to the Milk (Special Designation) (Raw Milk) Regulations, 1949, to which I have referred, it would really involve that in the present case these dealers were delegating something, the bottling, which they were forbidden to do by the regulations, to somebody else, the third parties, the producers, who alone were responsible for the bottling. In my judgment that part of the decision in *Quality Dairies* (*York*), *Ltd.* v. *Pedley* (10) cannot apply on the facts of this case. Accordingly, I have come to the conclusion that on the true construction of reg. 27 (1) of the Milk and Dairies (General) Regulations, 1959, no offence was committed by the dealers. It therefore becomes unnecessary to consider what would be the next question, that is whether it had been proved in this case that the ash was in the bottle immediately before the milk was put in or whether the ash got into the milk after the milk had been put into a perfectly clean bottle, and the further submission which was being made by the prosecution that, even if the latter was the true position, the ash must be treated as in part adhering to the bottle, thus making the bottle dirty. It is unnecessary to consider those matters.

It is also strictly unnecessary to consider whether s. 113 applies, but as the matter has been fully argued I think it would be right to express an opinion on it. Section 113 (1) of the Food and Drugs Act, 1955, sets out what is often referred to as the third-party procedure. The subsection begins in this way:

> "A person against whom proceedings are brought under this Act shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings . . ."

The narrow point here is whether the words "a person against whom proceedings are brought under this Act" cover proceedings brought charging offences under the regulations made under this Act, because reg. 27 of the Milk and Dairies (General) Regulations, 1959, is made under s. 29 of the Food and Drugs Act, 1955. I should have thought, on reading those words alone, that they are really dealing with proceedings brought in regard to offences under the Act, whereas a reference to the regulations in question shows that there is a provision, reg. 34, making contravention of the regulations an offence, and laying down the penalty. There is a clear difference between proceedings brought for offences under the Act and proceedings brought for offences under the regulations. It appears, however, from certain other sections, in particular s. 114 and s. 115, that the draftsman had this distinction in mind, yet he did not draw any such distinction in s. 113. Nevertheless, I still feel that s. 113 is really only dealing with proceedings brought charging offences under the Act, and it is to be observed that by s. 123 provision is made for the regulations themselves applying provisions of the Act. Section 123 (1), so far as it is material, provides:

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(8) [1946] 1 All E.R. at p. 382; [1946] K.B. at p. 294. (9) [1917] 2 K.B. at p. 845.
(10) [1952] 1 All E.R. 380; [1952] 1 K.B. 275.

> "Regulations made under Part 1 of this Act [we are not concerned with that] Milk and Dairies Regulations and Milk (Special Designation) Regulations [and the first of those, viz., Milk and Dairies Regulations, is the one with which we are now concerned], without prejudice to the generality of the provisions under which they are made, may . . . (b) apply, as respects matters to be dealt with by the regulations, any provision in any Act (including this Act) and dealing with the like matters, with the necessary modifications and adaptations."

We have been referred to regulations which have been made, and which are referred to in BELL'S SALE OF FOOD AND DRUGS (13th Edn.), where s. 113, or procedures similar to that laid down in s. 113, have been specifically applied and incorporated in the regulations. In particular, we were referred by counsel for the producers to the Milk and Dairies (Channel Islands and South Devon Milk) Regulations, 1956 (S.I. 1956 No. 919), reg. 6.

In these circumstances, I am confirmed in the view that s. 113, unless specifically incorporated in the regulations in question, does not apply to proceedings brought charging offences against these regulations.

Finally, a point was raised on which the court was asked to express an opinion, namely, what is the proper procedure to be adopted by justices in dealing with these third-party proceedings. Having regard to the view I take that third-party proceedings are inapplicable, it would clearly be wrong for this court to express any opinion as to the proper procedure if they did apply. Accordingly, I have come to the conclusion that the appeal succeeds and that the conviction must be quashed.

SALMON, J.: I agree. It is common ground that reg. 27 (1) of the Milk and Dairies (General) Regulations, 1959, imposes an absolute duty on every dairy farmer and distributor who fills bottles with milk to ensure that immediately before the bottles are so filled they shall be thoroughly clean. It is manifest that the imposition of such a duty is necessary for the protection of the public. If the bottles are dirty immediately before they are filled, there is obviously a risk that the milk will become contaminated. If, on the other hand, the bottles are thoroughly clean at that moment, it seems unlikely that thereafter any part of the bottle which is in contact with the milk can become dirty before the bottle is opened by the ultimate consumer.

It has been argued that reg. 27 (1) imposes a further obligation on the distributor who handles the bottles of milk after they have been filled. It is suggested that such a distributor uses the bottle of milk within the meaning of reg. 17 when he takes delivery of it and at every moment of time till he parts with possession of it. If the regulation does impose such an obligation, I find it difficult to see why the duty should be on such a distributor to ensure that the bottle is thoroughly clean immediately before he takes delivery. I should have thought that if the legislature intended to impose a duty on one who handles the milk bottle after it is filled, the obligation to ensure cleanliness would have been not before taking delivery but before parting with possession of the bottle. Moreover, if the word "used" in the regulation is to be given the meaning for which the prosecutor contends, then the distributor who handles the bottle to examine it before he takes delivery is using it and thereby committing an offence if it be dirty. It would accordingly be impossible for him to comply with the regulation.

No doubt the legislature could and sometimes does impose an obligation with which it may be impossible to comply, but only when the imposition of such an obligation is necessary for the protection of the public. Here the public is adequately protected by the duty imposed on the person filling the bottle to ensure that the bottle is clean immediately before it is filled. Moreover, had it been intended to impose the stringent obligation on the distributor for which the prosecutor contends, I feel that very much plainer language would have been used in the regulation. On the ordinary and natural meaning of this regulation the dealers are entitled to succeed and the appeal should be allowed.

WINN, J.: I agree with both the judgments which have been delivered, but mainly because we are differing from the justices on their construction of the Milk and Dairies (General) Regulations, 1959, reg. 27 (1), I feel it right that I should say, indicating some sympathy with the justices, that it is only in the ultimate analysis of the matters and for the reasons which my Lords have given, that I myself have come to the conclusion that the word " use " in the regulation has the particular meaning that my Lords have declared. I must admit that, contrary to what Lord Parker, C.J., has said, I should have thought that the natural meaning of the words " used for containing milk shall, immediately before use ", taken by themselves as language would have been any use the purpose or essential function of which was that milk should be contained in the vessel, and on that interpretation the carriage of the milk in the vessel would be use of the vessel for containing milk. It does not seem at all natural to use the words here as synonymous with " used for receiving milk ", or " used for having milk poured into the vessel ". It does not seem to me so plain that the policy of the legislature might not have been to impose an absolute obligation on a person not able legally himself to open the vessel in order to see whether it was clean.

I think it possible that there may be, though I have not gone into the question, other particular forms of legislation dealing with such articles as cartridges or gunpowder, where a double responsibility may be imposed. One instance that occurs to me is the overriding responsibility of the master of a merchant ship in waters where he has compulsorily to take a pilot on the bridge; but in this context I do feel for the reasons given, which I will not repeat, that the more limited meaning must be given to the word " use ". It is to be noted that the context is not all that clear because the preceding article refers to the use for treatment or handling of milk, which must be wider than having milk poured into the vessel.

In my view, apart from the other instances referred to later, reg. 27 (1) is prima facie to be construed as meaning such use as is referred to in reg. 26, just as one has in reg. 27 (2) a clear indication that the use referred to in the last line of that paragraph is any use which will bring the appliance into contact with the milk. Another reason why the regulation is somewhat unsatisfactorily drafted is that in para. (6) (a) the words " such milk tanker, vessel or appliance shall as soon after use as is practicable ", must, one would suppose, mean so soon after its use for carrying milk has ceased; whereas before it is used again presumably means before it is again brought into contact with milk by being filled. Having regard to the concluding words, I have come to the conclusion that the whole subject-matter of reg. 27 is to be regarded as use by bringing milk into contact with it, that is to say, so soon as milk is again brought into contact with the vessel.

Appeal allowed.

Solicitors: *Scott & Son* (for the dealers); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Beckenham (for the prosecutor); *Latter & Willett*, Bromley (for the producers).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

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R. *v.* LAKE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Winn and Widgery, JJ.), February 6, 1961.]

Criminal Law—Sentence—Preventive detention—Second sentence while first still
B *current—Second sentence to date from conviction and absorb unexpired portion of first sentence.*

When a prisoner serving a sentence of preventive detention is sentenced to a term of preventive detention, the second sentence should date from the conviction and thus absorb the unexpired portion of the previous sentence of preventive detention (see p. 588, letter B, post).

C [**Editorial Note.** This case should be considered with *R.* v. *Cannell* ((1953), 37 Cr. App. Rep. 188).

As to consecutive sentences, see 10 HALSBURY'S LAWS (3rd Edn.) 492, para. 898.

As to general principles applicable when imposing a sentence of preventive detention, see ibid., 512, para. 931.]

D **Appeal.**

This was an appeal by Doris Lake against a sentence of ten years' preventive detention imposed on her on Nov. 7, 1960, at Buckinghamshire Quarter Sessions. She had pleaded guilty before the chairman and a bench of magistrates to breaking into a house and stealing property to the value of £100, and asked for four other
E cases to be taken into consideration. The sentence was ordered to run consecutively with a sentence of eight years' preventive detention which she was then serving and which had been passed on her on Mar. 9, 1955. Leave to appeal against sentence was granted by HINCHCLIFFE, J., on Jan. 16, 1961. The facts appear in the judgment of the court. The cases cited below were mentioned in argument*.

P. Perrins for the appellant.

F The Crown was not represented.

LORD PARKER, C.J., gave the following judgment of the court: This appellant pleaded guilty at Buckinghamshire Quarter Sessions to breaking into a house and stealing property to the value of £100. She asked for four other offences to be taken into consideration in connexion with a stolen cheque book
G and a Post Office Savings Bank book. She was sentenced by the chairman to ten years' preventive detention, which was made consecutive to a sentence of eight years' preventive detention passed on her on Mar. 9, 1955. It is against that sentence that she now appeals to this court by leave of the single judge.

This woman aged forty-six has a most extraordinary history. Since 1930 she has either been sentenced in respect of, or had taken into consideration, no less
H than eighty-one offences of either house-breaking or larceny. It is quite clear that she is a menace. After borstal training she had various sentences of imprisonment in 1938, 1939, 1941, 1943 and 1944. Coming to more recent times, in 1946 she had four years' penal servitude, in 1949 five years' preventive detention and in 1955, as I have already said, on Mar. 9 she was sentenced to eight years' preventive detention. While serving that sentence on Sept. 3, 1960,
I she absconded from Holloway Prison, and the present offences were committed in the three weeks that she was on the run before she was re-arrested on Sept. 24, 1960.

The real question here is whether it is proper in a case of this sort to make the sentence of preventive detention consecutive to the previous period of preventive detention. The court can see nothing wrong in law in doing so, but it does

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* *R.* v. *Beamon*, [1948] 1 All E.R. 947; *R.* v. *Wilsher*, [1953] 2 All E.R. 326; *R.* v. *Cannell*, (1953), 37 Cr. App. Rep. 188; *R.* v. *Nurse*, (Nov. 14, 1960, C.C.A.), see (1961) Cr. Law Review 57.

appear to the court that care must be taken to see that the prisoner is not in A
effect punished twice, first by a sentence of preventive detention and secondly by
a forfeiture of the period which he or she would have spent on licence. To
take the present case, we are told that she would have had sixteen months
on licence, which she will no longer have, so that as a result of these offences she
has ten years' preventive detention and the loss of sixteen months on licence.
In those circumstances, the court feels that the better practice in cases of this B
sort is to make the sentence of preventive detention, whatever it is, date from
conviction, in which case it will absorb, as it were, the unexpired portion of any
previous sentence of preventive detention. Moreover, that seems much more
in line with the position when a sentence of preventive detention is imposed on
a person who is on licence during a previous sentence of preventive detention.
In such a case s. 26 (6) of the Prison Act, 1952, provides that the unexpired C
portion of the previous sentence of preventive detention ceases so soon as a
fresh sentence of preventive detention is imposed. Accordingly, in these circumstances
the court thinks that the proper course in the present case is to make the
sentence of ten years' preventive detention date from conviction.

Appeal allowed in part. Sentence varied.

Solicitor: *Registrar, Court of Criminal Appeal* (for the appellant). D

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

R. *v.* MADAN. E

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Winn and Nield, JJ.), January 30, 1961.]

*Constitutional Law—Diplomatic privilege—Immunity from legal process—
Criminal proceedings—Purported waiver on behalf of accused—Conviction
—Subsequent purported waiver by High Commissioner on whose staff* F
*accused was—Whether accused entitled to immunity at date of conviction—
Diplomatic Immunities (Commonwealth Countries and Republic of
Ireland) Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 18), *s.* 1.

In criminal proceedings for something that is malum prohibitum the
principles of law concerning diplomatic immunity in civil proceedings
are equally applicable (see p. 592, letter F, post). G

On Aug. 9, 1960, the appellant was convicted at London Sessions of
obtaining a season ticket by false pretences and of attempting to obtain
money by false pretences. At all material times he had been employed in
the passport office of the High Commissioner for India and was on the list
of the Secretary of State under s. 1 (4) of the Diplomatic Immunities H
(Commonwealth Countries and Republic of Ireland) Act, 1952*, as a person
entitled to diplomatic immunity. The solicitor appearing for the appellant
before the examining magistrate had purported to waive this immunity on
his behalf. On Nov. 21, 1960, the Deputy High Commissioner for India wrote
to the Commonwealth Relations Office stating that the appellant was entitled
to diplomatic immunity under the Act of 1952, but that in order not to I
impede the course of justice, and as a very special case, the High Commissioner
was prepared to waive it (under s. 1 (5)† of the Act of 1952).

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* Section 1 (4), so far as material, reads: "The Secretary of State shall compile a list of the persons appearing to him to be entitled to immunity from suit and legal process under sub-s. (1) of this section . . . and the Secretary of State shall from time to time amend the list and shall cause the list and any amendment of the list or any amended list to be published in the London, Edinburgh and Belfast Gazettes".

† The terms of s. 1 (5) are printed at p. 591, letter F, post.

Held: the criminal proceedings, being against a person entitled to diplomatic immunity, were without jurisdiction (whether he claimed immunity or not) unless and until there was a waiver, which, if it were to be effective, must be a waiver on behalf of the chief representative of the state in question, for the immunity was the privilege of the state and not of the individual; the letter of Nov. 21, 1960, did not purport to be a retroactive waiver, and accordingly the appellant's conviction would be quashed.

R. v. *A.B.* ([1941] 1 K.B. 454) considered and applied.

Appeal allowed.

[As to diplomatic immunity and who may claim such immunity, see 7 Halsbury's Laws (3rd Edn.) 268-271, paras. 573, 574, 575 and Supplement; ibid., 272, 273, paras. 577, note (h), 578 note (1); and for cases on the subject, see 11 Digest (Repl.) 628, 629, *515-519*, *521*, 630, 631, *530*, *535*, *536*, 632, *549-553*, *555*.

As to waiver of privilege, see 7 Halsbury's Laws (3rd Edn.) 271, para. 576 and Supplement; see also 10 Halsbury's Laws (3rd Edn.) 292, para. 544, note (u); and for cases on the subject, see 11 Digest (Repl.) 634, 635, *590-596*.

For the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, s. 1, see 32 Halsbury's Statutes (2nd Edn.) 45.]

Cases referred to:

Dickinson v. *Del Solar*, [1929] All E.R. Rep. 139; [1930] 1 K.B. 376; 99 L.J.K.B. 162; 142 L.T. 66; 11 Digest (Repl.) 635, *595*.

Engelke v. *Musmann*, [1928] All E.R. Rep. 18; [1928] A.C. 433; 97 L.J.K.B. 789; 139 L.T. 586; 11 Digest (Repl.) 631, *543*.

Marshall v. *Critico*, (1808), 9 East, 447; 103 E.R. 643; 11 Digest (Repl.) 633, *575*.

R. v. *A.B.*, [1941] 1 K.B. 454; 165 L.T. 382; sub nom. *R.* v. *Kent*, 110 L.J.K.B. 268; 28 Cr. App. Rep. 23; 11 Digest (Repl.) 634, *589*.

Appeal.

This was an appeal by Kanhya Lal Madan against his conviction at the County of London Sessions on Aug. 9, 1960, before the deputy chairman and a jury, of obtaining a season ticket by false pretences and attempting to obtain money by false pretences. He was sentenced to four months' imprisonment. On Nov. 25, 1960, the Commonwealth Relations Office issued a certificate under s. 1 (3)* of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, verifying that the appellant had from February, 1959, been, and still was, a member of the official staff of the High Commissioner and that his name was included in the list pursuant to s. 1 (4) of the Act of 1952 and published in the London Gazette of Mar. 10, 1959, as amended. The cases cited below were referred to in argument in addition to those mentioned in the judgment†. The facts appear in the judgment.

Christmas Humphreys, Q.C., and *J. A. Kirpal* for the appellant.

I. A. Kennedy for the Crown.

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* Section 1 (3), so far as material, provides: "If in any proceedings any question arises whether or not any person is entitled to immunity from suit and legal process under any provision of this section . . . a certificate issued by or under the authority of the Secretary of State stating any fact relevant to that question shall be conclusive evidence of that fact".

† *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149; *Re Suarez*, [1918] 1 Ch. 176; *R.* v. *Gee*, [1936] 2 All E.R. 89; *Baccus S.R.L.* v. *Servicio Nacional del Trigo*, [1956] 3 All E.R. 715; *High Commissioner for India* v. *Ghosh*, [1959] 3 All E.R. 659; see also footnote * post, p. 590.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), and *J. R. Cumming-Bruce* as amicus curiae*.

LORD PARKER, C.J., gave the following judgment of the court: This appellant was convicted at the County of London Sessions of obtaining a season ticket by false pretences and also of attempting to obtain money by false pretences, and was sentenced to four months' imprisonment on each count concurrently. He now appeals from that conviction by leave of the court.

The facts are that, having on Mar. 2, 1960, purchased a three-monthly season ticket for a journey between Baker Street and Clapham South, the appellant applied on Mar. 3, 1960, for and obtained later a duplicate from London Transport on the ground that he had lost the original ticket. It was the prosecution case that he gave the original ticket to a friend who was or had been living in the same house as he was. The appellant then used the duplicate himself. The small sum of money which it was alleged he had obtained by false pretences was in respect of reimbursement of the fares which he had paid until the duplicate ticket was issued.

The reason why leave to appeal was given by the single judge in this case was that this man appeared to be on the staff of the High Commissioner for India. He was employed in the passport division of the Indian High Commissioner's office in London, and was entitled to diplomatic immunity. It appears that at all times he has been entitled to diplomatic immunity, being on the list kept by the Secretary of State under s. 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. This matter, however, was unknown to the court which tried him, and only came to light subsequently. It appeared for the first time in the committal proceedings that, when one of the police witnesses was cross-examined, he stated that he had ascertained that the prisoner was on the staff of the High Commissioner for India. That again emerged when the prisoner himself gave evidence at the trial, but nothing more was thought of the matter until the probation officer was called and was questioned as to what steps the High Commissioner's office were likely to take in regard to this man, he having been convicted of these offences by the jury. There was an adjournment while the probation officer got in touch with the High Commissioner's office, and when that had been done and the matter was again before the court, he told the learned deputy chairman that he had been in touch with a representative of the High Commissioner's office, who was under the impression that the prisoner was entitled to diplomatic immunity. The deputy chairman then said that so far as diplomatic immunity was concerned, the defendant must at some time, if he ever thought of it, have waived it, and that it was late to claim it then. Counsel who was appearing for the prosecution said that he thought that the position was that the prisoner was entitled to it but that he expressly waived it before the magistrate either by himself or by his solicitor. I should add that it has been conceded in this case that the solicitor then appearing for the prisoner before the committing magistrate did then purport to waive the immunity.

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* The Attorney-General's submissions were to the following effect: It was common ground that under the Act of 1952 the appellant was entitled to diplomatic immunity as he was on the list the Secretary of State maintained under s. 1 (4). It was not necessary for the appellant to claim immunity (see *Re Suarez*, [1918] 1 Ch. 176 at p. 192); nor was it in his power to waive that immunity under s. 1 (5) of the Act of 1952. On the question of waiver of immunity, the reasoning of SINGLETON, L.J. (who gave a dissenting judgment) in *Baccus S.R.L.* v. *Servicio Nacional del Trigo* ([1956] 3 All E.R. at pp. 730, 731) and of PARKER, L.J. (ibid., at pp. 736, 737), was in point. The waiver could only be made by the High Commissioner, and had been made after the trial. The extent of diplomatic immunity in criminal proceedings could be found by reference to civil actions. He could not put forward any argument that the examining magistrate had jurisdiction: therefore, the committal was bad (see GODDARD, J., in *R.* v. *Gee*, [1936] 2 All E.R. at p. 90) and by analogy the trial in the present case was a nullity. The Attorney-General referred to *Mighell* v. *Sultan of Johore* ([1894] 1 Q.B. 149) and read passages in the judgments (LORD ESHER, M.R., at pp. 159, 160; LOPES, L.J., at pp. 160, 161; KAY, L.J., at p. 162).

A After those proceedings, and as late as November of last year, the Deputy High Commissioner wrote to the Commonwealth Relations Office in these terms in a letter dated Nov. 21, 1960:

> "The High Commissioner desires me to say that Mr. Madan is and was entitled to diplomatic immunity in accordance with the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. I am B further directed to say that, in order not to impede the course of justice and as a very special case, the High Commissioner is prepared to waive the immunity in the present instance without any prejudice to the interests of this High Commission and on the clear understanding that it will not be treated as a precedent in the future."

The appellant, notwithstanding that, asserts that that waiver could only operate C from Nov. 21, 1960, that the waiver must be a waiver by the High Commissioner and not by himself or by his solicitor, and that in those circumstances both the committing magistrate and the court of trial had no jurisdiction to deal with him at all; in other words, all the proceedings prior to Nov. 21, 1960, were a complete nullity, and it would follow that he has not been properly convicted.

Certain things are clear. In the first place it is not for someone who is entitled D to diplomatic immunity to claim it in the courts. It is unnecessary to refer to the authorities, but it is clear that proceedings brought against somebody, certainly civil proceedings brought against somebody, entitled to diplomatic immunity are, in fact, proceedings without jurisdiction and null and void unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court. Moreover, it is clear that that waiver must be a E waiver by a person with full knowledge of his rights and a waiver by or on behalf of the chief representative of the state in question. In other words, it is not the person entitled to a privilege who may waive it unless he does so as agent or on behalf of the representative of the country concerned; it must be the waiver of the representative of the state. That that is clear can be seen from the Act itself to which I have referred. Section 1 (5) provides:

F

> "Notwithstanding anything in the preceding provisions of this section—(a) a chief representative may waive any immunity conferred by or under this section on himself or on a member of his staff, or on a member of his family or of the family of a member of his staff, or on a person in the service of the government of the country which he represents . . ."

G Quite apart from that subsection, the law, as we understand it, has always been that the privilege can only be waived by the accredited diplomatic agent. It is sufficient, perhaps, in this connexion to refer to *R.* v. *A.B.* (1), where LORD CALDECOTE, C.J., deals with the matter. He says this (2):

> "The first thing to be said is that the privilege claimed by the appellant is a privilege which is derived from, and in law is the privilege of, the H ambassador and ultimately of the state which sends the ambassador. It was a privilege which was originally based on the comity of nations, before it was declared by 7 Anne c. 12, in 1708 [Diplomatic Privileges Act, 1708]. LORD BUCKMASTER, in the case of *Engelke* v. *Musmann* (3) said: 'My Lords, the privilege affording ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine I of the common law declared in terms by the statute 7 Anne c. 12'; and the statement that I have made that the privilege is the privilege of the ambassador was stated by LORD HEWART, C.J., in his judgment in *Dickinson* v. *Del Solar* (4): 'The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent.'"

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(1) [1941] 1 K.B. 454. (2) [1941] 1 K.B. at p. 457.
(3) [1928] All E.R. Rep. at p. 19; [1928] A.C. at p. 440.
(4) [1929] All E.R. Rep. at p. 140; [1930] 1 K.B. at p. 380.

A Lord Caldecote, C.J., in his judgment in that case (5) further referred to *Marshall* v. *Critico* (6), where Lord Ellenborough, C.J., said (6): " This is not a privilege of the person, but of the state which he represents ". Accordingly, in the judgment of this court it matters not that the appellant may have expressly through his solicitor waived his diplomatic immunity. That is the general position as the court understands it in regard to civil proceedings.

B So far as criminal proceedings are concerned, there is no express authority, as we understand it, on the matter. Indeed, in *R.* v. *A. B.* (7), to which I have already referred, Lord Caldecote, C.J., expressly kept the question open in these terms (8):

> " I find it unnecessary to decide whether or not the diplomatic privilege of the character discussed before us can be claimed by a member of a diplomatic staff in connexion with a criminal charge . . ." C

The matter is dealt with in 7 Halsbury's Laws (3rd Edn.), at p. 269, where it is stated in these terms:

> " He [and it is there dealing with the representative of the state concerned] is exempt from the criminal jurisdiction of the state in which he resides, and is not subject to interference or arrest except, possibly, in the one instance of his engaging in acts contrary to its safety and welfare." D

In note (q) dealing with that passage the rival theories on the matter are set out, and the note ends in these terms:

> " There is no modern English authority on the subject, but judicial statements suggest that the courts do not regard the immunity to be complete in point of law, at any rate as regards persons other than the public minister himself, whatever may be the position in practice having regard to amity in foreign relations." E

The Attorney-General, to whom the court is indebted for his argument in this case, informs the court that he has been through the various cases and passages dealt with in that note and that he can find no passage whatsoever which supports the proposition that any distinction is to be drawn between the privilege of F the representative of the state himself and the privilege of those on his staff. When one is dealing with something, as in this case, which is malum prohibitum, this court takes the view that in a case such as this there is no distinction to be drawn between the principles of law applicable in the case of civil proceedings and criminal charges. It would follow, therefore, that in the present case this G appellant was subject to proceedings carried on without jurisdiction in that all the time he was entitled to diplomatic immunity. The sole question is whether the effect of the letter of the Deputy High Commissioner of Nov. 21 last waiving the immunity can be said to operate in any way retrospectively. It is enough for our decision in the present case to say that on its face it does not purport to do so. What the true position would be if it had purported to be retrospective it is H unnecessary for us to say. It is sufficient that in the present case it does not on any view purport to be retrospective.

In these circumstances, this court has no option but to quash both convictions. It makes no further order.

Appeal allowed. Convictions quashed.

Solicitors: *Percy Short & Cuthbert* (for the appellant); *Solicitor, British Transport Commission* (for the Crown); *Treasury Solicitor.*

[*Reported by* N. P. Metcalfe, Esq., *Barrister-at-Law.*]

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(5) I.e., *R.* v. *A.B.*, [1941] 1 K.B. at p. 458.

(6) (1808), 9 East, 447.

(7) [1941] 1 K.B. 454.

(8) [1941] 1 K.B. at p. 457.

TRUSTEES OF TOLLEMACHE SETTLED ESTATES *v.* COUGHTRIE (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Denning, Lord Morris of Borth-y-Gest and Lord Hodson), January 16, 17, 18, February 13, 1961.]

Income Tax—Profits—Lease—Sand pit—Rent received by lessors in excess of Sch. A assessment—Computation of excess rent—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 175 (1) (*a*), *s.* 82, *Sch. A, para.* 2.

A sand pit was let by the appellants for twenty-one years from March, 1946, at a surface rent of £10 per annum and a royalty of 6d. per ton of sand taken from the land. There was also provision for additional land to be taken on similar terms, and land was so taken and the surface rent increased. For 1953-54, the sand pit was assessed to Sch. A to the Income Tax Act, 1952, in the sum of £7, apparently on the basis of agricultural value of land, and an assessment of excess rent was made under Sch. D, pursuant to the Income Tax Act, 1952, s. 175. The amount of the rent and royalties was £668 (comprising £22 in respect of the then apportioned fixed rent and £646 in respect of royalties received in that year). The total assessment of excess rent for the year was £577 computed as follows—£668 less one-eighth, viz., £584, less a further £7, the amount of the Sch. A assessment. The appellants contended that the excess rent under s. 175 should not be so assessed, but should be assessed by reference to an estimate of the reasonable rent of the sand pit spread over the term of the lease, such reasonable rent being, on the appellants' evidence, £292 per annum.

Held: the appellants were rightly assessed to income tax under s. 175 of the Income Tax Act, 1952, and Case VI of Sch. D for the year of assessment on the sum of £577 because they were chargeable to tax on the excess of (a) an assessment on the basis of the rent and royalties actually received by them in that year (being an assessment with any appropriate adjustments under Part 3, ss. 82-116, of the Act of 1952) over (b) the actual amount of the Sch. A assessment on the land (viz., an assessment based on a notional annual value under s. 82) as reduced (under s. 99) for the purposes of collection.

Decision of the COURT OF APPEAL ([1960] 2 All E.R. 122) affirmed.

[As to excess rents chargeable to tax, see 20 HALSBURY'S LAWS (3rd Edn.) 291, para. 530; and for cases on the subject, see 28 DIGEST (Repl.) 216-221, *913-954*.

For the Income Tax Act, 1952, s. 82, Sch. A, para. 2, and s. 175, see 31 HALSBURY'S STATUTES (2nd Edn.) 80, 172.]

Cases referred to:

Barron v. *Littman*, [1952] 2 All E.R. 548; [1953] A.C. 96; 33 Tax Cas. 373, 398; 28 Digest (Repl.) 220, *947*.

R. v. *Westbrook, R.* v. *Everist*, (1847), 10 Q.B. 178; 16 L.J.M.C. 87; 9 L.T.O.S. 21; 11 J.P. 277; 116 E.R. 69; 31 Digest (Repl.) 235, *3704*.

Appeal.

Appeal by the taxpayers, Richard Bertram Verdin, Sir Randle John Baker Wilbraham and Wilfred Pyemont, the trustees of the Tollemache Settled Estates, from an order of the Court of Appeal (LORD EVERSHED, M.R., PEARCE and HARMAN, L.JJ.), dated Mar. 24, 1960, and reported [1960] 2 All E.R. 122, reversing an order of UPJOHN, J., dated May 11, 1959, and reported [1959] 2 All E.R. 582. The taxpayers had appealed from a decision of the General Commissioners of Income Tax for the Drayton Division of Shropshire against an assessment to income tax made on them under Sch. D to the Income Tax Act, 1952, for 1953-54 in the sums of £5 in respect of excess rents and £1,000 in respect of royalties, as lessors of a sand pit at Beeston in the county of Chester under a lease for twenty-one years from Mar. 25, 1946. The facts are set out in the opinion of VISCOUNT KILMUIR, L.C.

A *Hubert H. Monroe, Q.C.*, and *R. Buchanan-Dunlop* for the appellants, the taxpayers.

R. E. Borneman, Q.C., and *A. S. Orr* for the Crown.

Their Lordships took time for consideration.

Feb. 13. The following opinions were read.

B **VISCOUNT KILMUIR, L.C.:** My Lords, this is an appeal from an order of the Court of Appeal (LORD EVERSHED, M.R., PEARCE and HARMAN, L.JJ.), allowing an appeal by the Crown from an order of the High Court (UPJOHN, J.), by which an appeal by the appellants by way of Case Stated from a determination of the General Commissioners for the Drayton Division of Shropshire was allowed and the determination of those commissioners was reversed.

C The matter arises on an assessment made on the appellants under Sch. D to the Income Tax Act, 1952, for the year of assessment 1953-54 and concerns surface rent and royalties received by the appellants under a twenty-one year lease, granted by them in the year 1946, of certain land comprising a sand pit. Under the lease, the tenants paid £10 a year rent and a royalty of 6d. per ton of sand taken from the land. There was also provision, of which in the event the tenants took advantage, for additional land to be taken on similar terms. D The sand pit was assessed to Sch. A for the first time for the year 1953-54 and the additional land taken over by the tenants was the subject of a separate assessment. It is not necessary for me to state the details. Royalties paid by the tenants rose steadily from £90 odd for the year 1946-47 to over £840 for the year 1952-53; for the year 1953-54 they were £646 1s. Evidence was given before the General Commissioners by surveyors on behalf of the appellants and the Crown respectively E as to what would have been a reasonable fixed rent in respect of the original area of the sand pit together with the additional five acres for a twenty-one year lease from Mar. 25, 1946. Such reasonable rent was estimated by the appellants' surveyor at £292 per annum and by the Crown's surveyor at £500 per annum, but both surveyors were of opinion that a sand pit would rarely be let at a fixed rent for a term of twenty-one years, and that the only terms of F letting which would be satisfactory to both landlord and tenant would be those adopted in the present case, namely, a small fixed rent and a royalty per ton of sand extracted. Both surveyors were agreed that, if required to estimate at the beginning of a year a fair annual value for occupation of the sand pit over the coming year (in accordance with the Crown's alternative contention), they would have to consider all the circumstances, including the results of the previous G year's workings and the likely commercial demand for sand in the coming year but that, in the absence of any significant change of circumstances, their valuation would not differ greatly from that shown by the previous year's working.

It is common ground between the parties that the rent and royalties fall within s. 175 of the Income Tax Act, 1952, which subjects what are commonly called " excess rents " to income tax under Case VI of Sch. D, and the question H at issue in the appeal is whether, as the Crown contends, the appellants are, by the provisions of that section, assessable for the year of assessment on the basis of the rent and royalties actually received by them in that year (less the amount of the Sch. A assessment on the land, and subject to such reduction as is allowable under Sch. A for the purpose of collection), or whether, as the appellants contend, the section, on its true construction, requires a computation to I be made (in accordance with certain provisions applicable to Sch. A, and having regard to the rent and royalties reserved by, and the other terms of, the lease), of the annual value of the land. It is common ground that such a computation would result in a different, and in almost all cases a lower, assessment than would be produced on the basis of the rent and royalties actually received in the year of assessment.

The history of s. 175 and its statutory ancestor, s. 15 of the Finance Act, 1940, is set out at length in the judgment of UPJOHN, J. (1), and I need only make a short reference to it at this stage, adapting slightly the words of LORD ASQUITH OF BISHOPSTONE in *Barron* v. *Littmann* (2):

> " The [old] system [of taxing under Sch. A only] worked fairly so long as Sch. A value was frequently revised and so kept in step with commercial value. But when, during the war, quinquennial revaluations under this Schedule were suspended, an increasing disparity declared itself between the old Sch. A values and the rents which the premises in fact commanded in the market, and therewith an increasing tax-free commercial profit lodged in the hands of the entrepreneur. Section 15 of the Act of 1940 was clearly designed to ' catch ' this profit."

It is, I think, convenient to split s. 175 (1) into the following parts:

> A. " If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies . . ."

By these words—(a) one is instructed to look at the year of assessment, in this case 1953-54; (b) the lease in question is one to which this section applies under sub-s. (4); (c) the appellants are immediate lessors entitled to any rent payable under this lease.

> B. " he shall be chargeable to tax under Case VI of Sch. D in respect of the excess, if any, . . ."

With regard to these words I note—(a) the assessment is under Case VI of Sch. D; (b) that it is in respect of an excess. The top line of the subtraction sum which gives the excess is derived from the formula in the subsection and the bottom line is the actual amount of the assessment for Sch. A as stated in para. (a) of the subsection.

> C. " of the amount which would have been the amount of the assessment of the unit for the purposes of Sch. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the provisions of Part 3 of this Act) by reference to that rent and the other terms of the lease . . ."

This is the formula, and it is essential to note: (a) that, despite the reference to Sch. A, the wording keeps one's view focused on an annual value determined in accordance with the words which follow. One is taken away from the conception of an objective rack rent to the term of the lease in question. This fits in with the need for determining not the market value of the land, but the profit of the immediate lessor in question; (b) the determination of the annual value in this subsection has two constituents: (i) it must be by reference to " that rent and the other terms of the lease ". The words " that rent " refer back to " any rent payable under a lease " in the earlier part of the subsection. (ii) it must (in order to give effect to the words in brackets) be " in accordance . . . with the provisions of Part 3 of this Act."

From this analysis of the subsection, it is, in my opinion, impossible to escape the following construction. First and foremost, one is directed to the year of assessment. Secondly, as might be expected in a section the precondition of which is that a lessor should be entitled to rent, one proceeds to " that rent ", in other words, the rent actually payable. This is emphasised by the fact that the words chosen are not " the terms of the lease including the rent " but " that rent and the other terms of the lease ". Thirdly, having reached the figure of the rent actually paid, one has to consider whether it is the true rent. At this point one must bear in mind the two constituents of the formula to which I have referred.

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(1) [1959] 2 All E.R. at p. 584.
(2) [1952] 2 All E.R. at p. 560; 33 Tax Cas. at p. 411.

In other words, one has to look at "the other terms of the lease" but "in accordance . . . with the provisions of Part 3 of this Act". This means, in my view, that one has at this point to consider s. 86, which deals with tenants' rates, etc., paid by the landlord and owner occupier, and s. 88, which is concerned with (inter alia) cases where the rent is not the true consideration but by reason of other terms of the lease an adjustment must be made. The fourth step is to make the reduction for collection, also in accordance with Part 3 of the Act. That is how the top line of the necessary subtraction sum is arrived at. This construction, which is that which appealed to PEARCE and HARMAN, L.JJ., sends me to the actual payments made and conditions obtaining in this year of assessment. I have given full consideration to the view of UPJOHN, J. (3), that the section uses the words "the amount which would have been . . . the assessment of the unit for . . . Sch. A," and these predicate a notional figure. I have also considered the doubts of LORD EVERSHED, M.R. (4), based on the use of "annual value". I do not, however, find that there is anything in the section which drives one from reading the book to looking in the crystal but, on the contrary, it is from beginning to end looking at the actualities of the year of assessment.

For these reasons I would dismiss the appeal.

LORD DENNING: My Lords, this case concerns a sand pit in Cheshire. In 1946 the appellants let some two acres of it to a firm of builders' merchants for a term of twenty-one years. The rent payable was a surface rent of £10 a year for the two acres and a royalty of 6d. per ton on all sand worked and gotten from the land. The tenants covenanted that they would effectually and vigorously work and get the sand, unless it would be unprofitable on account of depression of trade or unless prevented by strikes, and so forth. The royalties went up year by year from some £100 in 1947 to some £800 in 1952. By September, 1953, the tenants had got all the sand they could from the first two acres and thereupon became entitled under the lease to take up another five acres at an additional £25 a year surface rent. They took up these extra five acres, and thenceforward paid £35 a year surface rent and royalty of 6d. a ton. We do not know whether there was enough sand to last out the full term of twenty-one years or not. We are only concerned with the tax payable by the appellants for the year 1953-54. During that year from Apr. 1, 1953, to Mar. 31, 1954, the appellants received a surface rent of £22 and royalties of £646, making £668 altogether. These two sums together are to be regarded as the rent; see *R.* v. *Westbrook, R.* v. *Everist* (5). The Sch. A figure for that period was only some £7, for it was apparently assessed on the agricultural value of the land.

Both sides agree that the relevant section is s. 175 of the Income Tax Act, 1952, which provides for a tax on excess rents, that is, roughly speaking, on rents which exceed the Sch. A figure. But the dispute is how the excess rent is to be calculated. The Crown say that it is to be calculated by reference to the *actual* figure of rent, namely, £668 received by the owners during the year in question. The appellants say it is to be assessed by reference to an *estimate* of the annual value spread over the period of the lease. The nature of the contest can best be seen by giving the actual figures. The Crown say that the amount chargeable to tax is £577, made up as follows:

Royalties actually received during the year Apr. 1, 1953, to Mar. 31, 1954	£646
Surface rent actually received for the same period (apportioned for two acres from Apr. 1, 1953, to Sept. 29, 1953, and for seven acres from Sept. 29, 1953, to Mar. 31, 1954)	£22
The rent received under the lease was therefore	£668

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(3) [1959] 2 All E.R. at p. 587.

(4) [1960] 2 All E.R. at p. 127; [1960] Ch. at p. 489.

(5) (1847), 10 Q.B. 178.

This must be reduced by one-eighth for purposes of collection under s. 99	£84
Leaving	£584
Less Sch. A assessment on the land (apportioned for the acreage occupied during the year)	£7
The excess rent chargeable under s. 175 is therefore	£577

The appellants say that the Crown's assessment is wrong in taking the *actual* sum of £646 royalties received during the year. That figure, they say, should be replaced in the calculation by an *estimated* figure of the annual value. Counsel for the appellants said that the commissioners should be directed " to find what was the consideration agreed to be paid under the lease and to express that consideration (in the light of evidence as to the amount of sand available and the rate at which it was likely to be used up) as a figure of annual value ". By this I understand that, according to counsel, the commissioners should be directed to estimate the amount of sand to be gotten from the pit and see whether or not it was likely to be used up before the end of the twenty-one years. They should then estimate the royalties which the appellants were likely to receive over the twenty-one years and then average it out so as to get a yearly figure. In short, they should spread the anticipated royalties over the period of the lease. Counsel said, however, that they could revise it in any particular year if circumstances required, as for instance, if there was a depression in trade.

My Lords, I think that the Crown's contention is correct and the appellants are wrong for the simple reason that the words of the Income Tax Act, 1952, compel this result. Section 175 compels you to take " that rent ", that is, the rent payable under the lease for the year of assessment, and to feed that rent into the Sch. A machine in this way: First, you take " that rent ", i.e., the actual rent, as the starting point. Secondly, you take " the other terms of the lease " and make such adjustments, if any, in that figure of rent as are warranted " by Part 3 of this Act ". For instance, if the landlord pays the rates, the figure must be reduced under s. 86. If the tenant does the repairs, the figure must be increased under s. 88 (3) (b), and so forth. No such adjustments arise in the present case. Thirdly, you must deduct one-eighth, being the repairs allowance permitted " for the purposes of collection ", under s. 99. The result of that calculation is to give you the top figure. Then, in order to ascertain " the excess " on which tax is chargeable, you do this: You take the " actual amount " of the Sch. A assessment (usually a low figure left over from the past), reduce it by one-eighth for the purpose of collection, then deduct it from the top figure and you have " the excess " on which tax is chargeable under Case VI of Sch. D.

Counsel for the appellants sought to escape from this result by minimising the impact of the words " that rent ". He wished to read the section as if it read that you must determine the annual value " by reference to the terms of the lease ". Whereas it distinctly says that you must determine it " by reference to *that rent* and the other terms of the lease ". *That rent* is clearly the actual figure. Counsel sought to support his argument by saying that injustice would result unless the section was read in this way. He took two hypothetical cases: First, a lease for seven years granted for a *premium* of £700 and a rent of £100 a year. Secondly, a lease for three years granted at a *rising rent* of £100 for the first year, £200 for the second year and £300 for the third year. Injustice, said counsel, would result in those cases if the Sch. A figure was fixed at £200 and in addition " the excess " was calculated on the actual rent for the year of assessment.

My Lords, I am always ready, I hope, to look at any possible injustices said to be created by an Act of Parliament and to construe it whenever possible so as to remove them; for I take it that Parliament never intends to do an injustice to anyone. But I am quite unmoved by the possible injustices suggested by counsel for the appellants in this case. They are purely hypothetical, and I doubt if they will ever arise in practice. If they should, there are ways and means, as junior counsel for the Crown suggested, of overcoming them. On the other hand, I see every reason in common sense for taking the *actual* figure of rent and not resorting to an estimate: and that is what I think the statute requires.

I would, therefore, dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, the opening words of s. 175 of the Income Tax Act, 1952, show that from year to year a lessor may be chargeable to tax under Sch. D. He will be so chargeable in respect of any excess that in any one year there may be of one amount denoted by the words of the section over another. In the present case, no question arose as to the latter amount. It was the actual amount of the Sch. A assessment (as reduced for the purpose of collection). In order to arrive at the other amount denoted by the section, it has to be ascertained whether, in the particular year of assessment which is being considered, the lessor (the immediate lessor) was entitled to a rent which was payable under a lease to which the section applies. When ascertained, that rent becomes an essential part of the determination or special calculation which the section requires. The section requires a determination as to what " would have been " the Sch. A assessment (as reduced for the purpose of collection) on a certain given basis. What would it have been if the annual value had been determined by reference to " that rent " and the other terms of the lease? The rent so referred to is, in my judgment, the actual rent for the year in question as ascertained. In the present case, the lessors were entitled to a surface rent and to a royalty per ton " for all sand worked and gotten ". The combined amount of the rent and royalty payments can be regarded as the rent payable.

When assessment for the purposes of Sch. A is being made, and the annual value of property is being ascertained, it has to be considered whether there has been a letting at a rack rent fixed within a certain period and, if not, what is the rack rent at which the lands are worth to be let by the year. When the directions given in s. 175 are being followed, then inquiry has to take place as to what would have been the Sch. A assessment if the annual value had been determined (in accordance with the provisions of Part 3) by reference to the actual rent payable to the lessor in the particular year of assessment (and to the other terms of the lease). Instead, therefore, of determining the annual value by making an assessment or a valuation under s. 82, the figure actually payable to the lessor in the particular year is to be taken. Stated otherwise, if for the purposes of Sch. A the annual value had been determined by reference to the actual figure payable, then that actual figure would take the place of (or would be regarded as) the rack rent. No occasion for any further valuation or calculation under s. 82 (2) (a) or (b) would arise.

Section 175 also requires the supposition that the annual value had been determined in accordance, in whatever part of the United Kingdom the unit of assessment is situated, with the provisions of Part 3 of the Act. This introduces the relevant provisions of Part 3 for determining assessments. Section 86 and s. 88 may, for example, in particular cases require consideration. Furthermore, s. 175, in directing the inquiry as to what, on the given basis, would have been the amount of the assessment of the unit for the purposes of Sch. A, uses also the words " as reduced for the purpose of collection ". Such a reduction may be seen in s. 99. This being, as a matter of construction, my reading of s. 175, I add that this reading of it conforms with what must have been the object of the section which, broadly stated, was to impose an annual tax, being a tax under Sch. D, on differences between out-of-date Sch. A assessments and rents actually being received.

I would dismiss the appeal.

A **LORD HODSON:** My Lords, s. 175 of the Income Tax Act, 1952, repeats the language of s. 15 of the Finance Act, 1940, which was considered by your Lordships' House in *Barron* v. *Littman* (6). That case sustained the claim of the taxpayer to deduct losses suffered by him in respect of certain properties from excess rents chargeable under s. 15. All of their Lordships considered the operation of that section. My noble and learned friend, LORD REID, said (7):

B

> "... the provisions of s. 15 (1) can be regarded as supplementary to Sch. A. But they are not an extension of Sch. A. They tax a new kind of profits or gains, and they tax it under Case VI of Sch. D because it does not come within the scope of any other Schedule or Case. Moreover, liability to pay tax under s. 15 (1) is imposed directly on the lessor who makes the profit, whereas the occupier pays tax, at least in the first instance, under Sch. A. Section 15 C imposes liability to tax if a notional revaluation of the property based on the rent which the taxpayer actually receives exceeds whichever is the greater of the actual Sch. A assessment or any rent which he has to pay under a short lease. Broadly speaking, that is a case where the taxpayer has made a profit by letting or sub-letting, and where tax on the amount of his profit would exceed the tax due under Sch. A or such part of that tax as he D has to bear himself, and the amount of tax payable under s. 15 (1) when added to the tax under Sch. A or that part of it which he bears himself will roughly correspond to what he would have had to pay in tax if he had had to pay nothing under Sch. A but had been taxed on his whole profit from letting or sub-letting the property."

E Later, LORD REID said (8):

> "The calculation which s. 15 (1) directs is simply the method by which the profits from the transaction are to be measured for income tax purposes, and the assessment and charge to tax under the section are in respect of the profits so measured."

F True that the House was not concerned with how the notional revaluation or, as it may be called, "the top figure" was to be calculated, but the language used supports the contention of the Crown that the calculation is to be made by reference to the actual figure of rent received by the taxpayer during the year in question.

The appellants contended that the measure to be used is not the actual rent, G including in this case royalties received, but the annual value computed by reference to the terms of the current lease. They argued that the figure of £646 (the royalties received during the year Apr. 1, 1953, to Mar. 31, 1954) is only relevant evidence to enable the annual value to be computed and that the commissioners should be directed to find what is the consideration agreed to be paid under the lease and to express that consideration in the light of evidence as H to sand available and the rate at which it is likely to be used up as a figure of annual value. The words of the section, however, are, in my opinion, too strong for them. The section provides a formula by which the excess rent is to be calculated. It begins by referring to the year of assessment and to "any rent" to which the lessor is entitled. This rent must be the sum of money payable as rent in respect of that year. The "top figure" is to be calculated by reference to "that I rent and the other terms of the lease", but the calculation is to be made in accordance with the provisions of Part 3 of the Act. This means that such adjustments are to be made as are to be found in Part 3 of the Act as, for example, provisions relating to repairs and payments of rates: see s. 86 and s. 88 (3) (b) of the Act. Finally, by s. 99, a repairs allowance is permitted, as the result of which the assessment is, for the purposes of collection, reduced by one-eighth.

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(6) [1952] 2 All E.R. 548; 33 Tax Cas. 398.
(7) [1952] 2 All E.R. at p. 558; 33 Tax Cas. at p. 408.
(8) [1952] 2 All E.R. at p. 559; 33 Tax Cas. at p. 409.

The emphasis is on the word " rent "; that rent is the rent for the year of assessment and there is no ground for treating the rent as one of the terms of the lease to be used only as evidence on which a notional rent is to be fixed on a Sch. A basis. The words " other terms " cannot embrace rent for other years. The assessment is a Sch. D assessment under Case VI on profits and gains for the year of assessment, and the reference to Sch. A provisions is necessary in order that the taxpayer may not suffer the injustice of being deprived of any adjustments to which he should be entitled.

The appellants sought to support their argument by the example of a case where the Crown's contention that the actual rent for the year is the basis of assessment would cause an injustice. If, it is said, one takes a lease for three years at a rent of £100 for the first, £200 for the second and £300 for the third year, the Sch. A assessment being £200, the landlord would, if directly assessed, pay tax on £100 excess rent in the third year, which, on the face of it, is unjust, since in the first year his actual rent was less by the same amount than the Sch. A figure on which he had to pay tax. Anomalies there must be, perhaps not infrequently, in tax cases, but I am not driven by this apparent anomaly to adopt the construction of s. 175 put forward by the appellants.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Peake & Co.* (for the appellants, the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* CUTTS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Salmon and Winn, JJ.), January 19, 1961.]

London—Petrol-filling station—Consent of county council necessary for establishment of station adjacent to street—Refusal permissible only if proposed station would cause " obstruction to traffic "—Site of proposed station at intersection of several roads—Part of an adjacent road designated as site for street trading—Refusal of consent by local authority—Whether on appeal evidence of danger to traffic resulting from obstruction of traffic admissible—Whether evidence in regard to street traders admissible—London County Council (General Powers) Act, 1933 (23 *&* 24 *Geo.* 5 *c.* xxviii), *s.* 69 (1).

The respondent proposed to establish a petrol-filling station in London on a site adjoining the intersection of several roads, one of which had been designated, in part, as a site for street trading. The local authority refused to give their consent under the London County Council (General Powers) Act, 1933, s. 69 (1)*, which provides that " such consent shall not be refused . . . unless in the opinion of the local authority the petroleum-filling station if established would cause obstruction to traffic ". The respondent appealed to a court of summary jurisdiction under s. 69 (3). At the hearing of the appeal the local authority sought to adduce evidence (a) of the danger to traffic which would result from the obstruction of that traffic if a petrol-filling station were established on the site, and (b) in regard to the street traders. The magistrate, while finding as a fact that the establishment of the station at the site was bound to cause some obstruction to traffic, refused to allow evidence on points (a) and (b), and allowed the respondent's appeal. On an appeal by the local authority, by way of Case Stated,

Held: the evidence which the magistrate had disallowed should have been admitted for the following reasons—

(i) the words " obstruction to traffic ", in s. 69 (1) of the Act of 1933, were synonymous with " interference with traffic ", and evidence as to danger resulting from the admitted interference with traffic if the proposed petrol-filling station were established was a relevant matter for consideration in deciding whether consent should be given to the station being established.

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* The terms of s. 69 (1) are printed at p. 602, letter D, post.

(ii) evidence of the trade being carried on by the street traders was also relevant; and, therefore, the case would be remitted to the magistrate for him to hear evidence on these two points.

Appeal allowed.

[For the London County Council (General Powers) Act, 1933, s. 69, see 15 HALSBURY'S STATUTES (2nd Edn.) 830.]

Cases referred to:

A.-G. v. *Wilcox*, [1938] 3 All E.R. 367; [1938] Ch. 934; 159 L.T. 212; 26 Digest (Repl.) 474, *1623*.

Dwyer v. *Mansfield*, [1946] 2 All E.R. 247; [1946] K.B. 437; [1947] L.J.R. 894; 175 L.T. 61; 26 Digest (Repl.) 488, *1740*.

Fabbri v. *Morris*, [1947] 1 All E.R. 315; 176 L.T. 172; 111 J.P. 97; 26 Digest (Repl.) 488, *1741*.

Marshall v. *Blackpool Corpn.*, [1934] All E.R. Rep. 437; [1935] A.C. 16; 103 L.J.K.B. 566; 151 L.T. 286; 98 J.P. 376; 26 Digest (Repl.) 348, *651*.

Case Stated.

This was a Case Stated by E. R. GUEST, Esq., a metropolitan magistrate, in respect of his adjudication as a court of summary jurisdiction sitting at the West London Magistrates' Court on Nov. 16 and 23, 1959.

On Dec. 10, 1958, the respondent, Oliver Alfred Sidney Cutts, applied to the appellants, the London County Council, for their consent under the London County Council (General Powers) Act, 1933, s. 69 (1), to the establishment of a petrol-filling station on the site of the Star Cinema, Wandsworth Bridge Road, Fulham, London. The appellants, pursuant to s. 69 (5) of the Act, consulted the Metropolitan Police Commissioner, who had no objection to the application being granted. Pursuant to s. 69 (5) they also consulted Fulham Borough Council, and at the same time they consulted the borough council with reference to the respondent's application for planning permission under the Town and Country Planning Act, 1947. Under the London County Council (General Powers) Act, 1947, s. 16, the borough council had designated a part of the south side of Broughton Road Approach, which abutted on the site of the proposed filling station, as a site for street trading. The borough council requested that the respondent's application be refused on road safety grounds. On June 12, 1959, the appellants refused their consent. The respondent appealed under s. 69 (3) of the Act of 1933.

Before the magistrate, the appellants sought to give evidence of the danger to pedestrian and vehicular traffic which would result from the obstruction to that traffic by the establishment of a petrol-filling station on the site, but the magistrate was of the opinion that, in deciding whether consent should be given under s. 69, he was not entitled to consider any danger to traffic which would result from such obstruction, and, accordingly, he refused to admit that evidence. The magistrate was also of the opinion that he was not entitled to consider the fact that part of the south side of Broughton Road Approach was designated and used for street trading under the Act of 1947, and that, if consent to the establishment of a petrol-filling station were given, the street traders would have to be moved; and, accordingly, he refused to admit evidence which the appellants sought to give in regard to the street traders. After hearing other evidence, he allowed the respondent's appeal unconditionally.

The questions before the High Court were whether the magistrate had rightly refused to admit evidence (i) of the danger to traffic which would result from the obstruction of that traffic if a petrol-filling station were established on the site, and (ii) of the obstruction to traffic which would result from the establishment of a petrol-filling station on the site if the south side of Broughton Road

Approach were to continue to be used for street trading in accordance with the A
designation of Fulham Borough Council under the Act of 1947.

K. F. Goodfellow for the appellants.

G. D. Squibb, Q.C., and *J. R. Peppitt* for the respondent.

LORD PARKER, C.J.: This is an appeal by the London County Council by way of Case Stated by one of the metropolitan magistrates, who allowed an appeal by the respondent against the refusal by the appellants to give their B
consent under the London County Council (General Powers) Act, 1933, s. 69, to the establishment by the respondent of a petrol-filling station.

The site where it was proposed to establish the petrol-filling station was apparently the site of the Star Cinema, Wandsworth Bridge Road, Fulham, and is at the intersection of a number of roads. It is bounded on the north by Broughton Road Approach, on the west by Wandsworth Bridge Road, and leading into C
Wandsworth Bridge Road is Studdridge Street and a road called Hazelbury Road. It can be looked on, in a sense, as the intersection of five roads. The appellants had, as I have said, refused their consent, and the learned magistrate on a re-hearing of the matter gave an unconditional consent to the establishment of this petrol-filling station. Section 69 (1) provides:

> "After the commencement of this section no petroleum-filling station D
> shall without the consent of the local authority be established in the county so as to be adjacent to any street or so that any carriageway forming part of the petroleum-filling station communicates directly with any street but such consent shall not be refused in the case of any proposed petroleum-filling station unless in the opinion of the local authority the petroleum-filling station if established would cause obstruction to traffic." E

Section 69 (2) deals with conditions and restrictions which may be imposed in regard to the lay-out of the access and egress to the proposed station. Section 69 (3) provides for an appeal, and para. (a) is in these terms:

> "Any person aggrieved by the refusal of consent by the local authority
> under this section or by the terms conditions or restrictions attached to a F
> conditional consent may within fourteen days after notice of the refusal of consent or of the grant of a conditional consent (as the case may be) has been given to him appeal to a court of summary jurisdiction . . ."

Section 69 (5) provides that, before giving or refusing consent, the council must consult with the Commissioner of Police of the Metropolis and also with the
council of the metropolitan borough in which the station is proposed to be G
established. By s. 69 (6) the London County Council is made the local authority for the purposes of the section as respects the County of London.

The only points which arise for decision on this appeal relate to the exclusion of evidence on two matters. The appellants sought to adduce evidence as to the danger to traffic which would be caused by the establishment of this petrol-
filling station. The learned magistrate, while finding as a fact that the establish- H
ment of a petrol-filling station at the site was bound to cause some obstruction to traffic, refused, on the ground that it was irrelevant, to hear any evidence as to the danger to traffic which might result from that obstruction. The second matter is that there were street traders trading in Broughton Road Approach which had been designated for that purpose under the London County Council
(General Powers) Act, 1947. Again, the appellants sought to give evidence of I
the exact position in which those street traders operated, as to the times when they operated, and matters of that kind. The learned magistrate refused to admit that evidence, taking the view that, if consent to the establishment of the petrol-filling station was given, the street traders would have to be moved and presumably could be moved.

As to the first matter, the arguments are really in a short compass, and the matter depends on the true construction of the words in s. 69 (1) to which I have referred, namely:

> "unless in the opinion of the local authority the petroleum-filling station if established would cause obstruction to traffic."

I confess that, for my part, on reading that subsection at an early stage in the argument, I felt that the words "cause obstruction to traffic" were not synonymous with "cause an obstruction on the highway", but were really dealing with an interference with traffic. It is clearly not every interference with traffic for which the appellants could properly refuse consent; it must be a matter of degree. If they were satisfied that the interference was serious or substantial, then they had the right to refuse consent, and, if the matter is looked at in that way, it seems to me common sense, unless there are authorities or arguments which prevent one from doing so, that in testing the substantiality, the seriousness, the gravity, whatever one may call it, of the interference or the obstruction, it would be only right and proper to look at the potential danger involved.

Counsel for the respondent, however, has put forward forceful arguments to the contrary. His argument is to the effect that the words "if established would cause obstruction to traffic" involve that the local authority must consider the matter in the following light. They must say to themselves: the applicant, by reason of the ownership of land adjoining the highway, has certain rights, rights of access to and egress from the highway, rights to have vehicles on the highway, of loading and unloading, and, while all that is found to cause some obstruction on the highway, it is only by, as it were, balancing the rights of the public generally and the rights of the adjacent owner, as is done in cases of actionable nuisance, that the local authority are entitled to decide whether they should consent or refuse consent. In other words, says counsel, they can refuse consent only if they are satisfied that the petroleum-filling station will result in an actionable nuisance, in which case they not only may, but must, refuse consent; and, in considering that matter, it being a nuisance due to obstruction which is being considered and not a nuisance due to danger, evidence as to danger that would result from the obstruction is wholly irrelevant. For my part, I am quite unable to accept that argument.

I think that the words "obstruction to traffic" in s. 69 (1) are really synonymous with "interference with traffic"; they are not dealing at all with obstruction on the highway in the common-law sense. Secondly, it does not seem to me that an administrative body like the appellants would be the natural body to decide whether an actionable nuisance would result or was likely to result, and in all the circumstances I feel that s. 69 (1) is to be looked on quite apart from the law of nuisance, except in so far that it is not every interference with traffic which will justify the withholding of consent. The element of a substantial or a serious interference is imported, just as it would be in the case of an obstruction at common law. Accordingly, I am satisfied here that evidence as to danger resulting from the admitted interference with traffic is a relevant matter and ought to be considered. I would only add that, if I were wrong, and if the approach of counsel for the respondent to this matter is correct, I still feel that in deciding whether consent should be withheld or not, the danger which would result from an admitted obstruction is a relevant matter. It seems to me that in *A.-G.* v. *Wilcox* (1), to which we were referred, the evidence of danger was not only admitted but was the determining factor whether posts which occupied physically certain parts of a public way amounted to an actionable nuisance. However, I prefer to decide this case on the ground that s. 69 (1) falls to be considered quite apart from considerations of common-law nuisance.

As regards the second point, I feel that, if the case rested on that alone, I might well hesitate to send it back to the learned magistrate. In strictness, it seems to me that evidence of the trade being carried on by the street traders in Broughton Road Approach was relevant evidence. It may well be that the learned magistrate, after hearing that evidence, will come to the conclusion that, though the street traders added to the interference with traffic at that point, yet they could and would in due course be moved: in other words, he might attach very little weight to the presence at the moment of the street traders. However, in strictness, it seems to me that that was admissible evidence, though what weight should be given to it was essentially a matter for the learned magistrate. I would only add that the code under which these street traders operate is a very complicated code, and it might well be that the appellants, if evidence had been given, would have been able to show that for one reason or another, either because the street traders were registered street traders whose licence could not be taken away from them, or because there were no other places for them to trade, there were real difficulties in moving them.

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(1) [1938] 3 All E.R. 367; [1938] Ch. 934.

Accordingly, in my judgment, this appeal succeeds, and the case should go back to the learned magistrate with a direction that he should hear the evidence on the two points in question.

SALMON, J.: I agree and I add a word only because we are disagreeing with the view of the law expressed by the learned metropolitan magistrate. In my judgment the London County Council (General Powers) Act, 1933, s. 69, means that the local authority, once they are satisfied that the establishment of a petrol-filling station would cause obstruction to traffic, are given power to refuse their consent to the establishment of such a station. I agree with Lord Parker, C.J., that " obstruction to traffic " in the context of this section is synonymous with " interference with traffic ". In deciding whether the appellants shall withhold or grant their consent, it seems to me to be obvious that they are entitled to take into account the nature of the obstruction, that is to say, they may consider to what extent the obstruction will interfere with the flow of traffic and the effect of that obstruction. If they come to the conclusion, for example, that traffic will be held up for an inordinate time by the obstruction, that would be a ground for refusing their consent. Similarly, it seems to me equally clear that, if they come to the conclusion that the obstruction would constitute a danger, they would be equally entitled to withhold their consent. I also agree that, even if the view put forward so attractively by counsel for the respondent were correct, he would be in no better case, because, in considering whether or not an obstruction amounts to a nuisance, it seems to me plain that one of the elements to be taken into account is whether the obstruction constitutes a danger. It is quite true that there are many cases of a person who is liable for a nuisance on the highway which is dangerous, but which does not obstruct the highway. It may well be that there are obstructions to the highway that do not constitute a danger, but there are obviously some obstructions to the traffic and some obstructions to a highway that do constitute a danger, and these, in my view, would constitute a nuisance.

I only want to add one word in relation to the case in the House of Lords which was strongly relied on by counsel for the respondent and by the magistrate in reaching his decision; that is *Marshall* v. *Blackpool Corpn.* (2). In that case the House was considering s. 62 of the Blackpool Improvement Act, 1879, which is quite different from the section which this court is considering. In *Marshall's* case (2) the appellants, who occupied land adjoining the highway were minded to open a passage for vehicles from their land across a footpath into the carriageway. They had a common law right to do so. The Blackpool Improvement Act, 1879, gave the corporation no power to prevent the appellants from doing so. All that the Act did was to give the corporation power to control the way in which the appellants did the act which they were minded to do. In the present case, s. 69 of the Act of 1933 gives the local authority power to refuse permission for the establishment of a petrol station if it would obstruct traffic. The distinction between the two cases seems to me to be brought out very clearly by a passage in the speech of Lord Atkin, where he said (3):

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(2) [1934] All E.R. Rep. 437; [1935] A.C. 16.

(3) [1934] All E.R. Rep. at p. 439; [1935] A.C. at p. 22.

> "So far as I can see the section [s. 62 of the Blackpool Improvement Act, 1879] does not even purport to affect the right at all [i.e., the right to open a passage across the footway]. It is directed to works, and to works only. The place of the communication must be stated, not to enable the corporation to reject the place apart from the nature of the works, but to fix it on the plan and enable the corporation to judge what provision is made for kerbing and for a paved crossing, and to consider the dimensions and gradients of the necessary works. Plainly, the corporation may consider the nature of the proposed user in order to judge how the way should be constructed, both as to surface and kerbing and relation to the gradient. If the actual works, either by the steepness of the gradient or the depth of the side kerbing, would be likely to affect the safety of pedestrians on the footway or of vehicles on the roadway, there seems to me no reason why they should not take those factors into account."

It was evident in that case that the safety of pedestrians might be diminished by the very opening of a passage across the footway, however well it was constructed. There the court was not considering whether the appellants were entitled to do what they proposed to do; they were so entitled. The House was merely considering whether the corporation was entitled to withhold its consent to the way in which the proposed works were to be carried out. Therefore, in my view, *Marshall* v. *Blackpool Corpn.* (4) has no bearing on the matters which we are considering. For these reasons and the reasons given by LORD PARKER, C.J., I agree with the proposed order.

WINN, J.: I agree with both the judgments delivered and with the reasons therefor. I add only a few words about a doubt which I ventured to express during the submissions of counsel for the respondent. It was on this point: that I doubted—we have not been into the point at all and, therefore, I do no more than indicate that I reserve the question—whether the fact that customers desiring to avail themselves of the services of the contemplated filling station would from time to time perhaps form a queue, or otherwise increase the amount of traffic or of vehicles in the vicinity of the station, would per se constitute a nuisance. Counsel was concerned to submit that s. 69 of the London County Council (General Powers) Act, 1933, contrary to the view of the court, dealt only with cases where, in the opinion of the appellants, an actionable nuisance would be caused. I was endeavouring at that time to call up in my memory the name of a certain case. I failed to do so, but most conveniently the reference by counsel for the respondent to *Fabbri* v. *Morris* (5), which he named after the adjournment, has supplied for me that reference which I was endeavouring to recall. It is *Dwyer* v. *Mansfield* (6), decided by ATKINSON, J. As referred to in *Fabbri* v. *Morris* (7) by LORD GODDARD, C.J., the effect of *Dwyer* v. *Mansfield* (6) is this:

> "If a person is selling in the ordinary way from a shop, he cannot be held responsible because a queue forms in the street of people anxious to go into the shop and buy. If he is carrying on business in the ordinary way, no offence is committed, as was recently pointed out by ATKINSON, J., in *Dwyer* v. *Mansfield* (6). In that case the shopkeeper was a greengrocer, and at the time in question he was selling potatoes of which there was a scarcity."

I need read no more. For this additional reason I agree. *Appeal allowed.*

Solicitors: *Solicitor, London County Council* (for the appellants); *Warren & Co.* (for the respondent).

[*Reported by* KATHLEEN J. H. O'BRIEN, *Barrister-at-Law.*]

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(4) [1934] All E.R. Rep. 437; [1935] A.C. 16.
(5) [1947] 1 All E.R. 315.
(6) [1946] 2 All E.R. 247; [1946] K.B. 437.
(7) [1947] 1 All E.R. at p. 316.

R. *v.* GOVERNOR OF BRIXTON PRISON, *Ex parte* CALDOUGH. A

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, JJ.), January 31, February 1, 1961.]

Extradition—Fugitive offender—Evidence—Depositions—Counsel for fugitive not allowed to appear at taking of depositions in Canada—Whether depositions rendered inadmissible in committal proceedings in England—Conspiracy charges in wide terms—Whether applicant's committal thereon justified—Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *s.* 29, *s.* 39—*Canadian Criminal Code* (*Statutes of Canada*, 1953-54, *c.* 51), *s.* 453. B

The applicant was a Canadian citizen in respect of whom a warrant of arrest, dated Oct. 3, 1960, on four counts was issued in the city of Vancouver, British Columbia, Canada. On Dec. 12, 1960, at the taking of depositions in Vancouver for the purposes of proceedings under the Fugitive Offenders Act, 1881, the deputy police magistrate ruled that counsel on the applicant's behalf, the applicant then being in England, was not entitled to cross-examine witnesses, treating the proceedings in Canada as being ex parte. Subsequently, in proceedings at which the duly authenticated copies of the warrant and depositions were before the Metropolitan Chief Magistrate the applicant was committed to prison to await being returned to Canada. There was no evidence that the effect of the first sentence of s. 29* of the Fugitive Offenders Act, 1881, which provided that depositions might be taken in the absence of the accused " in like manner as if [he] were present and accused of the offence " was part of the law of Canada. Section 453† of the Canadian Criminal Code provided that where an accused was before a justice holding a preliminary inquiry the justice should take the evidence of witnesses on oath in the presence of the accused and allow the accused or his counsel to cross-examine them. Section 29 of the Fugitive Offenders Act, 1881, provided (in its second sentence) that duly authenticated copies of depositions might be received in evidence. The counts on which the applicant had been charged in Vancouver included three counts charging extensive conspiracy between Jan. 1, 1958 and Mar. 3, 1960, and counts 2 and 4 charged overt acts in connexion with the alleged conspiracy. On application for habeas corpus, C D E F

Held: a writ of habeas corpus would not be granted because—

(i) it was not possible, in the absence of evidence of Canadian law, to embark on a consideration whether what was done in Canada was proper under Canadian law; moreover the provisions of the second sentence of s. 29* of the Fugitive Offenders Act, 1881, were independent of the first sentence and, as the depositions were duly authenticated and were within the definition of "deposition" in s. 39 of the Act of 1881, they were admissible before the Chief Magistrate, who did not have to be satisfied that they were taken in accordance with a procedure normal in an English magistrates' court. G H

R. v. *Secretary of State for India, Ex p. Ezekiel* ([1941] 2 All E.R. 546) followed.

(ii) there was nothing in the formulation of the charges set out in the warrant that would have entitled the Chief Magistrate to disregard the warrant. I

[As to application for writ of habeas corpus by fugitive offenders, see 11 HALSBURY'S LAWS (3rd Edn.) 33, para. 55; and for cases on the subject, see 24 DIGEST (Repl.) 1012-1016, *159-177*.

For the Fugitive Offenders Act, 1881, s. 5, s. 29, s. 39, see 9 HALSBURY'S STATUTES (2nd Edn.) 898, 907, 911.]

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* Section 29 is printed at p. 608, letter A, post.

† The relevant provisions of s. 453 are printed at pp. 608, 609, post.

Cases referred to:

Campbell, Re, [1935] N.Z.L.R. 352; 24 Digest (Repl.) 1016, *238*.

R. v. *Secretary of State for India, Ex p. Ezekiel*, [1941] 2 All E.R. 546; [1941] 2 K.B. 169; 111 L.J.K.B. 237; 24 Digest (Repl.) 1012, *163*.

Motion.

This was a motion for a writ of habeas corpus, directed to the Governor of Brixton Prison, on behalf of George Frederick Caldough, a Canadian citizen who was in detention in Her Majesty's Prison at Brixton. A warrant to arrest him, dated Oct. 3, 1960, was sent to Great Britain by a justice of the peace for the city of Vancouver, British Columbia, Canada. On Nov. 11, 1960, the applicant was arrested in London under a provisional warrant issued under s. 4 of the Fugitive Offenders Act, 1881. On Jan. 10, 1961, following successive remands, he was committed to prison by the Chief Magistrate at Bow Street Magistrates' Court to await his return to Canada. The evidence on which he was committed to prison consisted substantially of depositions taken before Albert Leslie Bewley, deputy police magistrate, at Vancouver on Dec. 12, 1960. The warrant stated that the applicant had been charged, that he and others with whom he was charged had in the Province of British Columbia, between Jan. 1, 1958, and Mar. 31, 1960, (i) conspired with divers other persons unknown to make, circulate and publish statements they knew to be false with intent to induce persons to become shareholders in certain companies, (ii) made, circulated and published statements they knew to be false with intent to induce persons to become shareholders in certain companies, (iii) conspired with divers other persons unknown, by deceit, falsehood and other fraudulent means, to defraud the public of property, money or valuable security, (iv) by deceit, falsehood or other fraudulent means, did defraud the public of property, money or valuable security.

C. J. S. French for the applicant.

J. H. Buzzard for the Governor of Brixton Prison.

Victor Durand, Q.C., and *J. C. Mathew* for the Attorney-General of British Columbia.

LORD PARKER, C.J.: The applicant is a Canadian citizen in respect of whom a warrant was sent to this country by a justice of the peace for the city of Vancouver, Province of British Columbia. The applicant had in fact already been apprehended and detained in custody under a provisional warrant issued by the Chief Magistrate under s. 4 of the Fugitive Offenders Act, 1881, but it was on the warrant received from Canada duly indorsed and certain alleged depositions that the Chief Magistrate dealt with the case and committed him to Brixton Prison.

The jurisdiction of the Chief Magistrate is laid down by s. 5 of the Fugitive Offenders Act, 1881, in these terms:

> " A fugitive when apprehended shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction.
>
> " If the indorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British possession to the governor of that possession."

The evidence which may be deduced is dealt with by s. 29 of the Fugitive Offenders A
Act, 1881, as follows:

> " A magistrate may take depositions for the purposes of this Act in the
> absence of a person accused of an offence in like manner as he might take the
> same if such person were present and accused of the offence before him.
> Depositions (whether taken in the absence of the fugitive or otherwise) and
> copies thereof, and official certificates of or judicial documents stating facts, B
> may, if duly authenticated, be received in evidence in proceedings under
> this Act.
>
> " Provided that nothing in this Act shall authorise the reception of any
> such depositions, copies, certificates, or documents in evidence against
> a person upon his trial for an offence."

The section then goes on to deal with the proper method of authenticating the C
warrant and the depositions. Finally, by s. 39, the definition section, it is provided:

> " In this Act, unless the context otherwise requires . . . the expression
> ' deposition ' includes any affidavit, affirmation, or statement made upon oath
> as above defined . . ." D

The words " above defined " refer to the preceding definition of " oath ".

The warrant received in this country charged the applicant with others on
four counts. Counts 1 to 3 charged an extensive conspiracy between Jan. 1,
1958, and Mar. 31, 1960, " to commit an indictable offence, to wit, to make,
circulate and publish statements, they knew to be false in material particulars
with intent to induce persons to become shareholders " in certain companies; E
and in count 3 a similar conspiracy, " unlawfully by deceit, falsehood or other
fraudulent means to defraud the public of property ". Counts 2 and 4 alleged
overt acts in connexion with such conspiracy.

The first point taken on behalf of the applicant in the present case is that these
charges were not such as, according to the law ordinarily administered by the
Chief Magistrate, to quote the words of s. 5, entitled him to commit. Thus, it is F
said that counts 1 and 3 alleged a conspiracy which is much too extensive and
such as would not be allowed in this country; and in regard to counts 2 and
4 it is pointed out that the allegations are unparticularised in a number of
respects. It is, I think, sufficient to say in regard to this ground that I see nothing
in the formulation of the charges which would entitle the Chief Magistrate in
effect to disregard the warrant and the evidence and to decline to proceed in the G
matter.

The second point raised is of more substance. It goes to the admissibility of
the evidence tendered before and received before the Chief Magistrate. This,
though I have not seen the depositions, I understand consisted in whole or in
part of statements on oath made by witnesses before the deputy police magistrate
for the city of Vancouver. It is said on behalf of the applicant that these H
should not have been admitted, in which case there would have been no sufficient
evidence to justify committal in the present case.

The facts giving rise to this contention are that the deputy police magistrate
in Vancouver refused to allow counsel appearing for the applicant to cross-examine
the witness, treating the taking of the evidence before him as in effect
an ex parte proceeding. This, it is said, was contrary to the Fugitive Offenders I
Act, 1881, or at any rate contrary to what are loosely called the principles of
natural justice. Thus, s. 453 of the Criminal Code, which appears in the Statutes
of Canada for 1953-54, and which was in evidence before the Chief Magistrate,
lays down the position in regard to the taking of depositions when the accused
is present and charged with an offence. It provides, so far as is material:

> " When the accused is before a justice holding a preliminary inquiry,
> the justice shall (a) take the evidence under oath, in the presence of the

> A accused, of the witnesses called on the part of the prosecution and allow the accused or his counsel to cross-examine them . . ."

Section 29 of the Fugitive Offenders Act, 1881, however, by para. 1, to which I have already referred, provides that

> " A magistrate may take depositions for the purposes of this Act in the B absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him."

Accordingly, it is argued that applying that provision to s. 453 of the Canadian Criminal Code, there was nothing to exclude the right of the applicant, not personally, but by his counsel to cross-examine the witnesses.

Counsel for the applicant quite rightly drew our attention to a case in New C Zealand, *Re Campbell* (1), in which a similar point arose in connexion with depositions taken in New South Wales, and in which the Chief Justice of New Zealand held that the proceedings in New South Wales were ex parte and that the fugitive had no right by his counsel to cross-examine the witnesses. Counsel for the applicant here, however, submitted that that decision was wrong and that we ought not to follow it. Counsel for the Attorney-General of British Columbia, D on the other hand, supported the decision and contended that the purpose of the proceedings in the present case was the obtaining of a warrant. On examination, however, this proved to be quite untenable since the warrant had already been issued.

In my judgment, however, unless and until it is shown that the first paragraph of s. 29 of the Fugitive Offenders Act, 1881, is today part of the law of Canada, E and no such evidence was adduced before the Chief Magistrate, it is impossible to embark on a consideration whether what was done in Canada was proper under Canadian law. The provisions of s. 29, including the first paragraph, must therefore be viewed as applying solely to this country. Viewed in this way, the highest at which the point can be put is that depositions, duly authenticated, are not admissible unless such depositions have been taken under a procedure which, F if the depositions had been taken in England, would have complied with the provisions of the first paragraph. The answer to that, however, in my judgment, is that para. 1 and para. 2 of s. 29 are wholly independent provisions. Indeed, the word " such " before the word " depositions " in the second paragraph is significantly omitted. Moreover, it has already been held by this court in *R.* v. *Secretary of State for India, Ex p. Ezekiel* (2), that the first two paragraphs of G s. 29 are wholly independent provisions, and by that decision this court is bound. Further, it is I think impossible to say that what occurred in Canada is contrary to natural justice once one sees that affidavits are included in the definition of " depositions ". It is further to be remembered that by the third paragraph of s. 29 it is provided that none of this evidence shall be evidence against a person on his trial for the offence. The truth of the matter, as I see it, is that all that the H Chief Magistrate at Bow Street is concerned to see is that what is tendered as evidence consists of depositions as defined and that they are duly authenticated.

In my judgment, therefore, this application fails and must be refused.

WINN, J.: I agree, and for the reasons which LORD PARKER, C.J., has given. I would add only one point, and I am conscious that it may be only an I alternative way of stating a point already made, and it is this: when one appreciates that the expression " depositions " used in s. 29 of the Fugitive Offenders Act, 1881, is made by the force of the definition section to include any statement not on oath, it seems that the construction of the section as a whole must be such as not to raise a conflict between the meaning of the word " depositions " in the first paragraph and the second paragraph in the light of that definition. I, therefore, find it impossible to accept the view urged on the court by counsel for the applicant that "depositions" in the other paragraph means depositions taken in accordance with the normal procedure in an English magistrates' court.

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(1) [1935] N.Z.L.R. 352. (2) [1941] 2 All E.R. 546; [1941] 2 K.B. 169.

WIDGERY, J.: I also agree.

Application refused.

Solicitors: *Rowley Ashworth & Co.* (for the applicant); *Director of Public Prosecutions* (for the Governor of Brixton Prison); *Charles Russell & Co.* (for the Attorney-General of British Columbia).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

LONDON AND WESTCLIFF PROPERTIES, LTD. *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER.

[QUEEN'S BENCH DIVISION (Ashworth, J.), January 26, 27, 1961.]

Housing—Compulsory purchase order—Ultra vires—Proposed abuse of powers after land acquired—Relevance of events up to the time when the order was confirmed by Minister—Order intra vires the local authority when made—Subsequently bargain made between authority and freeholders of land being acquired contravening the Housing Act, 1957*—Bargain appearing on face of inspector's report to Minister—Confirmation of order ultra vires—Whether court entitled to quash order—Housing Act,* 1957 (5 *&* 6 *Eliz.* 2 *c.* 56), *s.* 47 (2), *Sch.* 4, *para.* 2.

In considering the validity of a compulsory purchase order made by a local authority under the Housing Act, 1957, the court may take into consideration matters occurring subsequently to the making of the order and up to the moment when the Minister confirms it (see p. 615, letter H, post).

The applicants were the leaseholders of certain buildings under a long lease expiring in 1979. D. Ltd. were the freeholders of the buildings and owned the reversion to the applicants' term. The local authority, having properly determined that the buildings were unfit for human habitation, declared the area comprising the buildings a clearance area under s. 42 of the Housing Act, 1957. On July 3, 1958, the authority made a compulsory purchase order in respect of the buildings as they were empowered to do under s. 43 of the Act. The applicants and D. Ltd. having consulted together, both lodged formal notice of objection to the order with the Minister. Subsequently and unknown to the applicants, the local authority made a bargain with D. Ltd., under which, in consideration of D. Ltd. paying to the authority £2,000 towards the cost of re-housing the tenants in the building, and on the understanding that D. Ltd. would not wish to pursue their objections to the order, the authority agreed to transfer to D. Ltd. possession of the residue of the applicants' leasehold term (the residue being twenty-one years) and not to proceed with the order regarding D. Ltd.'s freehold interest. This bargain was contrary to s. 47 (2) of the Act of 1957 under which the authority were required to obtain the best price for the sale of land which they had acquired compulsorily. The inspector in his report to the Minister on the inquiry held into the authority's application for confirmation of the order, recorded that at the inquiry the council declared their intention of making the leasehold interest available to D. Ltd. without payment but that D. Ltd. would be required to contribute £2,000 towards re-housing costs and declared that terms to this effect had

A been agreed. The inspector recommended that the order should be confirmed. The Minister confirmed the order. The applicants applied to the court under Sch. 4, para. 2* to the Act of 1957 to have the order quashed.

Held: the compulsory purchase order would be quashed for the following reasons—

(i) the use of the land proposed to be made by the local authority after B acquisition (to which use the local authority had agreed) involved a contravention of s. 47 (2) of the Housing Act, 1957, and this rendered the acquisition itself ultra vires (see p. 617, letter C, post).

(ii) the confirmation of the order by the Minister did not prevent the court's intervening because the proposed contravention of s. 47 (2) was apparent on the inspector's report, and the disregard of the proposed C contravention rendered the confirmation ultra vires (see p. 617, letter H, post).

Re Brighton (*Everton Place Area*) *Housing Order, 1937* ([1938] 4 All E.R. 446) considered.

[As to the functions of a local authority in regard to a clearance area, see 19 HALSBURY'S LAWS (3rd Edn.) 658, para. 1059; and as to the quashing of orders, D see ibid., p. 645, para. 1042.

For the Housing Act, 1957, s. 47 (2) and Sch. 4, para. 2, see 37 HALSBURY'S STATUTES (2nd Edn.) 361 and 475.]

Case referred to:

Brighton (*Everton Place Area*) *Housing Order, 1937*, *Re*, *Robins & Son, Ltd.'s Application*, [1938] 4 All E.R. 446; 108 L.J.K.B. 281; 103 J.P. 13; E sub nom. *Robins & Son, Ltd.* v. *Minister of Health*: *Re Brighton* (*Everton Place Area*) *Housing Order, 1937*, [1939] 1 K.B. 520; 160 L.T. 3; 26 Digest (Repl.) 692, *78*.

Motion.

By notice of motion dated Nov. 12, 1959, the applicants, London and Westcliff Properties, Ltd., gave notice of application for an order suspending until F final determination of the present proceedings the operation of a compulsory purchase order known as the London County Council (Verney Road, Camberwell) Compulsory Purchase Order, 1958, and for an order for payment of the costs of the motion by the respondents to it, the Minister of Housing and Local Government and London County Council. The notice was amended at the G hearing of the motion to ask for the quashing of the compulsory purchase order. The grounds of the motion were that the order was not made within the powers conferred by the Housing Act, 1957, in that (i) London County Council intended to deal with the land the subject of the order contrary to s. 47† of the Act of 1957, and (ii) the Minister acted ultra vires in confirming the order, it being an order made or intended to be exercised with a view to dealing with the land H acquired contrary to s. 47†.

At all material times the applicants were the lessees of certain flats in Imperial Buildings, Verney Road, Camberwell. Their lease was a long lease expiring in 1979. The freeholders of Imperial Buildings and reversioners to the applicants' term were a company, Diploma Laundry, Ltd., who also owned the freehold of land adjoining and on the east and south of Imperial Buildings. I On Mar. 4, 1958, London County Council (referred to hereafter as "the council") declared the area comprising Imperial Buildings to be a clearance area under s. 42 of the Housing Act, 1957, on the ground, which was not disputed, that the buildings were unfit for human habitation; acting under s. 43 of the Act, the council resolved to deal with the clearance area by purchasing it compulsorily and demolishing the buildings itself. Accordingly, on July 3, 1958, the council made the London County Council (Verney Road, Camberwell) Compulsory

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* For the terms of Sch. 4, para. 2, see p. 615, letter E, post.

† For the relevant terms of s. 47, see p. 614, letter H, post.

Purchase Order, 1958 (hereafter referred to as "the order"), under which objections to the order had to be made in writing to the Minister before Feb. 3, 1959. The clearance area was zoned for waterside industry and the council intended, if the order was confirmed by the Minister, to use the area for re-siting industry displaced by other slum clearance schemes in this part of the county. In the autumn of 1958 the applicants and Diploma Laundry, Ltd., began consultations through their respective surveyors as to the steps which they should take to contest the order. Furthermore, the applicants, who realised that Imperial Buildings was unfit for human habitation, had their own scheme for converting it to industrial use and, on Aug. 26, 1958, had applied to the council, as the local planning authority, for planning permission to convert the building to industrial use. Planning permission was refused by the council on Nov. 21, 1958, and on Nov. 23, 1958, the applicants entered an appeal against the refusal. By a letter dated Jan. 29, 1959, the surveyors of Diploma Laundry, Ltd., wrote to the applicants' surveyor as follows:

> "Without prejudice to the schedule of dilapidations which has been served, our clients are now prepared to enter into negotiations for the purchase of your clients' leasehold interest in [Imperial Buildings], but they will not be willing to pay a higher figure than your clients might reasonably be expected to realise if the compulsory purchase order is confirmed on the 'cleared' site basis. In order that the net sum which may be agreed may not be less than your clients would receive from the L.C.C. our clients may be willing to meet your clients' legal expenses on the transfer, and also your fees. Our clients will not now be willing to join your clients in an appeal against the London County Council's refusal [of planning permission] to permit an industrial conversion of the property . . . P.S. Since this letter was typed we have spoken to you at the telephone and we have held back the letter which we have drafted to the Ministry of Housing and Local Government making formal objections on behalf of our clients to the compulsory purchase order."

Then the grounds of objection to the order were set out in the letter. Thus the applicants and Diploma Laundry, Ltd. were co-operating in regard to both the order made in July, 1958, and the refusal of planning permission. Following on that letter the applicants' surveyor, on Jan. 30, 1959, gave written notice of objection to the making of the order to the Minister and on Feb. 2, 1959, Diploma Laundry, Ltd. also gave the Minister formal written objection to the order on the ground that they had purchased the land surrounding Imperial Buildings with a view to industrial development and incorporation with the site of Imperial Buildings and that separate industrial development of this site would prejudice the development of the surrounding land. Unknown to the applicants, negotiations then took place between the council and Diploma Laundry, Ltd., and by a letter dated Apr. 27, 1959, the council wrote to the surveyors acting for Diploma Laundry, Ltd. as follows:

> "The London County Council (Verney Road, Camberwell) Compulsory Purchase Order, 1958. Imperial Buildings. Freehold—Diploma Laundry, Ltd. With reference to the above matter I write to confirm the tentative arrangements reached at the meeting between our representatives. It is agreed that if the order is confirmed by the Minister the council will purchase the leasehold interest and undertake the re-housing of the tenants and demolition of the unfit building. I also confirm that I am prepared to recommend that in consideration of your clients making a contribution of £2,000 towards the cost of re-housing the tenants of the flats the council should not proceed with the purchase of their freehold interest in the land. The cleared site will thus be made available to your clients after the buildings have been demolished. I understand, further, that having regard to this arrangement your clients will not wish to pursue their objections to the

> council's order. If you agree that the position is as set out above I shall be glad if you will write to the Minister formally withdrawing the objection."

By letter dated May 1, 1959, Diploma Laundry, Ltd.'s surveyors wrote to the Minister formally withdrawing their clients' notice of objection to the order " as a result of negotiations . . . with the council ". On May 13, 1959, a public local inquiry was held at Camberwell Town Hall into both the application by the council for confirmation of their order by the Minister and the refusal by the council to grant the applicants planning permission to convert Imperial Buildings for industrial use. It was at the inquiry, at which both the applicants and the council were represented by counsel, that the applicants first had disclosed to them the letter dated Apr. 27, 1959, from the council to Diploma Laundry, Ltd. Prior to this the applicants had been unaware of the bargain made between the council and Diploma Laundry, Ltd. In para. 17 of his report on the inquiry to the Minister, the inspector recorded that the general case put forward for the council at the inquiry was that:

> ". . . the order site should be developed by Diploma Laundry, Ltd., as an extension to their present laundry—thus concentrating their interests in this area. Terms had been agreed but not yet finished and Diploma Laundry, Ltd. had withdrawn their objection. If confirmed the council would acquire the leasehold interest in the property and make the land available to Diploma Laundry, Ltd. That firm would not pay the council for the leasehold but would make a contribution of £2,000 towards re-housing the sixty-six occupants of the flats."

In para. 38 of his report the inspector recorded part of the general case for the applicants as follows:

> " On May 2, 1959, the leaseholders wrote to the freeholders and offered their leasehold interest in the property for the sum of £4,500. There had been no further negotiations since that date. If this appeal was dismissed the applicants would be prepared to negotiate for the sale of the lease."

The last sentence of that paragraph referred to the appeal against the refusal of planning permission because if that appeal were dismissed the applicants would be left with premises which were a declared clearance area and would be unable to convert them, as they wished, to industrial user. The inspector, in his final conclusions (para. 66 of the report), stated that the compulsory purchase order had been properly made and that he was satisfied that all the buildings fell properly within s. 42 of the Housing Act, 1957, but apart from this, the inspector gave no reasons why, as he recommended to the Minister in para. 71 of the report, the order should be confirmed without modification. Reasons which were proper reasons were given by the inspector for dismissing the applicants' appeal against the refusal to grant planning permission. In relation to the planning aspect of the matter it was clear from the inspector's report that though the council at the time of making the order intended to house on the site of Imperial Buildings an industrial occupier displaced by slum clearance schemes elsewhere the council did not then contemplate that Diploma Laundry, Ltd. would be the occupiers of the site. The Minister, having considered the inspector's report, on Aug. 28, 1959, issued two decisions, one dismissing the planning appeal and the other confirming the compulsory purchase order. At the hearing of the motion, ASHWORTH, J., said that he did not criticise the inspector for not dealing with the difficulties of s. 47 (2)* of the Act of 1957, regarding the confirmation of the order since counsel for the applicants had not been in a position to argue the point before the inspector. In an affidavit sworn on Nov. 30, 1959, the applicants' surveyor, Mr. Mallett, an experienced surveyor and architect, deposed that the consideration for the payment of £2,000 to be made by Diploma Laundry, Ltd. to the council was something other than the conveyance of the leasehold interest to Diploma Laundry, Ltd., and that if the site of Imperial Buildings were to be A cleared, and the leasehold interest of the applicants in that site were to be offered for sale in the open market, it would in his opinion realise a price substantially greater than £2,000. His Lordship, referring to this evidence, accepted the statement with regard to the consideration for the payment of the £2,000 as correct, although he said that it was not the governing reason for his decision. His Lordship cited the opinion as to price, but said that whether it was right B or wrong was of no moment to the ultimate decision of the case.

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* The terms of s. 47 (2) are set out at p. 614, letter H, *post*.

Ronald Bernstein for the applicants.

J. R. Cumming-Bruce and *R. A. Barr* for the Minister of Housing and Local Government.

London County Council did not appear and were not represented.

ASHWORTH, J., having referred to the notice of motion, continued: C I have had the advantage of a most able argument on behalf of the applicants, which has convinced me that, so far as the merits are concerned, this application certainly should succeed. The only point which has really given me much concern, after investigating the facts, is whether this court has power to make the order sought, but I am satisfied that it has. It is a troublesome case, and I have D some sympathy for counsel who has appeared for the Minister and who has been subjected, I confess, to a number of insistent questions from myself directed not to the misdoings of the Minister so much as to what seems to me to be conduct on the part of London County Council which is open to the most serious criticism. London County Council are not represented before me, and it has been counsel's unhappy lot to face the questions which might otherwise have been directed to E the council. If I may say so, speaking colloquially, he has stood up to the bowling as well as his resources permitted.

[His Lordship then stated the facts, commenting on the bargain contained in the council's letter dated Apr. 27, 1959 (see p. 612, letter H, ante) that it was one under which the council bought off the opposition of Diploma Laundry, Ltd. to the compulsory purchase order on the startling terms that, in consideration of F Diploma Laundry, Ltd. contributing £2,000 to the cost of re-housing the tenants, the council would not proceed with the order in regard to the company's freehold interest and, which was perhaps the most vital factor, would make the land available to Diploma Laundry, Ltd., who thus would acquire possession of the applicants' leasehold interest (which had twenty years to run) without payment. On that footing the council were giving away the leasehold interest which they G were to acquire under the compulsory purchase order. While the council might have a convincing and satisfactory explanation of that bargain, His Lordship did not know what it could be. His Lordship continued:]

I have already referred to s. 42 and s. 43 of the Housing Act, 1957, and I now turn to s. 47, on which counsel for the applicants rightly relies. Section 47 has as its sidenote, "Treatment of land acquired by local authority", and there H follow in sub-s. (1) detailed provisions as to the course which the local authority may take, including power to sell or let the land or exchange it. Then s. 47 (2), as in force at all material times until Aug. 16, 1959 (1), provides as follows:

> "Land sold, exchanged or leased under this section shall be sold, exchanged or leased at the best price, for the best consideration or for the best rent that can reasonably be obtained having regard to any restriction or I condition imposed."

It is true that under the new sub-s. (2) which was substituted by the Town and Country Planning Act, 1959, s. 58, Sch. 7, that has been altered to this extent, that now Ministerial consent can be obtained for the purpose of ratifying or approving sale, exchange or lease at other than the best price or rent. One asks oneself: Was it the declared intention of London County Council to comply with sub-s. (2) of s. 47?, to which there can be only one answer—" Certainly not ". Moreover, if declared intention is not enough, the applicants are entitled to say that it went far beyond that; there was an agreement which was performed so far as Diploma Laundry, Ltd. are concerned, who withdrew their objection to the compulsory purchase order. It was not a very attractive part of the argument of counsel for the Minister to hear him say, although he does not represent London County Council, that, after all, if the compulsory purchase order were confirmed, London County Council could then turn round and say to Diploma Laundry, Ltd.: " Oh, we are very sorry, but we have now had our attention called to s. 47 (2), and that bargain is over ". I wonder what sort of outcry there would have been on the part of Diploma Laundry, Ltd. and their advisers if any course such as that had been taken. Indeed, that line of argument is not open for one moment, because counsel for London County Council expressly informed the inspector that it was the intention to carry out the agreement, and that this was an agreement which had not been " finalised " in the inspector's words, by which I understand he means that it had not been put into binding formal or legal shape. But it was a bargain and a contract which one side had performed.

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(1) A new sub-s. (2) of s. 47 of the Housing Act, 1957, was substituted by the Town and Country Planning Act, 1959, s. 58 and Sch. 7 (see 39 Halsbury's Statutes (2nd Edn.) 1233, 1245).

Therefore, so far as it is a finding, the evidence is all one way that this proposal and this agreement involved London County Council in as plain a contravention of s. 47 (2) as any one could ever imagine he would see. And, in the light of that, and notwithstanding that finding, the Minister confirms the order. The applicants understandably come here and say: " This is ultra vires ".

I now have to consider whether, within the limited jurisdiction of the court, power is given to the court to interfere with what otherwise, I confess, I should regard as a grave injustice. The power given to the court is to be found in Sch. 4 to the Housing Act, 1957, para. 2.

> " If any person aggrieved by [a compulsory purchase order], or by the Minister's approval of a re-development plan or of a new plan, desires to question the validity thereof on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may . . . make an application for the purpose to the High Court, and . . . the court . . . (ii) if satisfied upon the hearing of the application that the order, or the approval of the plan, is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order, or the approval of the plan, either generally or in so far as it affects any property of the applicant."

It is in reliance on that provision that the applicants now come to the court.

It is probably correct to say that the compulsory purchase order, when made in July, 1958, was intra vires, and I have not heard any argument to suggest the contrary, because at that stage London County Council had not conceived this rather unpleasant plan to which I have been referring; they had had no occasion to do so. But, in my view, the relevant time for consideration of this matter is not the birth of the compulsory purchase order; the relevant time is the time right up to the moment when the Minister confirms it. If at that stage it has become evident that there was some defect in the order, or in the circumstances which surrounded it, which renders it incapable of confirmation without infringing some legal principle, then it becomes the Minister's duty to refuse confirmation.

Authority directly in point has not been cited to me, and one likes to think that instances of this sort of conduct are in their nature rare, and that that explains the absence of authority. But some cases (2) have been referred to me which have a bearing on it, and I am grateful to counsel for mentioning them. The one which I think is of most assistance is one which counsel for the Minister cited—*Re Brighton* (*Everton Place Area*) *Housing Order, 1937, Robins & Son, Ltd.'s Application* (3). The main issue in that case was whether the local authority could be stopped from proceeding under the compulsory purchase order as opposed to a clearance order. The victims, whatever the procedure should be, were a brewery company, and it seems to have been suggested that they feared that, if a compulsory purchase order were made against them, their interest would be acquired by the local authority and then sold back to them after a certain demolition had taken place at a profit to the local authority. The alternative method by a clearance order would have enabled the brewery company to carry out the demolition themselves, and they would have had the great advantage of having not merely more authority but a court order to evict the tenants whom otherwise they could not dispossess because of the Rent Restrictions Acts. That was the main issue in the case. Therefore the passages to which I am about to refer have, it may be said, not exactly a direct bearing on the position, but I do not regard them in any sense as obiter. SLESSER, L.J., having referred to the matter of the brewery company's fear, said (4):

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(2) *Mayor of Westminster* v. *London & North Western Ry. Co.*, [1905] A.C. 426; *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.*, [1947] 2 All E.R. 680; and *Smith* v. *East Elloe Rural District Council*, [1956] 1 All E.R. 855, were cited to the court.

> " The suggestion has been fairly broadly made that what will happen in this case is that the authority, being so possessed of the land, will attempt to sell it back to the persons from whom they have taken it, and at an enhanced price. I say nothing about that, beyond remarking first that that is a matter of speculation in the future, and I do not think that there is any evidence on which one is entitled at this stage to come to the opinion that they will do that. If that had been shown to the satisfaction of the person who held the inquiry to be their apparent intention, it might well have been the case—I will not put it higher than that—that the Minister might have hesitated to confirm the order. However, all that seems to me irrelevant to anything we have here to consider."

I pause in regard to that passage to point out that in that case the learned lord justice refers to the absence of evidence which would justify a conclusion adverse to the local authority. The very opposite is the case here. It is not a matter of fear; it is a matter of certainty because London County Council have committed themselves to letting Diploma Laundry, Ltd. have this leasehold interest for nothing. What the learned lord justice says is: " it might well have been the case—I will not put it higher than that—that the Minister might have hesitated to confirm the order ". One asks oneself what his language would have been if the Minister had been faced, so to speak, with a fait accompli of a declared intention, embodied in an agreement in writing, to contravene the provisions of s. 47. However, it does not stop there, and the learned lord justice said this (5):

> " I think that the Minister might properly consider, the local authority having the choice whether they would proceed by (a) or (b), whether he would in the public interest confirm (b). One of the grounds on which he might refuse to confirm (b) would be, for example, that it was being used mala fide to extort money out of the company."

If mala fides will do in the extortion of a fancy price, what is one to say of an ultra vires voluntary disposal of property? MACKINNON, L.J., also had something to say about this. He said (6):

> " The corporation, if they pull [the buildings] down and acquire the land, can sell it under s. 30 (1) (a) [of the Housing Act, 1936 (7)], or, without

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(3) [1938] 4 All E.R. 446; [1939] 1 K.B. 520.
(4) [1938] 4 All E.R. at p. 451; [1939] 1 K.B. at p. 532.
(5) [1938] 4 All E.R. at p. 453; [1939] 1 K.B. at p. 534.
(6) [1938] 4 All E.R. at p. 455; [1939] 1 K.B. at p. 537.
(7) The provisions contained in s. 30 of the Housing Act, 1936, are now contained in s. 47 of the Housing Act, 1957.

> pulling down the buildings, having purchased them, they can sell the site under s. 30 (1) (b), subject to a condition that the purchasers shall pull them down. Obviously, in either case, the appellants here, who want to extend their existing premises, must be the most eager purchasers. In such circumstances, the possibility of using the provisions of the Act for the indirect purpose of making money out of the appellants is obvious."

That is only another way of putting the criticism of the court about misuse by a local authority of powers conferred on it by statute; in that instance for the purpose of making money for themselves, and in this instance for the purpose of securing the withdrawal of opposition at a cost to the ratepayers of the value of the applicants' leasehold interest which was given away. In either event, I am bound to say that I regard it as a grave misuse of statutory power.

The situation then can be expressed in this way. If a local authority seeking confirmation of a compulsory purchase order make it plain before confirmation is given that they propose to use the land to be acquired in a way which directly involves a contravention of the Act, it seems to me that that acquisition of itself can be called ultra vires. It is true that there is power to acquire, because the houses are unfit for habitation. But I take it as much too narrow a view of the framework of the Housing Act, 1957, as counsel for the Minister suggested, to limit one's glance to what has happened up to the making of the order and the situation then prevailing. I venture to say again that, if it becomes plain (as it is in this case) that the use which is to be made of the land will involve the local authority in a breach of the Act, in an abuse of the powers conferred by the Act, then the court can step in. I would qualify that only in this respect, that if it is a matter, for example, of anxiety or suspicion, it might be that the court would be very slow to interfere, taking the line, as counsel for the Minister said, that one can normally rely on local authorities to observe the law. But if (as in this case) the local authority, misguidedly enough, have not merely declared their intention but committed themselves to an agreement, and referred to that agreement and relied on it before the Minister's own inspector, it does not lie in their mouth to say that that very use of their powers is a mere matter of speculation; it is a certainty if they get this order.

I ask myself, if that is right, whether this court has power to intervene when the Minister has confirmed the order. In my judgment, it has. The Minister confirmed an order which was, as I think, affected, if not vitiated, by the matters to which I have alluded. They were, or should have been, all present to the minds of those who were considering the confirmation of the order. It was plainly written on the face of the report and on the documents annexed to it that this was a bargain which London County Council had made, and which (as I agree with counsel for the applicants) the Minister's officials should at once have detected as improper. In those circumstances, it is not a case, as SLESSER, L.J., put it (8), of him hesitating before confirming the order; it was a case where, as I think, he was in duty bound to reject this confirmation and refuse it, because otherwise he would have been rendering himself a party to a proposal in direct conflict with the express provisions of the Act of 1957. When that situation arises, I take the view that a Minister who disregards it is acting ultra vires.

For those reasons, I am convinced that I have the jurisdiction which I quite frankly, on the facts, desire to have in order to put right an injustice, and I propose to make an order quashing this compulsory purchase order.

Order quashing the compulsory purchase order generally.

Solicitors: *I. A. Landy* (for the applicants); *Solicitor, Ministry of Housing and Local Government.*

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(8) [1938] 4 All E.R. at p. 451; [1939] 1 K.B. at p. 532.

NOTE.

GELBERG *v.* MILLER.

[House of Lords (Viscount Simonds, Lord Hodson and Lord Guest), February 23, 1961.]

Criminal Law—Appeal—House of Lords—Leave—Refusal of Queen's Bench Divisional Court to grant certificate that point of law of general public importance involved—Application to House of Lords for leave to appeal does not lie—Administration of Justice Act, 1960 (8 *&* 9 *Eliz.* 2 *c.* 65), *s.* 1 (2).

[As to appeal to the House of Lords in criminal cases, see 10 Halsbury's Laws (3rd Edn.) 545, para. 1002 and Supplement; and as to appeal to the House of Lords generally, see 9 Halsbury's Laws (3rd Edn.) 363, para. 845 et seq.]

Petition for leave to appeal.

Petition by John Harold Gelberg for leave to appeal to the House of Lords from an order of the Queen's Bench Divisional Court (Lord Parker, C.J., Streatfeild, Slade, Ashworth and Elwes, JJ.), dated Dec. 16, 1960, and reported ante, p. 291, dismissing an appeal by the petitioner by way of Case Stated from a decision of a metropolitan magistrate whereby the petitioner was, inter alia, found guilty of wilfully obstructing a police constable in the execution of his duty contrary to the Prevention of Crimes Amendment Act, 1885, s. 2. The Queen's Bench Divisional Court (see ante, at p. 297, letter I), refused the petitioner leave to appeal to the House of Lords, and declined to certify under s. 1 (2) of the Administration of Justice Act, 1960, that a point of law of general public importance was involved.

S. E. Brodie for the petitioner.
Paul Wrightson for the respondent.
J. R. Cumming-Bruce appeared as amicus curiae.

S. E. Brodie: If the court below does not give a certificate under s. 1 (2) of the Administration of Justice Act, 1960,* the House of Lords have power to do so, or, if they have no power to do so, then they have power to remit the case to the court below with a direction that that court should grant it. What is defeated by the absence of a certificate is the granting of leave but, by virtue of s. 2 (1)† of the Act, if the court below refuses an application for leave, then it is always open for the petitioner to apply for leave to the House of Lords. By virtue of s. 17 (4)‡ of the Act, as soon as an application for leave to appeal is made, an appeal becomes pending, and, if an appeal is pending, the House of Lords have power under s. 1 (4)* of the Act either to grant a certificate in lieu of the court below, or to remit the case to the court below with a direction that such a certificate should be granted.

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* Section 1, so far as is relevant, provides: " (2) No appeal shall lie under this section except with the leave of the [Divisional Court of the Queen's Bench Division or the Court of Criminal Appeal] or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House.

" (4) For the purpose of disposing of an appeal under this section the House of Lords may exercise any powers of the court below or may remit the case to that court."

† Section 2 (1) provides: " Subject to the provisions of this section, an application to the court below for leave to appeal shall be made within the period of fourteen days beginning with the date of the decision of that court; and an application to the House of Lords for such leave shall be made within the period of fourteen days beginning with the date on which the application is refused by the court below."

‡ Section 17 (4), so far as relevant, provides: " An appeal under s. 1 of this Act shall be treated for the purposes of this Act as pending until any application for leave to appeal is disposed of and, if leave to appeal is granted, until the appeal is disposed of; . . ."

VISCOUNT SIMONDS: The argument would apply equally to every case in which leave is asked in the court below and a certificate is refused—there would be an application here. Subsection (2) of s. 1 of the Administration of Justice Act, 1960, was put in so as to avoid that very thing. The point of the statute is that, if the court below thinks that a point of law of general public importance is involved, then, even though that court refuses leave to appeal, the petitioner may come to the House of Lords.

This petition is refused and any similar petition will be refused. The whole purpose of s. 1 (2) of the Act of 1960 is to ensure that leave to appeal shall not be granted unless it is certified by the court below that a point of law of general public importance is involved, and in this case the court below has declined to grant such a certificate. The petitioner has no right in such circumstances to present a petition for leave to appeal.

We have no jurisdiction to entertain any application for costs by the respondent.

Leave to appeal to the House of Lords refused.

Solicitors: *Humphrey Razzall & Co.* (for the petitioner); *Solicitor, Metropolitan Police* (for the respondent); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Edmund Davies and Widgery, JJ.), February 20, 1961.]

Criminal Law—Sentence—Corrective training—Duration—Two years permissible if adequate for the individual case—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 58), *s.* 21 (1).

[As to general principles applicable when sentencing a prisoner to corrective training, see 10 HALSBURY'S LAWS (3rd Edn.) 511, para. 927, especially note (*l*).]

Case referred to:

R. v. *Grant*, [1951] 1 All E.R. 28; [1951] 1 K.B. 500; 115 J.P. 36; 34 Cr. App. Rep. 230; 14 Digest (Repl.) 585, *5822.*

LORD PARKER, C.J., gave the following direction: It will be remembered that as long ago as 1950 in *R.* v. *Grant* (1) the Court of Criminal Appeal laid down that a sentence of corrective training should as a general rule be for a period of not less than three years. In that case LORD GODDARD, C.J., said (2):

> "If corrective training is to be imposed, three years, which means in effect two years, is the least sentence which is likely to be of any use, and, as I have said, the court has laid that down after we have had the advantage of hearing the views of the Prison Commissioners, who are the authority entrusted by Parliament with providing for corrective training."

Ever since that decision the court has endeavoured to adhere to that principle and as a result a number of sentences of two years' corrective training have been set aside.

The court has recently been informed that as a result of experience the Prison Commissioners have found it possible to provide a form of training which can be effected in a two years' sentence. Different individuals, of course, respond more or less rapidly to training and the commissioners no longer take the view that a three years' sentence is in all cases the shortest period in which effective training can be given.

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(1) [1951] 1 All E.R. 28; 34 Cr. App. Rep. 230.

(2) (1951), 34 Cr. App. Rep. at p. 235; [1951] 1 All E.R. at p. 30. Compare also, with regard to the length of sentence to corrective training, the observations of LORD GODDARD, C.J., in *R.* v. *Barrett* ([1949] 2 All E.R. 689).

In these circumstances it is open to the sentencing court to impose a sentence of two years' corrective training if they feel that this would be likely to provide an adequate period of training for the prisoner concerned, and this court will no longer set aside the sentence merely because it is a two years' sentence.

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

Re BOYLE'S CLAIM.

[CHANCERY DIVISION (Wilberforce, J.), January 13, 16, 1961.]

Land Registration—Rectification of register—Loss suffered by reason of rectification—Indemnity—Overriding interest alleged—Time at which to determine whether person was in actual occupation of land—Land Registration Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 21), *s.* 70 (1) (*g*), *s.* 83 (1).

In 1952 the applicant purchased a piece of land of irregular shape, his title being registered in July, 1952. The file plan showed that the land was irregular in shape, being wider at the western end than at the eastern end, but the plan bore no dimensions. On the northern boundary a hedge separated the land from the adjoining property except where a garage of the adjoining property projected. The applicant erected a bungalow on his land. In 1954 the adjoining owner demolished the hedge and erected a fence; the applicant removed the fence and re-erected it on a line more nearly following the line of the former hedge. In 1954 in an action in a county court rectification of the register was ordered, reducing the applicant's land by a triangular strip one hundred feet long and five feet wide at its base. The applicant claimed indemnity under s. 83 (1) of the Land Registration Act, 1925, in respect of the loss which he suffered by reason of the rectification. It was objected that the register had been rectified to give effect to an overriding interest within s. 70 (1) (g) of the Act of 1925, viz., the right of a person in actual occupation of the land.

Held: the material time at which to determine whether the owner of the adjoining property was in occupation of the triangular strip of land was the date when the applicant acquired his registered title (viz., July, 1952), and at that time the adjoining owner was in occupation of the garage but was not in occupation of any other part of the triangular strip, since it lay to the south of the hedge separating the properties; accordingly the plaintiff was entitled to indemnity in respect of any loss which he had suffered by reason of the rectification save in respect of land forming the site of the garage.

Re Chowood's Registered Land ([1933] All E.R. Rep. 946) applied.

[As to the right to indemnity where loss suffered by rectification of the register of land, see 23 HALSBURY'S LAWS (3rd Edn.) 206, para. 432; and for cases on the subject, see 38 DIGEST (Repl.) 901, 902, *951-953*.

For s. 70, s. 82 and s. 83 of the Land Registration Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 1002, 1013, 1015.]

Case referred to:

Chowood's Registered Land, Re, [1933] All E.R. Rep. 946; [1933] Ch. 574; 102 L.J.Ch. 289; 149 L.T. 70; 38 Digest (Repl.) 901, *953*.

Adjourned Summons.

This was an application by Arthur Henry Ernest Boyle, registered proprietor of land in Ruislip, in the county of Middlesex (formerly comprised in title No. MX.259039) by originating summons dated Mar. 24, 1959, on a reference by the Land Registrar pursuant to the provisions of r. 298 (2) of the Land Registration Rules, 1925 (S.R. & O. 1925 No. 1093), of the applicant's claim for an indemnity for the loss suffered by the applicant by reason of the rectification of the register in respect of the northern boundary of his property on an order of Uxbridge County Court dated Nov. 16, 1954, whereby a triangular strip of land one hundred feet long and approximately five feet wide at the base, which was formerly comprised in the registered title previously mentioned, was excluded from that title. The Attorney-General, representing the trustees of the insurance fund maintained under s. 85 of the Land Registration Act, 1925, was respondent to the summons and appeared for the protection of the fund. The facts are stated in the judgment.

A. P. McNabb for the applicant.
B. J. H. Clauson for the Attorney-General.

WILBERFORCE, J.: In June, 1952, the applicant acquired by purchase what was then a vacant piece of land in the parish of Ruislip, in the county of Middlesex, on which he later constructed a house, now known as No. 44, Mahlon Avenue, South Ruislip. He acquired his property by means of a transfer in a form appropriate to the transfer of registered land, which is dated June 13, 1952, and the original of which has been provided for me from the Land Registry. That document transfers to the applicant the land in question, which is described by reference to a conveyance dated Mar. 11, 1929, made between Home Freeholds Co., Ltd., and Robert Masson Smith, of the one part, and the applicant's vendors of the other part. The land is described as " delineated and coloured pink " on the plan drawn on that conveyance.

The conveyance of Mar. 11, 1929, is also in evidence, and from that conveyance and from the plan which was attached to it, it appears that the plot of land in question was an irregular-shaped piece of land fronting on to Mahlon Avenue on the east or north-east, with a return frontage onto Edwards Avenue on the south or south-east side. There are, with one exception, no dimensions either referred to in the conveyance or mentioned on the plan. The only figure which appears is a figure of one hundred feet for the length of the plot where it abuts onto Edwards Avenue. On the northern boundary of the property (which is the boundary which separates the applicant's land from that of his neighbour, and which is the boundary as to which disputes have existed) there appear the words " centre of hedge ". So that from that it would appear that in 1929 the northern boundary was constituted by a hedge dividing the two plots. As I said, the plot is irregular in shape, and it appears to the eye that the width of the property at the Mahlon Avenue or eastern end of the plot is narrower than its width at the rear end of the plot or at the western extremity.

Almost immediately after the acquisition of the property by the applicant in June, 1952, he applied for registration of his title to the land, and the land was in fact registered on July 2, 1952, the applicant being accepted as the registered proprietor with an absolute title. The file plan in the Land Registry again shows the plot of land as possessing an irregular shape, wider at the western end than at the eastern end, but there are, again, no dimensions on that plan, nor is there a reference to the hedge. It also appears from that plan that a house had already been erected on the adjoining property to the north, but that the plot acquired by the applicant was at that time vacant.

It appears from the evidence that shortly after the date of the conveyance, i.e., in 1954, measurements were taken of the plot acquired by the applicant, which showed that the width of the property was thirty-nine feet at the end fronting Mahlon Avenue and forty-four feet at the rear. Those measurements are stated, in para. 7 of the applicant's affidavit, to have been made by a Mr. L. C. Wilson, a qualified surveyor.

On May 11, 1953, the applicant acquired a building licence to construct a bungalow on his land, and later he erected a bungalow, which on its northern side approached very close to the adjoining property, and in particular approached very close to the garage which was then in existence on that property. Disputes arose between the applicant and the neighbouring owner, as a result of which proceedings were brought by the neighbouring owner, at that time a Mr. Draisey, in the Uxbridge County Court, claiming damages for trespass and an injunction against further trespass. There was also added during the proceedings a claim that the register be rectified by re-drawing the boundary between the two properties, so as to run at right angles to Mahlon Avenue, rather than in an oblique line. That case was heard in the Uxbridge County Court in November, 1954, and after evidence had been given by the plaintiff, Mr. Draisey, and by the defendant (the applicant), and also by other persons, the learned county court judge came to the conclusion that there had been no trespass by Mr. Draisey onto the applicant's land, but that, on the other hand, there had been trespass by the applicant onto Mr. Draisey's land, and the learned judge also found that there had been an error in the Land Registry as to the boundary between the two properties. To clarify the position and to avoid further disputes, he ordered rectification of the register by drawing the boundary in the form of a right-angled line.

The boundary was in due course rectified in the register, and the plan which has been filed consequent on the rectification now shows the boundary running (as was ordered by the county court judge) at right-angles to Mahlon Avenue, and shows a small, thin triangle as having in consequence been cut off from the applicant's property and included in Mr. Draisey's property, the triangle in question being about one hundred feet long—that is the length of the plot—and about five feet at its base, tapering to an apex on Mahlon Avenue.

I have been put in possession of a plan which has been prepared on behalf of the applicant which shows the effect of the new boundary on a larger scale, and that shows that the boundary between the properties now runs directly along the northern wall of the applicant's bungalow, leaving no space whatever within his property but outside the building, running in front to Mahlon Avenue and back to the rear wall. So that the present position would appear to be that if there are any footings or other constructions outside the northern wall of the applicant's property, those must now be situated on the land forming part of No. 42. The plan in question is also of interest as showing that a small strip of the garage of No. 42 was at all times situated over the boundary, even as the applicant contends that it should have been drawn; that is to say, over the boundary as constituted by the former hedge. To that circumstance, I shall return later.

The applicant makes his claim under the Land Registration Act, 1925, s. 83 (1), which provides:

> " Subject to the provisions of this Act to the contrary, any person suffering loss by reason of any rectification of the register under this Act shall be entitled to be indemnified."

Then there are detailed provisions, which I do not find it necessary to read. The rectification of the register was in fact effected by the county court under s. 82 (1) which states that

> " The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court . . ."

in certain enumerated cases, several of which could have been applied to the actual circumstance of this case. It is necessary to refer to s. 70 of the Act, which deals with " overriding interests ". That section provides in sub-s. (1):

> " All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to . . ."

certain overriding interests, and then the overriding interests are specified under various headings. I need only refer to sub-s. (1) (f) and sub-s. (1) (g). Sub-section (1) (f) is: " Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts "; and sub-s. (1) (g) is:

"The rights of every person in actual occupation of the land . . ." The rest is not material.

Section 70, and also the indemnity section, s. 83, have been considered by the court on one occasion, and that appears to be the only occasion on which a claim for indemnity has come before the courts. That is *Re Chowood's Registered Land* (1). In that case a claim was made by a company called Chowood, Ltd., for indemnity out of the fund in respect of certain strips of woodland as to which a rectification order had been made in previous proceedings which went to the Court of Appeal. It was agreed in those proceedings that the evidence and findings of fact in the previous proceedings should be treated as binding on the parties, and the indemnity claim proceeded on that basis. CLAUSON, J., dismissed the claim of the company to indemnity on the ground that the registered land was subject to overriding interests, the overriding interests in question in that case being rights already acquired under the Limitation Acts and, therefore, falling fairly and squarely within the provisions of s. 70 (1) (f) of the Act of 1925. The basis of the decision was that as the land was at all times subject to the overriding interests, rectification of the register for the purpose of giving effect to those overriding interests would not put the applicants in any worse position than they were before the rectification, and consequently it could not be said that they had suffered any loss. CLAUSON, J., referred to the case which might have arisen had the conflict between the parties to the rectification proceedings been a conflict not in relation to overriding interests, but in relation to the paper title to the respective properties. He said (2):

> "It was further suggested that Lyall's (3) title depended to some extent on what was called a paper title, and not solely on the Limitation Acts. I do not say what the position might have been if Lyall's paper title had disclosed, for example, a grant to her by Ralli's [the vendors'] predecessor in title which could be used to defeat Chowood's [the purchaser's] claim to the strip without recourse to the Statute of Limitations. Such a case can be dealt with when it arises."

That makes it clear, if indeed it is not clear from the section itself, that if the rectification is not ordered on the basis of existing overriding interests but on the basis of some defect in paper title, the matter might be dealt with differently and, at any rate, would not be covered either by the decision in *Re Chowood's Registered Land* (1) or by s. 70. Indeed, it is on the existence of an overriding interest that counsel, on behalf of the Attorney-General, puts his defence to the applicant's claim to indemnity in this case.

It is not claimed here that Mr. Draisey, or the owners of No. 42, came within s. 70 (1) (f) of the Act of 1925, or that they had acquired or were acquiring title under the Limitation Act. It is said that the case comes within s. 70 (1) (g) and that this is a case where we are concerned with the right of a person in actual occupation of the land. If that is so, if the case in fact comes within para. (g), then I would entirely agree, and it is not really disputed on behalf of the applicant that on principle exactly the same situation would arise as if the case had come within para. (f), and that the authority of *Chowood's* case (1) would be fully applicable, with the result that the applicant would fail. The question is whether in fact we are faced with a situation in which account has to be taken of the right of a person in actual occupation. It seems to me that the relevant date for considering the question whether there was a person in actual occupation of the land as to which the rectification was ordered must be the date when the person prejudiced by the rectification, i.e., the applicant in this case, acquired his registered title; in other words, in July, 1952. Can it be said that Mr. Draisey, or his predecessor in title, was in actual occupation of the disputed triangle of land at that time?

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(1) [1933] All E.R. Rep. 946; [1933] Ch. 574.

(2) [1933] All E.R. Rep. at p. 948; [1933] Ch. at p. 581.

(3) Lyall's land was a strip of woodland, which had been included in the conveyance by the vendors to Chowood, Ltd., the purchaser, but was land in the possession of a Mrs. Lyall, not of the vendors.

It is clear, in the first place, that a garage which had been constructed several years before on No. 42 was encroaching on the piece of land in question, and that in respect of that portion of the garage to which I have already referred there was a right of actual occupation within the meaning of the section. Therefore, it seems to me that in so far as the applicant is claiming indemnity for loss suffered by the fact that the garage was encroaching, since as a result of the county court judge's order the encroachment cannot be treated as trespassing on the applicant's property, his claim for compensation must necessarily fail.

One has to examine separately the question whether, apart from the encroaching portion of the garage, it can be shown that Mr. Draisey, or his predecessor, was in actual occupation of the rest of the long thin triangle. The evidence is not particularly clear, but I do not think that it is established by such evidence as there is that Mr. Draisey, or, rather, Mr. Bull, his predecessor in title, was in actual occupation of that land.

The evidence in support of this application, which is the primary evidence that I have to consider and which has not been disputed, is contained in the applicant's affidavit, sworn June 4, 1959. In para. 7 of that affidavit the applicant says that when he purchased the land in question in 1952 " there was a hawthorn hedge along the greater part of what appeared to be the north-west boundary " of his land. He then refers to the measurements taken by Mr. Wilson to which I have already referred. In para. 11 of the same affidavit he says that in or about June, 1954, Mr. Draisey (who had then become the owner of No. 42) cut down and removed the whole of the hawthorn hedge from the rear of his garage to the rear of the properties, a distance of about fifty-five feet, and replaced it by a post and wire fence which he erected on a line running from the south-east corner of the garage to the rear wall and within (as the applicant alleged) the boundary of his land as shown on the original plan. Then he says that he took up the fence and replaced it along the line of the hawthorn hedge. On those paragraphs it would appear reasonably clear that at the date when the applicant acquired his property and at the date when he registered the title to it, the boundary between the two properties, at any rate at the rear, in so far as it was not formed by the south wall of the garage on No. 42, did consist of a hawthorn hedge, and if that was so, it would be apparent that the owners of No. 42 would not be in occupation of the land falling to the south of the hedge.

I have also to consider and check against that evidence the proceedings which took place in the Uxbridge County Court. I have the pleadings in those proceedings and I have the judge's notes. I look, first, at the evidence as recorded by the learned judge. Mr. Draisey in his evidence there says that he took up the hedge (which he can only have done, of course, after he acquired the property in January, 1953) in part of the boundary. " The hedge ", he says, " was on my property ". So that confirms it was only at a later date than the date on which the applicant registered his title that the hedge was removed. Mr. Draisey, it is true, says that he erected the fence along the same lines, but it is apparent that the fence was not erected on exactly the same lines, otherwise the dispute between the parties would not have arisen.

Mr. Bull (the previous owner of No. 42) in his evidence said that there was a hawthorn hedge. " I pulled it up ", he says, " front and back. The hedge extended the whole distance of the plot ". That evidence is difficult to understand or to reconcile with the evidence of Mr. Draisey, and it certainly looks as if Mr. Bull confined his operations to that portion of the hedge which was later replaced by the south wall of the garage.

The applicant in his evidence says that he started to build some time in 1953. He thought that the hawthorn hedge was the boundary. He says:

> "The back of the garage seemed to be beyond the hedge. I saw the plaintiff [Mr. Draisey] taking up the hawthorn hedge. I took down the fence. I replaced it on to what I thought was the right boundary."

That again fits in with the picture which one has from the evidence generally that the garage was there in existence, having in part replaced the hedge; that when the applicant acquired his property, the hawthorn hedge was in existence, so he took it to be the boundary; and that at a later date (which was only when Mr. Draisey came on the scene) the hedge was taken down, and a fence erected in one position, and re-erected by the applicant in another position. I do not think that any of that evidence supports or, indeed, is consistent with, a proposition that at the date when the applicant registered the title of his property, Mr. Draisey was in occupation of the disputed triangle up to what was later decided to be the correct boundary between the properties.

Reliance was placed on the pleading delivered by the applicant in the county court proceedings, in particular para. 8, where it was alleged on behalf of the applicant:

> "Soon after the defendant [the applicant] purchased the said plot in June, 1952, he complained to the plaintiff [Mr. Draisey] that the plaintiff's garage and fence encroached on his the defendant's plot when the plaintiff agreed that the said garage and fence would have to be moved back but despite the said oral undertaking by the plaintiff he has refused to implement the said undertaking."

That paragraph, as I read it, is not precise in date, because it relates to a time soon after the applicant purchased the plot and it also relates to complaints made to the plaintiff (Mr. Draisey) so that it does not seem to me that that is sufficiently clearly identified with the critical date, namely, July, 1952, to enable any conclusions to be based on it. Further, I do not think that it sufficiently clearly establishes that the applicant accepted in that action that Mr. Draisey (the plaintiff) was in occupation of the disputed land. At any rate, it does not seem to me to be a sufficiently clear admission of occupation by the applicant to outweigh what to my mind emerges with reasonable clarity from the evidence.

I therefore come to the conclusion that it is not established that Mr. Draisey was in occupation of any portion of the disputed land, the land lost to the applicant by reason of the rectification, other than the small portion on which the garage was then already erected. I think that the situation was that when the applicant bought his property, the hedge was in situ between the two properties and that later on when Mr. Draisey had come on the scene, and not before, the hedge was taken down and replaced by a fence in the rear on a line from the corner of the garage to the rear boundary for a distance of about fifty-five feet.

I therefore consider that the case does not come within s. 70 (1) (g) of the Act of 1925 except as to the small extent that I have mentioned, and I am prepared to decide that in principle the applicant is entitled to indemnity out of the fund in respect of any loss which he has sustained by rectification, not including, of course, any loss which he has sustained by reason of the fact that a portion of the neighbouring owner's garage is situated on what at the time when he bought his property he thought to be his land.

Application granted.

[The summons was stood over to fix a date for cross-examination of witnesses on the question of quantum.]

Solicitors: *Philip Conway, Thomas & Co.* (for the applicant); *Treasury Solicitor.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

TAYLOR *v.* MEAD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Lawton, JJ.), February 9, 10, 1961.]

Road Traffic—Licence—Rate of duty—Altered condition of vehicle—Saloon car fitted with rails to carry samples of clothing for commercial traveller—When no samples being carried passengers could continue to use and sit in rear seats—Whether a goods vehicle within Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 89), *s.* 27 (1).

M. owned a saloon car in which he carried on his business as a salesman and traveller in women's dresses and other articles of clothing. This car was fitted with a rail extending across its width behind the front seats and attached to the pillars of the doors by two screws at each end. From that transverse bar ran two other rails to the back of the car, where they were attached to a bracket at the back behind the rear seat. On these rails he was able to suspend samples that he was displaying. There was no additional alteration to the interior or exterior of the car other than those rails, and, when no samples were being carried, passengers could continue to use and sit in the rear seats. M. was charged with unlawfully using the car for a purpose (viz., as a goods vehicle) which rendered the car liable for duty at a higher rate before such duty was paid contrary to s. 13 (2) of the Vehicles (Excise) Act, 1949*. A " goods vehicle ", as defined by s. 27 (1)† of that Act meant a mechanically propelled vehicle " constructed or adapted for use and used for the conveyance of goods." On appeal from the decision of the justices that no offence was proved as the car was not a goods vehicle within that definition,

Held: the words " constructed or adapted " in s. 27 (1) of the Vehicles (Excise) Act, 1949, meant " originally constructed or where the structure has been subsequently altered " and accordingly the question was whether the adding of the rail fitting constituted an alteration of the structure in the ordinary sense; in the present case the inside of the car remained the same, it was impossible to say that the decision of the justices on the facts was perverse and their decision should stand.

Dicta of ATKIN, J., in *Minty* v. *Glew* ((1913), 110 L.T. at p. 343), and of the EARL OF READING, C.J., in *French* v. *Champkin* ([1920] 1 K.B. at p. 79) applied.

Per WINN, J.: it would be consistent with the court's decision that, if a manufacturer had made a car complete with sockets for taking such rails as were used in this instance, that might amount to a construction for use for conveyance of goods (see p. 629, letter D, post).

Appeal dismissed.

[As to goods vehicles for charge to licensing duty, see 33 HALSBURY'S LAWS (3rd Edn.) 204, para. 347; and for cases on the subject, see 39 DIGEST 241-243, *173-206* and DIGEST Supps.

For the Vehicles (Excise) Act, 1949, s. 13 (2), s. 27 (1), see 21 HALSBURY'S STATUTES (2nd Edn.) 1444, 1453.]

Cases referred to:

French v. *Champkin*, [1920] 1 K.B. 76; 89 L.J.K.B. 131; 122 L.T. 95; 83 J.P. 258; 39 Digest 241, *168*.

Minty v. *Glew*, (1913), 110 L.T. 340; 78 J.P. 69; 39 Digest 242, *194*.

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* Section 13 (2) reads: " Where a licence has been taken out in respect of a mechanically propelled vehicle, and by virtue of such user as aforesaid a higher rate of duty becomes chargeable and duty at the higher rate was not paid before the vehicle was so used, the person so using the vehicle shall be liable to whichever is the greater of the following penalties, namely—(a) an excise penalty of £20; or (b) an excise penalty of an amount equal to three times the difference between the duty actually paid on the licence and the amount of duty at that higher rate."

† The relevant definition is set out at p. 627, letter H, post.

Case Stated.

This was an appeal by Case Stated by justices for the county borough of Bournemouth in respect of their adjudication as a magistrates' court on Aug. 9, 1960. On June 15, 1960, the appellant, Douglas Edwin Taylor, preferred an information against the respondent, Bernard William Mead, that he on Mar. 16, 1960, in Christchurch Road, Bournemouth, did unlawfully use a motor vehicle, a Humber Hawk 2,267 c.c. saloon car registered No. VUO 772, for a purpose which rendered it liable for duty at a higher rate before such duty was paid contrary to s. 13 (2) of the Vehicles (Excise) Act, 1949. The facts appear in the judgment of LORD PARKER, C.J. The appellant had contended that, although the vehicle was admittedly not "constructed" for the conveyance of goods, it was "adapted for use and used for the conveyance of goods" within the meaning of s. 27 (1) of the Act of 1949, and, accordingly, attracted higher rates of duty applicable to goods vehicles. It was contended by the respondent that the car was not constructed as a goods vehicle and that the fixing of the rails to the car did not constitute an adaptation for use as a goods vehicle within the definition contained in s. 27 (1) aforesaid. The justices came to the conclusion that the vehicle in question had not been adapted for use for the conveyance of goods and, accordingly, dismissed the information with costs against the appellant.

The question for the opinion of the High Court was whether the addition of rails to the vehicle for the purpose of carrying samples was an adaptation for use for the conveyance of goods within the meaning of s. 27 (1) of the Vehicles (Excise) Act, 1949, and whether on the facts they came to a correct determination and decision in point of law. The enactments and cases enumerated below* were cited in argument in addition to those mentioned in the judgment of LORD PARKER, C.J.

R. Stock for the appellant.
L. H. Collins for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the county borough of Bournemouth, before whom an information was preferred by the appellant against the respondent that he did, on a certain day last year, unlawfully use a certain motor vehicle for a purpose which rendered the vehicle liable to duty at a higher rate before such duty was paid contrary to s. 13 (2) of the Vehicles (Excise) Act, 1949. The justices dismissed the information, finding that an offence was not proved.

The Act in question is providing for the duty on vehicles and there is no doubt that the duty on a goods vehicle is higher than the duty on a private car. The question in this case turns on whether a Humber Hawk saloon car was on this day, within the definition of "goods vehicle" in this Act. The definition is to be found under s. 27 (1) of the Act and, so far as it is material, is in these terms:

> "'goods vehicle' means a mechanically propelled vehicle . . . constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise."

The respondent was a salesman and a traveller in ladies' dresses and other articles of clothing. He had fitted (1) in his Humber Hawk saloon car a rail extending the width of the car behind the front seats of the car attached to the pillars of the doors by two screws at each end. From that transverse bar ran two other rails to the back of the car, where they were attached to a bracket at the back behind the rear seat. On those rails he was then able to suspend the samples that he was displaying. There was no additional alteration to the interior or the exterior of the car other than those rails, and when no samples were being carried, passengers could continue to use and sit in the rear seats.

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* I.e., s. 5 (3), s. 26 (5) of the Vehicles (Excise) Act, 1949; *Collman* v. *Stokes*, (1910), 103 L.T. 592; *Lowe* v. *Stone*, [1948] 2 All E.R. 1076; *Pearson* v. *Boyes*, [1953] 1 All E.R. 492.

(1) The justices found as a fact that the rails, which cost 5s., were fixed in position on the respondent's instructions for the sole purpose of carrying, and avoiding creasing, his samples, none of which were sold.

As I have said, the justices came to the conclusion on those facts that the offence was not made out, and the only question before this court is whether in effect they misdirected their minds in law, or if they did not, that they must have come to a perverse verdict in that any reasonable jury properly directing themselves must, on those facts, have held that this vehicle had been adapted for use for the conveyance of goods. The law as to the meaning of those words is well stated by ATKIN, J., in *Minty* v. *Glew* (2). In dealing with a somewhat similar statute [the Customs and Inland Revenue Act, 1888, s. 4 (3)], and with similar words, he said (3):

> " But some meaning must be given to the words ' constructed or adapted for use *solely* for the conveyance,' and, inasmuch as this vehicle, when it was originally constructed, was an ordinary waggonette, it is plain, I think, that the respondent would have to rely upon the words that it was adapted for use. [I might interject, that is also the case here.] I assume, for the purposes of this case, that that word involves, at any rate, that there should be some amount of alteration of the original construction if the original construction was not solely for the conveyance of goods or burden in the course of trade or husbandry . . ."

The word "solely", printed in italics above, was in s. 4 (3) of the Act of 1888, but it is not in the provision in s. 27 (1) of the Act of 1949 now under consideration. ATKIN, J., is saying, in the passage quoted above, that there must be some amount of alteration of the original construction. To the same effect was the meaning put on those words in *French* v. *Champkin* (4) in the judgment of the EARL OF READING, C.J. (5). It seems to me perfectly clear, reading this case, that the justices were applying their minds to the question in law correctly, and the sole issue, therefore, is whether on those facts they must have come to the conclusion that the offence was made out.

It has been said over and over again in this class of case that, providing the justices have properly directed themselves, the question is one of degree and one of fact. For my part, I confess that the definition section (s. 27 (1)) of the Act does connote that the adaptation for use is the adapting of the structure. It seems to me that the conjunction of the words " constructed or adapted " are really saying " originally constructed or where the structure is subsequently altered ". Immediately one says that, the question arises whether it can be said that the structure of the vehicle in the ordinary sense of the word has been altered, or whether the structure remains the same, but that some small fitting or attachment is made which, though it physically involves making small holes for screws in the structure, could not in any ordinary sense of the word be an alteration of the structure. Indeed, in *Minty* v. *Glew* (2), the alteration, if I remember it aright, was that the waggonette in question had been fitted with stronger springs, and the wheels had been strengthened and widened, matters which quite clearly, as it seems to me, would be alterations in the structure.

Here the inside of the car remained the same; the cushions were there, the fittings could still be used for passengers, and for my part I am quite unable to say that the justices, in arriving at the conclusion that no offence was proved,

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(2) (1913), 110 L.T. 340. (3) (1913), 110 L.T. at p. 343. (4) [1920] 1 K.B. 76.

(5) I.e., [1920] 1 K.B. at p. 79: " The justices seem to have treated the word ' adapted ' as if it were synonymous with ' suitable ' or ' apt ', whereas it must be construed as meaning altered so as to make the vehicle apt for the conveyance of goods. The words are intended to cover the case of a vehicle which was not constructed solely for the purpose of conveying goods in the course of trade, but after its construction has been made apt for that purpose."

A were perverse. It is not a question of what any of us sitting here would have found on the facts, but merely whether it is possible to say that this decision was perverse, and that the justices, properly directing their minds to the question, must have come to an opposite conclusion, namely, that an offence was made out.

I have come to the conclusion that there is no ground for this court to interfere, and the appeal should be dismissed.

B

WINN, J.: I agree, but I feel constrained to add that for my own part, on the arguments which we have heard, I doubt whether any clear concept has emerged as to what is the structure of a motor car, and I must admit entertaining some doubt as to what is properly the meaning of that word as applied to a motor car. I would wish myself to have a further opportunity of considering C whether the word "constructed" in this definition of "goods vehicles" in s. 27 (1) of the Vehicles (Excise) Act, 1949, means more than "made", referring to the original making of the car as contrasted with subsequent alteration of that which the manufacturers have made.

There may be difficult problems of distinction between chassis and body, and so on, contrasting with the relatively clear distinction between that which D the manufacturers have made, and that which is subsequently added to or taken away from that which the manufacturers themselves made before ever the car left the works. I desire to say only this, also by way of safeguard, that, as at present advised, it does seem to me quite consistent with the judgment of the court in the present case that if any manufacturer chose to make a passenger car complete before it left the works with sockets or holes suitable for taking, E by way of insertion therein, the supports for such rails as were used in this case, that might well amount to "construction for use . . . for the conveyance of goods" within the meaning of this Act. We are not, however, deciding that. I agree that the appeal should be dismissed.

LAWTON, J.: I agree with the judgment of LORD PARKER, C.J., and have nothing to add.

F

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Bournemouth (for the appellant); *Rollit, Sons & Haydon* (for the respondent).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

QUINTAS *v.* NATIONAL SMELTING CO., LTD.

[Court of Appeal (Sellers, Willmer and Danckwerts, L.JJ.), January 12, 13, 16, February 3, 1961.]

Factory—Dangerous machinery—Duty to fence—Overhead travelling cable-way used for transporting materials from one part of factory to another—Large buckets suspended from cables and intermittently in motion—Bottom of buckets passing four feet above roof of factory building—Access to part of factory obtained from flat roof—Injury to workman standing on roof—Whether cable-way was "machinery"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

Master and Servant—Liability of master—Safety of servant—Duty of master to warn servant of danger—Extent—Overhead travelling cable-way low above roof to which servant had access and might be expected to go.

Negligence—Contributory negligence—Appeal—Apportionment—Finding of common-law negligence substituted for finding of breach of statutory duty—Duty of appellate court to reconsider apportionment of liability in light of changed ground of liability.

The plaintiff was employed by the defendants in their factory. For the purpose of transporting material from one part of the factory to another, the defendants operated an overhead travelling cable-way supported by stanchions, on each side of which ran a cable from which large buckets were suspended. The two cables moved in opposite directions and the buckets, which were spaced at intervals of 110 feet, travelled at a maximum speed of three miles an hour and were constantly in motion whenever the cable-way was being operated. The cable-way was operated intermittently and no whistle or other signal was given when it was started up. The cable-way was high above the ground, but, for part of its route, it passed above the flat roof of a crushing plant and the bottoms of the buckets were only four feet above the roof. Part of the flat roof was occupied by a small building, known as the magnet house, access to which was obtained by a door opening on to a corner of the flat roof. The distance from this door to the door of the magnet house was only a few paces, and the rest of the roof, including the route of the cable-way, was fenced off from the walking space between the two doors by a hand-rail, about three feet high and consisting of two rails. The flat roof was, so the court found*, a place to which workmen might be expected to come. At the material time there was a gap of eighteen inches in the hand-rail. While the cable-way was not in motion the plaintiff, who was waiting for the foreman to come to inspect work the plaintiff had done in the magnet house, went through the gap in the hand-rail to the edge of the roof, in order to ask a passer-by below to give a message to the foreman. While the plaintiff was standing in the route of the cable-way giving the passer-by the message, the cable-way started up and a bucket struck the plaintiff knocking him off the edge of the roof and thereby injuring him. The trial judge held that the defendants were in breach of statutory duty under s. 14 of the Factories Act, 1937†, but were not guilty of negligence at common law; that the plaintiff was guilty of contributory negligence, and that his share of the responsibility for the damage was seventy-five per cent. On appeal,

Held: (i) (Willmer, L.J., dissenting) the defendants were liable at common law for negligence because, the flat roof being a place where workmen might be expected to come, reasonable care required that there should be some demarcation on the roof marking the area traversed by the line of buckets and the defendants had provided no such sufficient demarcation or other warning of the danger (see p. 634, letter I, and p. 645, letter D, post); but the defendants' liability was not for breach of statutory duty because the cable-way was not machinery for the purposes of the Factories Act, 1937, s. 14 and, further, the buckets were not dangerous parts of machinery within that section (see p. 635, letter G, and p. 645, letter A, post).

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* This finding is at p. 633, letter I, *post*.

† The material part of s. 14 (1) is printed at p. 640, letter G, *post*.

(ii) the plaintiff's own negligence contributed to the accident, and (Willmer, L.J., dissenting), since the trial judge had not found the defendants to have been negligent at common law, the Court of Appeal would reconsider apportionment on the basis of such liability; on the facts the plaintiff and defendants were equally to blame, so that the plaintiff's share of the responsibility would be reduced from seventy-five per cent. to fifty per cent. (see p. 636, letter A, and p. 645, letter F, post).

Decision of Devlin, J. ([1960] 1 All E.R. 104) in part affirmed on different grounds and in part varied.

[As to a master's common-law duty not to expose his servant to unnecessary risk, see 25 Halsbury's Laws (3rd Edn.) 508-514, paras. 976-981; and for cases on the subject, see 34 Digest 194-199, *1580-1626*.

As to apportionment of liability where the plaintiff is a servant guilty of contributory negligence, see 28 Halsbury's Laws (3rd Edn.) 94, para. 99; and for cases on the subject, see 36 Digest (Repl.) 184-186, *987-997*.

As to the duty to fence dangerous parts of machinery, see 17 Halsbury's Laws (3rd Edn.) 74, para. 126; and for cases on the subject, see 24 Digest (Repl.) 1049-1055, *183-218*.

For the Factories Act, 1937, s. 14 (1), see 9 Halsbury's Statutes (2nd Edn.) 1009.]

Cases referred to:

British Fame (Owners) v. *Macgregor (Owners), The Macgregor*, [1943] 1 All E.R. 33; [1943] A.C. 197; 112 L.J.P. 6; 168 L.T. 193; 2nd Digest Supp.

Carroll v. *Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 24 Digest (Repl.) 1056, *221*.

Caswell v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.

Cherry v. *International Alloys, Ltd.*, [1960] 3 All E.R. 264; [1960] 3 W.L.R. 563.

Flower v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; *revsd. on other grounds*, [1936] A.C. 206; 36 Digest (Repl.) 173, *929*.

Ingram v. *United Automobile Service, Ltd.*, [1943] 2 All E.R. 71; [1943] K.B. 612; 112 L.J.K.B. 447; 169 L.T. 72; 2nd Digest Supp.

Nicholls v. *Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 24 Digest (Repl.) 1091, *419*.

Parvin v. *Morton Machine Co., Ltd.*, [1952] 1 All E.R. 670; [1952] A.C. 515; 116 J.P. 211; 24 Digest (Repl.) 1059, *239*.

Qualcast (Wolverhampton), Ltd. v. *Haynes*, [1959] 2 All E.R. 38; [1959] A.C. 743; [1959] 2 W.L.R. 510; 3rd Digest Supp.

Rees v. *The Admiralty*, [1960] 2 Lloyd's Rep. 261.

Rogers v. *News of the World* (Nov. 19, 1958), unreported, cited in *Kimpton* v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. 274; [1960] 1 W.L.R. 527.

Stapley v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; [1953] 3 W.L.R. 279; 3rd Digest Supp.

Walker v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, *212*.

Appeal.

The plaintiff, a fitter employed by the defendants, appealed against so much of the decision of Devlin, J., at Bristol Assizes on Nov. 17, 18 and 26, 1959, reported [1960] 1 All E.R. 104, as (i) assessed the plaintiff's general damages due to an accident at work at £7,000, (ii) held that the plaintiff's damages should be reduced by three-quarters by reason of the plaintiff's contributory negligence, and (iii) held that the defendants were not guilty of common-law negligence. The defendants cross-appealed against so much of the decision of Devlin, J., as held that they were in breach of their statutory duty to the plaintiff under s. 14 (1) of the Factories Act, 1937, and as apportioned their responsibility for the accident as a one-fourth share.

The facts are stated in the judgment of Sellers, L.J.

W. D. Collard for the plaintiff.

W. L. Mars-Jones, Q.C., and *D. J. Stinson* for the defendants.

Cur. adv. vult.

Feb. 3. The following judgments were read.

SELLERS, L.J.: By this appeal the plaintiff seeks to increase the damages awarded to him by Devlin, J., at Bristol Assizes in November, 1959. The defendants by a counter-notice seek to avoid all liability or to reduce the award. Every major issue at the trial has been challenged before us. The judgment, in the result, was for £2,175 damages on the basis that the defendants had been in breach of a statutory duty which caused the accident and injury to the plaintiff and that the plaintiff's own negligence made him also responsible. The apportionment of responsibility the learned judge assessed as three-quarters to the plaintiff and one-quarter to the defendants so that the plaintiff only recovered one-quarter of the £8,700 total assessment of damages in the event of full liability. The damages were made up of £7,000 general damages and £1,700 special damage and in respect of these the plaintiff submitted that £7,000 was totally inadequate and that the apportionment was too unfavourable to him. The defendants did not submit that the total damages assessed were too high but they contended that if there were any liability on them at all it should be less than one-quarter.

The apportionment depends on the nature and extent of the defendants' breach of duty and of the plaintiff's own negligence and falls for consideration when these have been established but on the question of amount the court without hearing argument for the respondents on the issue was satisfied that it could not interfere with the sum of £7,000 assessed as general damages. The learned judge found and was justified in finding that the plaintiff was not incapable of work but that as a result of his injuries he could only do sedentary work. The plaintiff had since his accident received training as an inspector and if he eventually obtained a job of that sort his earnings might well be no less than his pre-accident earnings. The learned judge gave full weight to an offer of work made by the defendants at a late date but he did not treat it as compensation. This offer was much criticised by the plaintiff's counsel, and the plaintiff's disability for work and its attainment and the deprivations of the enjoyments of life were emphasised, but the assessment of general damages was substantial and I see no reason to alter it.

The main question for consideration is how much, if any, of the total assessment the plaintiff should receive. The action was based on the alleged liability of the defendants both for negligence at common law and for breach of s. 14 (1) of the Factories Act, 1937. The judgment finds no negligence but a breach of the statute and both findings are in issue.

At the defendants' factory where the plaintiff was employed as a fitter there was on June 28, 1955, the date of the accident, an overhead rope-way leading from a berthing place for vessels about half a mile into the factory. Along this rope-way buckets, spaced at intervals of 110 feet, were suspended and were pulled at about three miles an hour when fully in motion but they did not immediately reach that speed from stationary. The buckets normally carried ore or other material from one end and after depositing their contents where required returned empty on a continuous line. Although it was alleged that the plaintiff was injured by a dangerous part of unfenced machinery singularly little evidence was given of the rope-way and its method of working, other than that to be derived from photographs restricted to the small part of it at the place of the plaintiff's accident. There was it seems a machine somewhere which pulled a rope attached to the buckets. The bottoms of the buckets are some twenty-two feet above the ground but at the scene of the plaintiff's accident they pass over a flat concrete roof which is eighteen feet above the ground so that the buckets are only four feet above it. This is the roof of a crushing plant building. It is about forty-four feet long and the rope-way traverses it at a slight angle. Where it commences to pass over the roof in the direction of travel of the buckets it is at its centre about four feet from the outer edge of the roof; where it leaves the roof it is about eleven feet from the outside. At the exit side the full depth of the roof is about twenty-seven feet, but not quite centrally situated on the roof is the magnet house, which protrudes over the roof about fourteen feet leaving only some thirteen feet of open roof over which the rope-way travels, being at its centre, only about six feet away from this building as it approaches and only four feet at the other end of its travel. As the buckets lie centrally on the rope the clearances at each end between the buckets and the magnet house are even less that that. The magnet house is approached by a stairway inside the crushing house below. This gives access to the roof and then a pace or two across the roof gives access to the magnet house through a door opening on to the roof. As the roof is not protected at the edges, even if there were no rope-way with travelling buckets creating a danger as they move across, it would have been prudent to have protected those going to the magnet house in the course of work by means of some railing or warning or both. No doubt for this purpose, a hand-rail of spaced uprights with a top rail and a lower rail had been erected, but for years before the plaintiff's accident the portion nearest to the magnet house had been broken away so that both men and goods could and did pass through. The judgment finds that general user of the roof was unauthorised but there seems little doubt on the evidence that it in fact took place. It was said that the rail was originally broken down in order to get goods into the magnet house and it was proved that the gap in the rail had been similarly used on two occasions shortly before this accident.

There was difficulty in getting some goods necessary for the magnet house and its maintenance up the stairway in the crushing house and in addition the dust there was so great that masks had to be worn. Because of these difficulties the rigger in charge of the operation had twice brought a replacement belt up externally by block and tackle and passed it into the magnet house. The last time this was done was the morning of the plaintiff's accident. The tackle took some time to fix up and dismantle and this was done within some thirty yards of the foreman's office window. No special arrangement was made by the foreman. It was left to the rigger to carry out the task and he did it in that way. If it was wrong the defendants must be responsible for that. Apparently the narrow gap between a passing bucket and the magnet house, particularly at the nearest corner from which end the belt was lifted, was negotiated without mishap by the men avoiding the buckets. From time to time other men approached this flat roof externally, mainly for maintenance. It was clearly, I would hold, a place to which workmen had free access from the internal stairway and to which they came occasionally externally and to which they might be expected to come either on duty or casually when their duty took them to the magnet house.

The rope-way normally stopped for about ten minutes in the morning and again in the afternoon and for a long break in the middle of the day but in the ordinary course of working it would stop and start intermittently. No whistle or other signal was given for the rope-way to start though no doubt for the wary it made a noise which could be heard. In these circumstances the roof was, as the learned judge found, a dangerous place for a workman. He might be knocked down if unexpectedly struck by a bucket, even moving so slowly, and more particularly he might be knocked off the edge of the roof if he was situated near to it at the time of a blow.

That is what happened to the plaintiff. About 1.30 p.m., although the precise time is uncertain, he had finished the fitting of the new conveyor belt which had been brought up externally in the morning. He had been down by the internal stairway (by which also he had returned) to ask the foreman to come and pass this work. The plaintiff thought the foreman was to come in a short time but after waiting some time and as the time for a midday meal was well past, he went on to the roof's edge nearest to the foreman's window to try to summon the foreman or to attract a passer-by to inform him. There was a passer-by below but he was not readily receptive of the plaintiff's message and as this conversation was taking place the plaintiff was knocked off the roof by a bucket. He was then standing in the way of the line of buckets. He said that when he came out from the magnet house there was a stationary bucket almost opposite him, that is about twenty-six or twenty-seven feet from the edge over which it would leave the roof. The rope-way had started up and the bucket was seen by the man below, who shouted a warning but too late for the plaintiff to act.

The plaintiff was no doubt very unwise to move into the line of the rope-way, although it would have been safe so long as the buckets were stationary as they were when he went out. He ought not to have been unmindful that they might move whilst he was talking to someone below. It seems to me, however, that it was the kind of carelessness which might well be expected to arise in circumstances such as these. The judgment recognises the danger, but holds that there was no breach of duty because a warning was all that was necessary and the plaintiff knew full well all the circumstances.

I have set out the facts at length because I would hold, differing with respect from the learned judge, that the defendants' liability to the plaintiff lay at common law and not under s. 14 (1) of the Factories Act, 1937. I can see no practical reason why this slowly moving line of buckets should be completely and securely fenced. As the roof can be, and sometimes is, approached externally and not solely from the internal stairway, a fencing such as has been put up now by the door to the magnet house would not, I think, be a secure fence under the Act of 1937. It would give no protection to anyone approaching the roof externally.

The danger cannot, however, in my opinion properly be held to come from any dangerous part of moving machinery. It arises from the situation of the rope-way in such close proximity to the roof. It becomes a bad arrangement and a danger as soon as it is established that the roof is a place where workmen do from time to time go. Was a warning sufficient, as the judgment finds? The defendants had to take reasonable care to avoid exposing their workmen to unnecessary risks having regard to the kind of user which was known or ought to have been known. The present case illustrates what might have been foreseen to be likely to arise. When the rope-way was stopped the roof might at any given time be free and open without any bucket over it or it could have one bucket in one place over it as here and the rest of the roof clear. Unless a man remained mindful that the buckets might start up and would move over the roof he might inadvertently go on to any part of the roof and particularly as here whilst engaged in attracting attention and talking he might be neglectful of where precisely he was. A set of railway lines defines the track, a white line in the road indicates which is the correct side of the road. Here there was nothing. Whilst I see no occasion for a secure fence along each side of this stretch of rope-way I would hold that reasonable care required some demarcation on the ground of the area traversed by the line of buckets—a low fence on both sides, or intermittent posts or even white or yellow lines which are so often now found in factories to demark a footway. This would not have served to exclude the plaintiff from the danger zone as would a fence required under s. 14 (1) but it might well have prevented him getting in the danger zone as he could have seen the danger area outlined on the ground. I would not regard such débris as there was as a sufficient demarcation. The photographs are, I think, the only evidence of this, and it appears to be negligible at the outgoing side where the plaintiff was.

It seems to me to be just the kind of case covered by the common-law duty of a master to his servants and not a situation which would call for the severe requirements relating to dangerous parts of machinery.

If it is to be held that the provision of the Factories Act, 1937, applies it is not only a novel application of the provision but a most inconvenient one and one which, it would seem, was never contemplated. If a mere warning by the presence of a defective rail is all that the common law would require, it is remarkable that the statute should call for a complete enclosure by a secure fence. In the many cases before the courts over the years it has not been suggested that a railway, either normal gauge or narrow gauge, in a factory should be totally enclosed as if in a tunnel or at least with two high walls if no roof. Many travelling belts, which may move at least as fast as three miles per hour, often with operatives working at them on one or both sides, picking things off or placing things on, are obviously not fully enclosed, though I apprehend a moving belt might do some damage to the unwary. More comparably perhaps, overhead cranes, for which special statutory regulations exist, have not been required to move in a securely fenced track. It would be, I should have thought, unnecessary and probably almost impossible from a practical point of view for them to do so. The overhead crane has to be so used as to avoid in its manoeuvres doing injury to workmen in its vicinity and this duty which would arise under the common law is also imposed by the Factories Act, 1937, s. 24 (7), as follows:

> "If any person is employed or working on or near the wheel-track of an overhead travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken by warning the driver of the crane or otherwise to ensure that the crane does not approach within twenty feet of that place."

The judgment refers to *Parvin* v. *Morton Machine Co., Ltd.* (1) but since then, and after the judgment under appeal, *Cherry* v. *International Alloys, Ltd.* (2) was decided in this court and this incorporated the reasoning of *Rogers* v. *News of the World* (3). I find nothing of general principle to add to what was said in those cases and, applying the approach there made, I would hold that the bucket which struck the plaintiff cannot be said to be a dangerous part of machinery. It would not be in harmony with these decisions to hold that it was, although admittedly the facts are far from identical. The bucket and the rope-way itself are plant and the machine which pulls the rope is machinery. It is an odd and, I would think, an unnecessary conception, to treat the whole rope-way as one piece of machinery within the meaning of the Factories Act, 1937. The bucket does not change its solid character. In itself it creates a danger more akin to that of a wheelbarrow or truck pushed by hand. It is its change of place which creates the danger and in any real sense it is the place and not the bucket which is dangerous. If the rope-way is to be regarded as machinery then I agree that it was not securely fenced. If it had been, there could have been no accident, the plaintiff could not physically have got into the danger zone by negligence on his part and on that basis I would have thought and held that the defendants' responsibility for the accident would have been great and by far the greater blame would lie on them.

As the learned judge found no liability at common law he did not consider apportionment on that basis and it falls to this court to do so for the first time.

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(1) [1952] 1 All E.R. 670; [1952] A.C. 515.

(2) [1960] 3 All E.R. 264.

(3) (Nov. 19, 1958), unreported, cited in *Kimpton* v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. at p. 277.

If the defendants had complied with the duties as I have sought to express them at common law it might well be—though there is no certainty about it—that the plaintiff would have been reminded of the danger and kept off the track of the buckets and there would have been no accident. In these circumstances I would hold that there had been serious neglect on both sides and I would find the plaintiff and the defendants equally to blame and would allow the appeal to that extent.

In arriving at both my conclusions on apportionment in the event of liability at common law, as I would find it, or under the Factories Act, 1937, as the learned judge and Willmer, L.J., would hold, I agree with Willmer, L.J., that an appellate court will not lightly interfere with an apportionment made by the trial judge but, as I have pointed out in the present case, on the judge's findings he has not to consider any apportionment on the basis of a common-law liability for he found none. This court, therefore, has to do so.

I would with deference take the view that the respective responsibilities of the parties and what is just and equitable having regard thereto can only properly be assessed when it has been found what the plaintiff in fact did and what the defendants failed in their duty to do. The nature and extent of the defendants' duty is, in my view, highly important in assessing the effect of the breach or failure of duty on the happening of the accident giving rise to the plaintiff's claim and on the conduct of the plaintiff. There is an interaction of factors, acts and omissions to be considered. It has often been held that there is a high responsibility on a defendant who fails to comply with his statutory duty which is absolute and has penal sanctions. A workman is not to be judged so severely. There was in this case no wilful interference by the plaintiff with any protection provided by the defendants under the statute, for none was provided (see s. 119 of the Factories Act, 1937).

It was a case of carelessness by a workman who had worked and waited long past the time at which he normally broke off work and had a meal. It was no doubt negligent of him, but where his employers failed as they did the question arises whether it is just and equitable to deprive the plaintiff of so much. The difference between one-quarter and one-half to blame is over £2,000 and I do not think that we are obliged to hold that a plaintiff to whom such a sum would be very substantial should be deprived of an effective appeal on apportionment if this court thought the apportionment to be wrong. In *Stapley* v. *Gypsum Mines, Ltd.* (4) the House of Lords altered the apportionment and since then this court has from time to time also done so on similar grounds to those on which it would alter an assessment of damages.

The view that I have taken of this case is that I would give judgment in favour of the plaintiff for £4,350, but as that sum is still below the £5,000 paid into court the plaintiff should be, I think, penalised in costs from the date when that was offered.

I would allow both the appeals and enter judgment for the plaintiff for £4,350.

WILLMER, L.J.: I find myself in agreement with all the conclusions reached by the learned judge in his two admirably reasoned judgments. But for the fact that my brethren are not of the same opinion, I should have been content to say no more. In view, however, of the differences of opinion which have emerged I think it right to explain in detail my reasons for supporting the learned judge's conclusions.

These conclusions may be summarised under the following five headings: (i) the main cause of the accident was the plaintiff's own negligence: (ii) it was not caused by any negligence at common law on the part of the defendants: but (iii) it was in part caused by breach of statutory duty on the part of the defendants: (iv) the plaintiff's fault contributed to the extent of three-quarters, and that of the defendants to the extent of one-quarter: (v) the plaintiff's damages should be assessed at £8,700, of which £1,700 was agreed special damage. In the result the learned judge gave judgment for the plaintiff for the sum of £2,175, being one-quarter of the damages as found.

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(4) [1953] 2 All E.R. 478; [1953] A.C. 663.

Both sides have appealed to this court, and in the course of the hearing of appeal and cross-appeal each one of the learned judge's five conclusions has been attacked by one side or the other. I propose to deal with the criticisms which have been made of the learned judge's conclusions in the order I have set out above.

The learned judge has been criticised for addressing himself first to the question of the plaintiff's negligence. The effect of doing so, it is said, was to warp his mind when he came to consider whether the defendants were guilty of negligence or breach of statutory duty and (if so) what were the proportions of the respective parties' responsibility. I do not agree with this criticism. In my judgment the learned judge was right to keep in the forefront of his mind the question what was the main cause of the accident. It was most important to form some view as to the nature of the plaintiff's conduct, and as to how far it was reasonably foreseeable. For, as I shall presently show, this was an important matter to have in mind when considering the defendants' responsibility both at common law and under the statute. Nor do I think it fair to say that the learned judge allowed his mind to be warped by his decision as to the negligent nature of the plaintiff's conduct. For he himself pointed out that that decision did not establish any more than that *if* the defendants were liable then the plaintiff must contribute something, and the damages must be proportionately reduced.

I make no apology, therefore, for following the same course as the learned judge and considering first the nature of the plaintiff's conduct. I can deal with this briefly because I understand my brethren to be in agreement with me in thinking that the plaintiff's behaviour was foolhardy in the extreme. We are not dealing with one who was a stranger to the working of the rope-way, nor with one of whom it could be said that he was lured out on to the flat roof of the crushing house by the fact of a piece of the railing having been removed. The plaintiff, as he himself said in evidence, was fully aware of the danger of the rope-way where it passed over the flat roof. He knew about the danger of the rope-way because he had twice had occasion to work on the roof in company with Mr. Carter, the rigger, the last time being on the very day of the accident. He knew, as another man might not have known, that the cutting away of the piece of railing was not done as an invitation to stroll out on to the roof. He knew the track of the rope-way; for it was broad daylight, and the track could be followed both from the wires which were just overhead and from the deposit of débris underfoot which can be plainly seen in the photographs. Yet he elected not only to go out on to the roof—for no better reason than that he preferred to do this rather than descend the stairway—but to position himself right in the track of the rope-way. Moreover, he did so with his back to the direction from which the buckets would come if the rope-way started to work, thereby disregarding what I should have thought was the most elementary of all precautions. Finally, he chose to stand right at the edge of the roof, with an eighteen-foot drop in front of him, so that the merest touch from a moving bucket would inevitably throw him off his balance and cause him to fall to the ground below. Of such behaviour on the part of a man who claims to have been injured by the fault of somebody else I find it difficult to speak in temperate language. I can only say that, whatever the fault of the defendants may have been, the learned judge was in my judgment abundantly justified in coming to the conclusion that the main cause of the plaintiff's misfortune was his own negligence.

In reaching this conclusion I have not overlooked what was said by LORD WRIGHT in his speech in the House of Lords in *Caswell* v. *Powell Duffryn Associated*

Collieries, Ltd. (5), nor the oft-quoted dictum of LAWRENCE, J., in *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.* (6), with regard to the standard of care for his own safety to be expected of a workman working in factory conditions. Although these cases were very properly cited to us, I cannot see that what was said bears much relation to the circumstances of this case. It cannot be said that this plaintiff was subject to the distractions and fatigue of factory conditions, which in other circumstances might be held to justify some degree of inattention and inadvertence. I can see nothing to excuse the extent of the foolhardiness manifested by this plaintiff.

I pass now to consider whether the plaintiff proved that the defendants were under any liability to him at common law. This, I think, involves consideration of three questions, which may be framed as follows. (i) Was the plaintiff's behaviour such as was reasonably foreseeable by the defendants, so as to impose on them a duty at common law to guard against it? (ii) If so, did the defendants take adequate steps to discharge that duty? (iii) If they failed to take adequate steps in discharge of their duty, was their failure a cause of the plaintiff's damage?

As to the first of these questions, much reliance has been placed on the fact that on two occasions—once in April, 1955, and again on the morning of the accident—Mr. Carter, with a gang of men including the plaintiff, had been working on this very roof for a substantial period of time in the course of taking a heavy conveyor belt to the magnet house, having lifted it to the roof with the aid of a tackle specially rigged for the purpose. The fact that this was done must, it is said, have been known—or at least it ought to have been known—to the defendants through their foreman. It is to be inferred from the defendants' acquiescence in this being done that there was on their part, to use counsel for the plaintiff's phrase, a complete toleration of the use of this roof for the purpose, or, if not that, at least a complete lack of supervision. It was further said that the fact of the railing having been cut and not restored showed that the defendants did not care whether or not their men went out on to this roof. The learned judge in his judgment said that he was not satisfied on the evidence that any general or unauthorised use of the roof was brought home to the knowledge of the defendants. This finding was challenged on behalf of the plaintiff, but I do not think that this issue is of any great importance. For in any case the defendants must be vicariously responsible for the acts of Mr. Carter, to whom they had delegated the task of moving the conveyor belt and who evolved the system used. In these circumstances it seems to me that had an accident occurred through the movement of the rope-way while the work of moving the conveyor belt over the flat roof was in progress the defendants could well have been said to have been in breach of their duty to provide a safe system of work. In fact, however, the accident which occurred had nothing whatever to do with the work of moving the conveyor belt, which had long since been completed. I do not see how the fact of the conveyor belt having been moved in this way can be prayed in aid as showing that there was any toleration on the part of the defendants of the act of the plaintiff in going out on to the roof at the time when he did it or for the purpose for which he did it. I am not, therefore, prepared to accede to the argument that there was anything in the nature of acquiescence on the defendants' part in the behaviour of the plaintiff. Having got rid of the argument founded on the use of this roof for the purpose of moving the conveyor belt—which I regard as quite irrelevant to the issues in this case—I hasten to say that I entertain no doubt but that it could reasonably be foreseen by the defendants that one of their employees might, for one reason or another, go out on to this flat roof. This to my mind was a readily foreseeable risk, and I agree with what I understand to have been the learned judge's view that the danger was such as to impose a duty on the defendants to take some steps about it.

This raises the question what steps the defendants could and should have

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(5) [1939] 3 All E.R. at pp. 735-740; [1940] A.C. at pp. 174-179.
(6) [1934] 2 K.B. at p. 140.

A taken for the protection of the plaintiff and men in his position. Were the steps which they did take an adequate discharge of the duty imposed on them? I can think of only two kinds of precaution which they could have taken. One possible precaution would be to fence off the flat roof altogether, not merely by means of a pole and rail fence, but by erecting a real barricade such as would, for practical purposes, effectively prevent access to the roof. But it must be remembered B that the persons to be protected were responsible grown men, who must be expected to know about the rope-way and the potential danger from it—and in the case of the plaintiff a man who, as the learned judge found, was in fact fully aware of the danger. The risk of an accident such as occurred was indeed, as I have said, a foreseeable risk, but it was certainly not one of any great probability. In my judgment the erection of a barricade such as I have C suggested would be something going far beyond what reasonable care demanded, and indeed it has not really been argued that the defendants' duty at common law called for any such barricade.

The only other possible precaution was to see that the plaintiff and others like him were sufficiently warned of the danger. Various possible ways of conveying such a warning were canvassed before us, as for instance by exhibiting D a notice warning people not to go on the roof or to keep clear of the rope-way, or by painting the roof with white lines to mark the track of the rope-way. It is to be remembered that there was already in existence a rail fence dividing the passage-way to the magnet house from the rest of the flat roof, and this in my judgment was such as to convey to the mind of any reasonable man a warning that he should not go on the roof. It is true that the end of the rails had been E removed, leaving a gap of some eighteen inches through which it was physically possible to pass out on to the roof. But I cannot agree with the suggestion that the existence of this gap was such as to abrogate the warning that the fence might otherwise give, or to amount to an invitation to go out on to the roof. If my boundary fence is broken down, so that there is a gap in it, that does not mean that it ceases to be a boundary fence, nor does the gap constitute an invitation F to my neighbour to come through into my garden. I cannot think that the provision of any further warnings would have deterred a man in the position of the plaintiff if he was not deterred by the existing fence. The plaintiff would certainly not have been deterred—for I attach great importance to the view expressed by the learned judge when he said:

> "If the plaintiff had been specifically warned I think the accident would G still have happened because knowing the danger he really elected to disregard it."

The learned judge saw and heard the plaintiff in the witness-box, and had abundant opportunity of forming his estimate of the man. We, who have not had that advantage, should not lightly disregard the view which the learned judge formed.

H It is not to be forgotten that we are dealing in this case only with the duty owed by the defendants to this plaintiff. As was said by LORD RADCLIFFE in *Qualcast (Wolverhampton), Ltd.* v. *Haynes* (7):

> ". . . actions of negligence are concerned with the duty of care as between a particular employer and a particular workman. An experienced workman dealing with a familiar and obvious risk may not reasonably need the same I attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition."

In the same case LORD KEITH OF AVONHOLM said (8):

> "The duty owed by the employers was a duty owed to the plaintiff. This is not necessarily the same as the duty owed to others of the workers. The duty may vary with the worker's knowledge and experience."

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(7) [1959] 2 All E.R. at p. 40; [1959] A.C. at pp. 753, 754.
(8) [1959] 2 All E.R. at p. 42; [1959] A.C. at p. 755.

It may very well be that some other workman, less familiar with the dangers of the rope-way than was the plaintiff, would have been entitled to receive some better or clearer warning. I am disposed to agree with the remark of the learned judge that " if some stray workman had got up there and had been struck the position of the defendants would have been a different one ". In the case of this plaintiff, however, I think that the matter is concluded by the finding of the learned judge that he (the plaintiff) " already had that warning. He knew the danger; he knew because he said so in terms in his evidence ". I cannot think that the common law imposed a duty on the defendants to take any further steps for the protection of a man who knew the danger, but who, in spite of his knowledge, elected to behave in such a foolish way as the plaintiff did.

This being so, the question whether any failure on the part of the defendants to take adequate steps in discharge of their common-law duty was a cause of this plaintiff's damage does not arise. I agree with the learned judge in thinking that no breach of the defendants' common-law duty to the plaintiff was proved.

I turn then to the charge of breach of statutory duty, on which the plaintiff succeeded before the learned judge. The question which has been raised is certainly a novel one, and I do not pretend that I have found it easy to determine. Having given the matter the best consideration that I can, I find myself unable to disagree with the conclusion at which the learned judge arrived. It is suggested that the effect of the learned judge's decision is to impose on employers in the position of the defendants a wholly new obligation, and that if it is to stand it will be bound to have far-reaching consequences. This I venture to doubt. I doubt whether there are many places where a rope-way of this character passes so close over a flat roof as to create a danger of the sort disclosed in this case. Be that as it may, our duty is to apply the provisions of the statute, and if this leads to consequences that were not intended the remedy lies with the legislature.

It appears to me that four questions arise for determination: (i) Was the rope-way machinery within the meaning of s. 14 (1) of the Factories Act, 1937? (ii) If it was machinery, was the particular part of it with which we are concerned dangerous, so as to require that it be securely fenced? (iii) If so, was this particular part securely fenced? (iv) Was the absence of a secure fence a cause of the plaintiff's injury?

There can, I think, be no room for doubt that the defendants' premises constitute a factory to which the Act of 1937 applies. The material part of s. 14 (1) of the Act is in the following terms:

> " Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

The term " machinery " is not defined, except that s. 152 (1) of the Act provides that it " includes any driving-belt ". It has, however, been held by the House of Lords not to include machinery which is the product of the factory—see *Parvin* v. *Morton Machine Co., Ltd.* (9). In that case LORD NORMAND, in the course of his speech, drew a distinction (10) between " machines or machinery manufactured in the factory " on the one hand and " machines or machinery for use in the factory in the processes of manufacture or as ancillaries to these processes " on the other. These latter words may be of some significance in the present case, for I entertain no doubt that the rope-way in question in this case was something ancillary to the processes of manufacture carried on in the defendants' premises. More recently it has been held by this court in *Cherry* v. *International Alloys, Ltd.* (11), that the term " machinery " does not extend to cover a petrol-driven truck used in the factory. Such a vehicle was described by SELLERS, L.J. (12), as " a self-contained unit moving about " the factory, as opposed to " what might be called production machinery ". Here again it appears to me that the distinction drawn by Sellers, L.J., may well be of some significance in the present case.

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(9) [1952] 1 All E.R. 670; [1952] A.C. 515.

(10) [1952] 1 All E.R. at p. 670; [1952] A.C. at p. 520.

(11) [1960] 3 All E.R. 264.

(12) [1960] 3 All E.R. at pp. 265, 266.

Before the learned judge the argument on behalf of the defendants appears to have been that the rope-way is simply a means of transport to be compared with a railway, the buckets of the rope-way presumably being regarded as corresponding to the wagons on a railway. This argument did not find favour with the learned judge, who took the view that the rope-way must be regarded as one piece of apparatus and, as such, as machinery within the meaning of the Act of 1937. Before us the argument has been slightly different, for since the matter was before the learned judge further guidance, it is suggested, has been provided by the decision of this court in *Cherry's* case (13). We have been invited to treat the buckets of the rope-way as analogous to the truck in *Cherry's* case (13), and to regard them as vehicles rather than as part of the factory machinery. In my judgment this argument is fallacious for precisely the same reasons as the argument addressed to the learned judge was rejected by him. It is based on the erroneous assumption that the buckets are independent units similar to vehicles, and overlooks the basic fact that the whole of the rope-way, as pointed out by the learned judge, constitutes one single piece of apparatus. The buckets do not move as individual units, but as parts of a single, articulated whole. In *Cherry's* case (14), Pearce, L.J., said:

> " The association of s. 14 with s. 12 and s. 13 [of the Factories Act, 1937] by position and wording tends towards the view that the section is primarily dealing with the machinery that is at the operative end of the prime movers and transmission, the effective machinery to which the power is directed."

Those words, which I respectfully adopt, when applied to the rope-way in the present case, seem to me to be wholly destructive of the defendants' argument.

In the long run, as was decided by this court in *Cherry's* case (13), the question whether a particular apparatus in a factory constitutes machinery within s. 14 of the Act of 1937, is to be determined by the standards of common sense. Judged by these standards I do not see how the rope-way, viewed as a whole, could properly be described as other than machinery for use in the factory ancillary to the processes of manufacture. Had such an apparatus, similar in type, but smaller in size, been installed in a single room in a factory, so that workers on the factory floor were in danger of being struck by the moving parts, no one could have doubted that it would have to be treated as machinery within the meaning of s. 14. I cannot think that the mere fact of this apparatus being on a much larger scale can be held to alter its character as machinery.

If that is established, the next question is whether any part of the rope-way was dangerous, so as to require that it be securely fenced. As to this, the view expressed by du Parcq, J., in *Walker* v. *Bletchley Flettons, Ltd.* (15) has generally been accepted as correct. He said:

> ". . . a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."

In other words, the test is what is reasonably foreseeable. I have already said that in my view it could reasonably be foreseen by the defendants that one of their employees might go out on to the flat roof of the crushing house. A person who did any such thing would clearly be in danger of being struck by one of the buckets if the rope-way were in operation. It is argued on behalf of the defendants that s. 14 of the Act of 1937 is designed only to protect against the dangers that commonly arise from machinery in a factory such as catching, cutting, pinching A and crushing, and that danger from being knocked down is not a danger to which the section is directed. I venture to ask, why not? The section itself contains no words limiting the kinds of danger against which protection must be given. Granted that the danger of being knocked down by the moving parts of machinery may not be one that commonly arises; yet that is no reason why the provisions of the section should not be applied in the rare case where that B danger does arise.

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(13) [1960] 3 All E.R. 264.

(14) [1960] 3 All E.R. at p. 267.

(15) [1937] 1 All E.R. at p. 175.

In my judgment the part of the rope-way which passed over the flat roof of the crushing house was a dangerous part of the machinery and, as such, ought to have been securely fenced. It cannot seriously be contended that without such fencing it was as safe as it would be if securely fenced. It is objected—presumably with the idea of showing that the application of s. 14 to this rope- C way would be absurd—that if fencing is required at all it must be required on both sides of the rope-way, and that a fence on the side of the magnet house alone would not be a sufficient compliance. This suggestion seems to me to be unrealistic. Applying once more the test of what is reasonably foreseeable, it seems obvious that fencing could only be required on that side of the rope-way to which access could otherwise be ordinarily obtained. There is no means of access D to this flat roof except by way of the staircase leading to the magnet house. If that route were effectively fenced off, no access could be obtained to that part of the roof which lay on the other side of the rope-way short of putting up a ladder specially for the purpose. That would not, I think, be a reasonably foreseeable risk. In my judgment the rope-way where it passes over the roof of the crushing house ought to be securely fenced on the side facing the magnet house, E and this, I think, would be a compliance with the section.

To the question whether there was in fact such a secure fence as I hold to be required there can be but one answer. As was pointed out by LORD SIMONDS in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (16), the fence that the section requires " is intended to keep the worker out ". What is required, said LORD PORTER in *Carroll* v. *Andrew Barclay & Sons, Ltd.* (17) is " the erection of a barricade to F prevent any employee from making contact with the machine ". Judged by this standard, the fence which was in fact erected at the top of the stairway leading to the magnet house was clearly insufficient. The learned judge expressed his view on this aspect of the case in the following words (18):

> " . . . the fence must not merely guard against accident but must be such G as takes into account human weaknesses which include, as well as forgetfulness and inadvertence, an inclination sometimes to run minor risks and to take short cuts. Some degree of recklessness has to be foreseen as well as carelessness. The fence need not be so constructed as to keep out a determined man, but, I think, it must be such as will deter a man who, in pursuit of a short cut, is willing to run a minor risk. The fence in this case, whether complete or broken, was not of that construction; it was nothing H more than a line that demarcated a dangerous or forbidden area and, as such, it was an insufficient compliance with s. 14 (1) of the Act of 1937."

I am content to express my entire agreement with this conclusion.

Was the absence of such a secure fence as the section required a cause of the plaintiff's injury? To this question, again, I think there can be but one answer, I namely, that it was. The contrary was indeed strenuously argued by counsel for the defendants, but the accident could not have happened save for the fact that, in the absence of a secure fence, the plaintiff was free to wander at large on the flat roof of the crushing house. Moreover, the accident which occurred was an accident of the very kind that called for a secure fence to prevent its occurrence. It was equally strenuously argued on the other side that the absence of a secure fence was the sole cause of the accident. For reasons which I have already given, however, I cannot accept this view, agreeing as I do with the learned judge's conclusion that the main cause of the accident was the plaintiff's own negligence. The case is, in my judgment, plainly one in which the accident was caused by fault on both sides.

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(16) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.
(17) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 486.
(18) [1960] 1 All E.R. at p. 107.

I pass, therefore, to consider the learned judge's conclusion that the plaintiff should himself bear three-quarters of the responsibility for the accident. It was suggested during the argument that the degrees of contribution might be affected according as the fault of which the defendants were guilty were held to amount to a breach of their common-law duty or a breach of their statutory duty. I confess that I cannot follow this suggestion. In either case the question to be answered concerns the degree to which the respective faults of the parties should be held to have contributed. The question is largely one of causation, and once the defendants' fault is held to have been a cause the degree to which it may be held to have contributed cannot be affected according as it may be called by one name or another. In either case the duty laid on the court by the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), is to reduce the damages recoverable

> ". . . to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

The problem of apportioning blame where there has been fault on both sides is one that has been familiar in the Admiralty jurisdiction for fifty years. It has long been held to be a matter primarily for the discretion of the trial judge, who finds the facts, and who has the advantage of seeing the participants at first hand and assessing the degrees of their responsibility. It is well settled that, in the absence of any error of principle, an appellate tribunal will interfere with the trial judge's apportionment only in exceptional cases, and then as a rule only where it can be seen that the trial judge has failed to give effect to some material fact or has failed to take into account some material consideration. The principles guiding an appellate tribunal in such circumstances have nowhere been more clearly stated than in *British Fame (Owners)* v. *Macgregor (Owners), The Macgregor* (19). In *Ingram* v. *United Automobile Service, Ltd.* (20) this court held that the same principles should be followed in apportioning damages as between two tortfeasors under the Law Reform (Married Women and Tortfeasors) Act, 1935. I know of no reason why the same should not apply when damages are apportioned under the Act of 1945. We so held in this court in the recent case of *Rees* v. *The Admiralty* (21). I approach this case, therefore, with those principles well in mind. For reasons already stated I cannot see that the learned judge was guilty of any error of principle, nor can I find anything to criticise in the view which he took of the facts of the case. Agreeing as I do with his view that the main cause of this accident was the plaintiff's own negligence, I find it impossible to say that he was guilty of any error in coming to the conclusion that the plaintiff should himself bear three-quarters of the responsibility.

The only remaining issue is with regard to the quantum of the plaintiff's damages. On this point I need add very little, for I find myself in agreement with my brethren in thinking that the sum awarded is one with which this court cannot possibly interfere. The sum of £7,000 awarded as general damages was intended to compensate the plaintiff not only for his pain and suffering and for the considerable, and continuing, loss of enjoyment and facilities which he has sustained, but also for a material curtailment of his future earning capacity. It is to be remembered that he has already been compensated for his loss of earnings up to the date of trial by the £1,700 agreed special damage. The argument has mainly turned on the degree of curtailment of future earning capacity which ought to be taken into account. The learned judge has been criticised for attaching too much weight to the offer of employment which the defendants themselves made to the plaintiff at the trial, and which he apparently refused. Had the learned judge treated this offer as an exact measure for all time of the plaintiff's loss of earning capacity, he would no doubt have been in error in doing so. But he did no such thing, as he himself made abundantly clear in the course of his judgment. The importance of the defendants' offer, as the learned judge rightly appreciated, lay in the fact that it showed the plaintiff to be by no means unemployable. He is thus to be regarded as a man of reduced earning capacity, but not as a man of no earning capacity. This view seems to me to be fully in accord with the agreed medical evidence. The learned judge clearly felt the difficulty—a not uncommon difficulty in this class of case—of awarding now a once-for-all lump sum which would fairly compensate the plaintiff for his likely loss of earning capacity for the rest of his life. It appears to me, however, that he directed himself correctly, and unless we can say that the sum which he awarded amounted to a wholly erroneous estimate of the plaintiff's loss we cannot interfere with the figure at which he arrived. For my part, I find myself unable to differ from the learned judge's assessment.

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(19) [1943] 1 All E.R. 33; [1943] A.C. 197.

(20) [1943] 2 All E.R. 71; [1943] K.B. 612.

(21) [1960] 2 Lloyd's Rep. 261.

For these reasons, agreeing as I do with the learned judge's conclusions on all the matters in controversy, I would dismiss both appeals.

DANCKWERTS, L.J., referred to the facts and continued: The claim of the plaintiff was based, alternatively, on common-law negligence, and on a breach by the defendants of the Factories Act, 1937, s. 14 (1). The learned judge decided against the plaintiff on the first ground but in his favour on the second, and awarded the plaintiff damages. He found that the plaintiff was guilty of contributory negligence and assessed his share of the blame at seventy-five per cent., reducing the damages accordingly. I find it convenient to deal with the second ground, dealing with the Factories Act, 1937, first.

The plaintiff's case is that there was a failure by the defendants to fence dangerous machinery as required by the Factories Act. The material provision is s. 14 of the Factories Act, 1937, which provides as follows:

> " Other machinery.—(1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

The learned judge considered that the whole of the rope-way must be regarded as one piece of apparatus and as machinery within the meaning of the Act of 1937, so that any dangerous part had to be fenced. It is with diffidence that I differ from a judge who has had far greater experience than I can have had of these matters, but the learned judge himself regarded the matter as a novel point on which there is no clear authority. Now it is clear that some limitation has to be put on the meaning of the word " machinery " for the purposes of the Act. Not every kind of machinery is within the terms of the Act. For instance, in *Parvin* v. *Morton Machine Co., Ltd.* (22) it was held that the Factories Act, 1937, did not extend to machinery manufactured in the factory, and in *Cherry* v. *International Alloys, Ltd.* (23) it was held that the engine of a motor truck is not machinery for the purposes of the Act. The considerations stated by SELLERS, L.J., seem to me to have great force, and I agree with his conclusion. In my opinion an aerial rope-way is not machinery for the purposes of the Act, though no doubt some machinery is required to keep it in motion at some fixed point. Certainly the buckets do not appear to me to be machinery and as a matter of common sense I do not think that it is correct to treat the whole of the rope-way as machinery for the purposes of s. 14 of the Act of 1937. Accordingly, I am in the defendants' favour on this point.

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(22) [1952] 1 All E.R. 670; [1952] A.C. 515.

(23) [1960] 3 All E.R. 264.

This is not the end of the matter, for there remains the question of liability at common law. On this point also I am afraid that I differ from the conclusion of the learned judge. The learned judge found that there was a duty on the defendants, but that it was only a duty to warn of the danger. I do not quarrel with that, but the warning was certainly ineffective, and, in my view, it was insufficient. Though the foreman, who had only been a short time on this part of the works, said that he had no knowledge of the use made of the roof, I think that it is plain that the roof had been used before this occasion as a means of access to the magnet house, and the defendants must be taken to have had knowledge of such use. The learned judge was of opinion that, even if there had been a more effective barrier, the plaintiff would have made his way on to the roof. This is pure speculation, in my view: the facts must be taken as they were. There was an ineffective barrier, with an obvious gap in it, which made access to the roof the easiest thing in the world. It was far from being any real warning—it was practically an invitation to use the roof. In my view, therefore, the defendants were guilty of a breach of duty at common law and are under the resulting liability.

Of course, the plaintiff behaved in an amazingly foolish manner, turning his back on the buckets, and standing directly in their track, when a step or two to one side would have avoided danger. The plaintiff admitted that he knew where the track of the buckets went across the roof, but I think he chose to stand where he did because, having seen a stationary bucket, when he went out on the roof, he assumed that the rope-way would not be set in motion before he had dispatched his message to the foreman. It is not easy to apportion the blame in such a case, and, on the whole, I am prepared to accept the view of SELLERS, L.J., that fifty per cent. reduction for contributory negligence is sufficient, on the basis of a liability of the defendants at common law. I agree that the learned judge's assessment of the total damages should not be disturbed.

Appeal and cross-appeal allowed. Judgment varied to: Judgment for the plaintiff for £4,350. Leave to both parties to appeal to the House of Lords.

Solicitors: *W. H. Thompson* (for the plaintiff); *Gascoin & Co.* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

Re COHEN (A BANKRUPT). *Ex parte* THE BANKRUPT *v.* TRUSTEE OF THE PROPERTY OF THE BANKRUPT. *Ex parte* TRUSTEE OF THE PROPERTY OF THE BANKRUPT *v.* THE BANKRUPT AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Upjohn and Pearson, L.JJ.), January 11, 12, 13, 1961.]

Bankruptcy—Appropriation of salary or income—Life interest of bankrupt in father's residuary estate—Whether " income " within Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 51 (2).

A bankrupt was entitled under his father's will to a life interest in the father's residuary estate, which consisted of real property (which was let) and shares in a building society. He claimed that the income of the estate (namely, the rents and dividends), although vested in the trustee in bankruptcy, was income within s. 51 (2)* of the Bankruptcy Act, 1914, with which, therefore, the trustee in bankruptcy could not deal except under an order of the court on an application by the trustee under the subsection.

Held: the income of the residuary estate of the bankrupt's father was not within the scope of s. 51 (2) of the Bankruptcy Act, 1914, because the word " income " in the subsection had a limited meaning and referred to income in the nature of salary.

Ex p. Benwell, Re Hutton ((1884), 14 Q.B.D. 301) and dictum of LORD ESHER, M.R., in *Re Shine, Ex p. Shine* ([1892] 1 Q.B. at p. 527) applied.

Re Tennant's Application ([1956] 2 All E.R. 753) distinguished.

Re Landau ([1934] All E.R. Rep. 130) doubted.

Appeal dismissed.

[As to the payment of salary or income of a bankrupt to his trustee by order of the court, see 2 HALSBURY'S LAWS (3rd Edn.) 456, para. 903; and for cases on the subject, see 5 DIGEST (Repl.) 994-996, *8020-8040*.

For the Bankruptcy Act, 1914, s. 51 (2) see 2 HALSBURY'S STATUTES (2nd Edn.) 387.]

Cases referred to:

Benwell, Ex p., Re Hutton, (1884), 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677; 5 Digest (Repl.) 995, *8025*.

Forder, Re, Forder v. *Forder*, [1927] All E.R. Rep. 324; [1927] 2 Ch. 291; 96 L.J.Ch. 314; 137 L.T. 538; 5 Digest (Repl.) 720, *6259*.

Hollinshead v. *Hazleton*, [1916] 1 A.C. 428; 85 L.J.P.C. 60; 114 L.T. 292; 5 Digest (Repl.) 995, *8024*.

Huggins, Ex p., Re Huggins, (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 5 Digest (Repl.) 995, *8023*.

Landau, Re, Ex p. Trustee, [1934] All E.R. Rep. 130; [1934] Ch. 549; 103 L.J.Ch. 294; 151 L.T. 190; 5 Digest (Repl.) 995, *8030*.

Shine, Re, Ex p. Shine, [1892] 1 Q.B. 522; 61 L.J.Q.B. 253; 66 L.T. 146; 5 Digest (Repl.) 994, *8020*.

Tennant's Application, Re, [1956] 1 All E.R. 425; [1956] 1 W.L.R. 128; *affd.* C.A., [1956] 2 All E.R. 753; [1956] 1 W.L.R. 874; 5 Digest (Repl.) 995, *8031*.

Appeal.

This was an appeal by Louis Cohen, a bankrupt, from a judgment of the Divisional Court in Bankruptcy (DANCKWERTS and RUSSELL, JJ.), dated Feb. 8, 1960, dismissing his appeal from an order made by His Honour JUDGE MCKEE, at Leeds County Court, on Oct. 22, 1959.

Under the will of his father, Barnet Cohen, who died on Mar. 13, 1935, the bankrupt was entitled to a life interest in the father's residuary estate. On

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* The terms of s. 51 (2) are printed at p. 648, letter A, post.

July 15, 1954, the bankrupt mortgaged his life interest as security for certain loans made to him. On Nov. 4, 1954, he was adjudicated bankrupt. On June 22, 1956, on a motion by the trustee in bankruptcy, an order was made in Leeds County Court, with the consent of the mortgagees, who were the respondents to the motion, declaring that the mortgage was a fraudulent preference and void against the trustee in bankruptcy. The bankrupt was not a party to the proceedings. From the date of the order the income of the residuary estate was paid to the trustee in bankruptcy. On May 8, 1957, an application by the bankrupt for his discharge was refused. On July 6, 1959, the bankrupt filed a notice of motion claiming a declaration that the trustee in bankruptcy had no title to the income of the residuary estate. On July 23, 1959, the trustee in bankruptcy filed a notice of motion claiming (a) a declaration that the life interest of the bankrupt in the residuary estate vested absolutely in the trustee in bankruptcy by virtue of the orders of Nov. 4, 1954, and June 22, 1956, and, alternatively, (b) an order under s. 51 (2) of the Bankruptcy Act, 1914, for the payment to the trustee of the whole, or such part as might be just, of the income of the residuary estate for the benefit of the creditors. The bankrupt and the present trustees of the will of the bankrupt's father were respondents to the motion. By an affidavit dated July 28, 1959, the trustees of the will agreed to submit to any order which the court might make. By an order dated July 29, 1959, the two motions were consolidated. By an order dated Oct. 22, 1959, the county court judge dismissed the bankrupt's motion and made the declaration sought by the trustee in bankruptcy, on the ground that the bankrupt's life interest under the will was not " income " within the meaning of s. 51 (2) of the Act of 1914. The Divisional Court affirmed the decision of the county court judge and gave the bankrupt leave to appeal to the Court of Appeal.

Muir Hunter for the bankrupt.
D. S. Forrester-Paton for the trustee in bankruptcy.

LORD EVERSHED, M.R.: Like the learned judges in the Divisional Court, we feel that we should not render any assistance in this case, or in other cases, by reserving judgment. As DANCKWERTS, J., observed, he thought that the route through the jungle would not be further illuminated by consideration, and I venture to share that view, though I say at once that the case is a difficult one, and rendered more difficult by decisions extending over nearly a century. We have been much indebted to counsel for the bankrupt for putting the point before us clearly and referring us to many of these decisions on a point which has never, in fact, come in this form for decision before the court hitherto.

The bankrupt, under his father's will, enjoys a life interest in what represents the residuary estate of his father. The estate is at the moment invested partly in real property, which has been let, and partly in shares in a building society; so that the income to which the bankrupt was entitled (subject to the bankruptcy) consisted in part of the rent, less proper deductions (including, presumably, Sch. A tax), and in part of dividends on the shares.

It has been the contention of the bankrupt that the income which I have described is income vested, it may be, in the trustee, but with which, none the less, the trustee cannot deal in any way save by application under s. 51 (2) of the Bankruptcy Act, 1914. It is desirable that I should read the substance of both that subsection and its predecessor. Section 51 (1) is as follows:

> " Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct . . ."

Section 51 (2) reads:

> “ Where a bankrupt is in receipt of a salary or income other than as aforesaid, or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct.”

It may be taken (and it has certainly been conceded in argument before us) that, if a subject-matter is within the scope of s. 51 (2)—that is to say, if it is a salary or pension, by way of example—then, albeit that the subject-matter vests in the trustee, the trustee’s right or power to deal with the subject-matter is qualified or limited by the terms of the subsection. It follows in the present case, if counsel for the bankrupt is right, that the trustee in bankruptcy could not dispose of the life interest of the debtor; his only right and only power would be to make application to the court that the whole, or such part as the court might think fit, of this revenue or income should be applied by the trustee towards meeting the bankrupt’s debts.

The problem, on the facts which I have stated, resolves itself, for a reason which I hope to justify, to this short point: Is this income, are these dividends and rents, income in the nature of salary, that is, income possessing the same or similar characteristics as salary? I fully accept that, in posing the question thus, I am assuming a premise, namely, that the word “ income ” has a limited significance in this subsection. That premise I hope to justify shortly; but, assuming it for the moment, then for my part I answer the question (and I answer it without hesitation, as did the learned judges in the court below) negatively; that is to say, in my view the income here the subject of debate is not income of the kind which I have mentioned, and, therefore, is not within the scope of s. 51 (2). I arrive at that conclusion as a matter of common sense and common use of language. Counsel for the bankrupt, in his reply, suggested that this income, these dividends and rents, could be regarded as truly analogous to a pension. I cannot accept that argument. As a matter of sense and of language, I do not think that the income is so analogous. If that view is right, it is, of course, the conclusion of the case, and for my part I attempt no further definition of the phrase “ income other than as aforesaid ”. I rest my conclusion on the significance of the word “ income ” which I have already indicated, and which I derive from the cases which I shall presently mention. The result (and particularly my unwillingness further to expand the meaning of this subsection) may perhaps be unfortunate; but I think that it is, as the law has developed over the past century, inevitable. Certainly, so far as this case is concerned, I am satisfied in my own mind that the answer which I have given is in accordance with the intention of Parliament in the legislation now before us. There has been some discussion of the matter of public policy, the “ unruly horse ” referred to by Lord Parker of Waddington in his speech in *Hollinshead* v. *Hazleton* (1), to which I shall later allude. I certainly prefer not to attempt any riding of that horse in this case; but, looking back over the history of this legislation, as we were invited and assisted to do by counsel for the trustee, I am much confirmed in the view which I have formed that to hold otherwise than as I do in this case would be to defeat the intention of Parliament, and, as I have mentioned public policy, to defeat also that element of public policy referred to by Lord Atkinson in *Hollinshead* v. *Hazleton* (2), namely, that prima facie, if a man becomes bankrupt, his assets should be available for the discharge of his debts.

If one goes back to the Bankruptcy Act, 1861 (the first Bankruptcy Act, we were told, to affect non-traders) one finds there, as the clearest possible and inevitable conclusion, that a life interest actually enjoyed by a bankrupt is something which it would be the duty of the trustee in bankruptcy to realise for the benefit of the creditors. I do not think that I need take time in lengthy citation, but that view seems to me to flow beyond a peradventure from the terms of s. 115 and s. 127 of that Act. To illuminate it a little further, it was by s. 115 that provision was made preventing a trustee from disposing of a life interest until it had fallen into possession. Section 127 laid down the duty of the trustee to realise the assets for the benefit of the creditors, and the Act itself made it quite clear that the property of the debtor included property of every nature and kind. That Act contained in s. 134 the ancestor of what is now s. 51 (1) of the Act of 1914. Though the language was not the same, it was directed to the pay, half-pay, salary, etc., of persons in the service of the state; and it may well be that the subject-matters with which s. 134 dealt were subject-matters which by common law were not assignable. In 1869 the bankruptcy legislation was further amended and consolidated by the Bankruptcy Act, 1869, and there was then added to s. 89 of the Act of 1869, which was the successor of s. 134 of the Act of 1861, what is the ancestor of s. 51 (2) of the Act of 1914, namely, s. 90, providing for the case where the bankrupt is in receipt of " a salary or income other than as aforesaid ", the language corresponding in other respects with that in s. 51 (2) of the Act of 1914. But I note that in s. 90 of the Act of 1869 there is no such catalogue as one now finds in s. 51 (2), that is to say, no reference to items such as half-pay, pension or compensation. The matter stood with the more general language, " salary or income other than as aforesaid ". In the Bankruptcy Act, 1883, one finds in s. 53 (1) and s. 53 (2) language substantially corresponding to that in s. 51 (1) and s. 51 (2) of the Act of 1914.

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(1) [1916] 1 A.C. at p. 461.

(2) [1916] 1 A.C. at p. 436.

That is a brief sketch of the legislation, and I only add that the present sections of the Bankruptcy Act relative to property vesting in the trustee, and so on, are in the widest possible terms, as were the corresponding terms in the earlier legislation; and it has been inherent in the argument of counsel for the bankrupt (and accepted by counsel for the trustee) that s. 90 of the Act of 1869 is not to be limited to cases in which the subject-matter—the salary or income—is a subject-matter not so vesting in the trustee. Looking back over the history of the decided cases, it seems to me that there has been some confusion on this head. In *Re Landau, Ex p. Trustee* (3), which is of some importance, this court appears to have assumed that the subject-matter there before the court, namely, a maintenance award under an order of the Divorce Court, was not a subject-matter vesting in the trustee. It may be that (as a matter of historical interest) the special provision which I mentioned in s. 134 of the Act of 1861 was intended to be, and was effectively, limited to the sort of subject-matter which, by common law, is inalienable. The addition in s. 90 of the Act of 1869 of the words " salary or income other than as aforesaid " clearly, I think, introduced, by way of complement to what had gone before, a subject-matter which was unlike the preceding subject-matter in the sense that it covered subject-matter which would be alienable, and, therefore, prima facie would vest in the trustee. I do not pursue that aspect of the matter, but I mention it because it may well be that the confusion, if such it be, which has arisen in this matter may, in part, arise from the consideration whether s. 51 (2) of the Act of 1914 and its predecessors were, or were not, originally intended to deal with something which, apart from the impact of that subsection, or section, would not have vested in the trustee at all. I say, however, no more about the legislation. My reference to it, I hope, justifies what I have said, namely, that the conclusion which I reach in this case appears to me plainly in accord with the intention of Parliament so far as it can be derived from a consideration of the legislation during the past century.

I must, however, now come to justify what I have described as the premise of my conclusion, namely, the view which I have taken of the meaning of the word

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(3) [1934] All E.R. Rep. 130; [1934] Ch. 549.

"income" as we find it in s. 51 (2) of the Act of 1914. But, before I do so, I would add that a conclusion different from that which I have reached would produce anomalies which might fairly be described as extravagant. There can be no doubt that, if one who owns income-producing property in the form of shares, real property, etc., went bankrupt, the trustee would be entitled and bound to realise the assets for the benefit of the creditors, and thereby, of course, to take from the bankrupt, not only his right to the corpus, but also his enjoyment of the income. It would seem strange that there should be so marked a distinction, from the point of view of the interest of creditors, between the case where a man owns the income-producing asset and the case where, though he does not own that asset, he is entitled to a life interest therein. What, on this view, would be the situation if a man owned the asset subject to the possibility of it being divested, I know not.

Counsel for the trustee referred in the course of his argument to *Re Forder, Forder* v. *Forder* (4), which was mentioned in the judgment of RUSSELL, J. I do not derive great assistance from consideration of that case; but this can, I think, be asserted. If the argument for the bankrupt is correct, then it would appear inevitably to follow that, on the bankruptcy of one who had an interest in property liable to forfeiture, the result would be likely to be quite different if, on the one hand, the trusts were expressed by reference derived from s. 33 of the Trustee Act, 1925 (i.e., if the will or settlement provided that the beneficiary should enjoy the income on "protective trusts") and, on the other, where the beneficiary took under a will or settlement which set out at length the conditions on which a forfeiture should arise, in language such as was in fact employed in *Re Forder* (4). Again, I need not pursue this point, but it would seem a strange result that there would be liable to be such fine distinctions producing such great differences.

I must now turn to the cases. Very properly, counsel for the bankrupt, in opening, referred to the considerable line of authorities which touches on this matter, and I shall refer, not to all, but to some of them. The proper starting point inevitably is *Ex p. Huggins, Re Huggins* (5), which was decided by this court in 1882, the relevant Bankruptcy Act, therefore, being that of 1869. It will be recalled from my earlier references that s. 90 of that Act was the counterpart of s. 51 (2) of the Act of 1914, but it did not contain the references to pension and the like found in the present subsection. Mr. Huggins had been chief justice of the colony of Sierra Leone from which office he had retired on receiving a pension from or through the Colonial Office. He had then proceeded to engage in a bottle-washing business which, as a commercial venture, was disastrous, and the question was whether the pension which he was receiving (and I emphasise that the word "pension" did not then appear in s. 90 of the Act of 1869) was one to which the trustee in bankruptcy could resort to any extent for the purpose of payment of creditors. The argument on the bankrupt's behalf was that the pension was not assignable and, therefore, was outside the scope of bankruptcy altogether. SIR GEORGE JESSEL, M.R., expressed some sympathy with the unfortunate ex-chief justice, who had not chosen, like the cobbler, to stick to his last; but he arrived at the conclusion that the pension vested in the trustee, and that none the less it was within the ordinary sense of the formula "salary or income" in s. 90 of the Act of 1869. He used this language (6):

> "The present appellant's income is not a 'salary', but it is 'income'. The word 'income' is as large a word as can be used. It is not the less 'income', because it has to be voted every year by the colonial legislature."

The second member of the court was LINDLEY, L.J., and he said this (7):

> "Is this bankrupt 'in the receipt of a salary or income other than as

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(4) [1927] All E.R. Rep. 324; [1927] 2 Ch. 291.

(5) (1882), 21 Ch.D. 85.

(6) (1882), 21 Ch.D. at p. 92.

(7) (1882), 21 Ch.D. at p. 93.

A aforesaid ?' His pension is not a 'salary', inasmuch as he is not bound to render any services in respect of it. But why is it not 'income'? Surely it is income in every sense of the word."

The learned lord justice proceeded to point out that it was not a mere voluntary allowance.

B That decision in 1882 on its face, and in the light of the short citations which I have made from the judgments, might quite fairly lead to the view that "income" meant income; that it was, as SIR GEORGE JESSEL, M.R., said, as large a word as could be used, with the result that "income" would include income of every kind, and, therefore, would cover, inter alia, the income with which the court is concerned in the present case. That it does not have so wide an effect became apparent two years later in 1884; C but, before I refer to the case in 1884 I shall go straight to *Re Landau* (8), another decision of this court rather more than fifty years later. It will have to be borne in mind that for the moment I have passed over the intervening cases which follow very closely *Ex p. Huggins* (9), but the full significance which the passages which I have read from *Ex p. Huggins* (9) might have was, I think, first brought into play in *Re Landau* (8).

D *Re Landau* (8) was a case in which a lady had divorced her husband and had obtained from the Divorce Court an order (albeit by consent) for the payment of £1,800 per annum, tax free, by way of maintenance. She had then gone bankrupt. It was her contention—which had succeeded before the registrar in bankruptcy—that this maintenance was not available at all to the trustee in bankruptcy. Against that ruling the trustee in bankruptcy appealed. There is no note in the report of the arguments of counsel, but it seems to me quite plain E from the judgments (and I hope I have not misapprehended them) that the court reached its conclusion on the assumed basis that the subject-matter of this order of the Divorce Court was unassignable and did not, therefore, vest in the trustee in bankruptcy. LORD HANWORTH, M.R., referred to *Ex p. Huggins* (9) and particularly to the observations of SIR GEORGE JESSEL, M.R. (10). All the members of the court came to the conclusion that, although the maintenance F income was not vested in the trustee in bankruptcy, nevertheless the trustee was entitled under s. 51 (2) of the Act of 1914 to apply for an order that part of it should be available to him for the discharge of the bankrupt's debts. SLESSER, L.J., also referred to *Ex p. Huggins* (9) and, in particular, to what LINDLEY, L.J., had said. ROMER, L.J., having affirmed the view previously taken by FARWELL, J. (11) that s. 51 applied whether the property was or was not vested in the G trustee, then proceeded to consider the argument which had been put forward by counsel for the bankrupt that this payment was not income. Referring to what LORD ESHER, M.R., had said in *Ex p. Benwell* (12), to which I have obliquely alluded as having followed *Ex p. Huggins* (13) by two years, ROMER, L.J., said (14):

> H "It is true that LORD ESHER in *Ex p. Benwell* (12) said that income in s. 90 of the Bankruptcy Act, 1869, which corresponded to s. 51 (2) of the Act of 1914, was income ejusdem generis with salary; but, with all respect to that learned judge, I do not think such a statement assists us very much unless it goes on to tell us to what genus the salary payment belongs. LORD ESHER did not go as far, but in the same case COTTON, L.J., did, and I in the passage read by the Master of the Rolls said (15): 'In my opinion s. 90 points to some definite annual amount which is coming to the bankrupt'.

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(8) [1934] All E.R. Rep. 130; [1934] Ch. 549. (9) (1882), 21 Ch.D. 85.
(10) (1882), 21 Ch.D. at p. 92.
(11) In *Re Garrett, Official Receiver & Trustee* v. *The Bankrupt*, [1930] All E.R. Rep. 139; [1930] 2 Ch. 137.
(12) (1884), 14 Q.B.D. 301. At the time of the decision in *Ex p. Benwell*, LORD ESHER was SIR BALIOL BRETT, M.R.
(13) (1882), 21 Ch.D. 85. (14) [1934] All E.R. Rep. at p. 136; [1934] Ch. at p. 560.
(15) (1884), 14 Q.B.D. at p. 308.

> The £1,800 a year free of tax without any question whatsoever is a definite annual amount coming to the bankrupt in the present case."

Adverting to what he had said a little earlier, ROMER, L.J., went on to say that the sum was income within the meaning of s. 51 (2).

The decision in that case has stood now for a quarter of a century. I am fully alive to the fact that it must bind this court, and, indeed, in the last of the cases to which I desire to refer, *Re Tennant's Application* (16), this court held itself so bound. Both UPJOHN, J., at first instance (17) and this court shared the view that, if the matter were res integra, that case might well have been properly decided in the opposite way from the way in which it was in fact decided; but UPJOHN, J., and this court felt themselves bound by the decision in *Re Landau* (18) and found it impossible to draw any sensible distinction between *Tennant's* case (19) and *Landau's* case (18).

In *Tennant's* case (19) the bankrupt was again a lady who had divorced her husband, the only difference between that case and *Re Landau* (18) being that there had not been an order of the Divorce Court in regard to maintenance, the husband having by covenant agreed to pay an appropriate sum for maintenance. To have distinguished the two cases would have involved saying that there was some distinction between the income derived by an ex-wife under a deed of covenant and the income derived under a Divorce Court order made by consent. I observe, however, that, in delivering the leading judgment in that case, I said (20):

> "I desire to emphasise that I am confining my decision in this appeal to the facts of this case and the questions raised in this case. It was said by counsel for the trustee that, if UPJOHN, J., was right, then the same result would follow in the case, for example, of a person who is absolutely entitled to income as life tenant under a settlement of some fund or to an annuity under a testator's will. Those cases are not before us, and I express no view on them. Incomes of those kinds may or may not be within s. 51 (2) . . ."

That case is now before us, and, as I have indicated, I think that the income with which we are now concerned is in quality different from the income which the bankrupts in *Re Landau* (21) and in *Re Tennant's Application* (22) were receiving. The latter was income of a special kind; it was by way of maintenance following the dissolution of a marriage. It follows from what I am saying that such maintenance can fairly, as a matter of language, be treated as having at any rate some of the essential characteristics of a salary, but that the income with which we are now concerned cannot. The distinction may be thought to be fine, but it appears to me, from the cases to which I am now coming, that the line has to be drawn somewhere; and I prefer not to attempt any further definition, but to repeat that, if *Re Tennant's Application* (22) and *Re Landau* (21) are on one side of the line, then, in my view, without any doubt this case is on the other. I have already said (23) that I will avoid any attempt at equitation on the unruly horse of public policy; but there is at any rate something to be said on the line of public policy for dealing differently with a maintenance award or maintenance income, of the kind involved in those two cases, and the kind of income in the present case. I make just one point here which appears from *Tennant's* case (22). If the sum payable as maintenance in that case was to be treated as being outside s. 51 (2) on the ground that the trustee could proceed to dispose of the covenanted income for the whole of the bankrupt's life, or whatever period might be appropriate, then, of course, there would appear to have been nothing to prevent the bankrupt making an application in the Divorce Court for some further maintenance, and so presumably, it would go on indefinitely. No considerations of that kind enter into the present case.

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(16) [1956] 2 All E.R. 753.
(17) [1956] 1 All E.R. 425.
(18) [1934] All E.R. Rep. 130; [1934] Ch. 549.
(19) [1956] 1 All E.R. 425; *affd.* C.A., [1956] 2 All E.R. 753.
(20) [1956] 2 All E.R. at p. 759.
(21) [1934] All E.R. Rep. 130; [1934] Ch. 549.
(22) [1956] 2 All E.R. 753.
(23) See p. 648, letter H, ante.

It is now time that I retrace my steps to 1884, and refer to *Ex p. Benwell* (24), mentioned by ROMER, L.J., in *Re Landau* (25). That case was decided in 1884 after the passing of the Bankruptcy Act, 1883, but the Act which applied to the facts in that case was still the Act of 1869, the same Act which had been considered in *Ex p. Huggins* (26). In *Ex p. Benwell* (24) the bankrupt's profession was described as that of a " bone-setter "; today he might be called an osteopath. On the facts his income appeared to be somewhat precarious, and its amount very much in dispute. The question was whether what he earned from his professional activities was income within the meaning of s. 90 of the Act of 1869. In so far as he earned it and received it, it would, no doubt, be income in his hands. Any professional man who earns fees pays tax on what he earns on the footing that it is taxable income. This court, however, held that the future fees in question were not " income " within this broad formula by giving to it in its context in the words " income other than as aforesaid " the qualification which I have already mentioned, that is, by limiting the word in s. 90 to income in the nature of salary. That is made quite clear by BRETT, M.R., who had succeeded SIR GEORGE JESSEL as Master of the Rolls. He said (27):

> " What is the meaning of the word ' salary ' in the section? It must be a salary of the same kind as those things which have been already mentioned [a reference to s. 89], though it is not paid in respect of similar services. Then there is the general word ' income '. The rule is that general words added to particular words do not include everything which would come within them according to the literal meaning of the English language, but are to be limited to things ejusdem generis with those things which have been previously mentioned. ' Income ', therefore, must mean ' income ' in the nature of a ' salary '."

COTTON, L.J., similarly so limited it. He said (28):

> " In the cases provided for by s. 88 [the section then relating to beneficed clergymen and now replaced by s. 50 of the Act of 1914] the bankrupt has a right, if things go on as they are, to receive a specific sum every year, and then a part of that sum can be set aside and paid to the trustee for distribution among the creditors. Is not s. 90 intended to deal with something of the same nature? In my opinion it is. It speaks of an order for the payment to the trustee ' of such salary or income, or any part thereof '. In my opinion the court cannot under s. 90 deal with the capacity which a man has to earn money by the exercise of his personal skill . . . In my opinion s. 90 points to some definite annual amount which is coming to the bankrupt, and in such a case a part of it can be set aside for the benefit of his creditors."

The third member of the court was LINDLEY, L.J., who had participated in the decision in *Ex p. Huggins* (26) and from whose judgment in that case I have already cited. It may be that his language, apparently broad in *Ex p. Huggins* (26), was not then intended to be as wide as a first reading might suggest, because in *Ex p. Benwell* (29) what LINDLEY, L.J., said was this:

> " The question is whether the professional earnings of the present bankrupt are an ' income ' of such a nature as is pointed at by s. 90, and, for the reasons which have been already given, I think that they are not."

The next case is *Re Shine, Ex p. Shine* (30), which came before this court in 1892. Mr. Shine was an actor, and the question arose in that case because he had a contract with a manager whereby, in return for his undertaking to act at a particular theatre or theatres for a term of two years, he should receive a salary of £30 a week. His affairs having got involved, and a receiving order having been made against him, he then made an arrangement with the manager that the manager should retain £20 out of the £30, and apply that amount towards payment of his debts. Unfortunately all his creditors would not agree with this course, and so the question arose what the rights of the trustee were in relation to this £30 a week. It was held by this court that the payment was " salary or income " within what was then s. 53 (2) of the Act of 1883, but that, none the less, the arrangement which had been made with the manager was valid. I need not take time to deal with the second point save to point out that, if the rights and powers of the trustee were limited to the powers under s. 53 of 1883, then the bankrupt presumably could deal with the income as he had done until the powers were exercised. But the argument also was that this weekly payment received by the actor was neither " salary " nor " income " within the meaning of s. 53 (2) of the Act of 1883. I note in passing that s. 53 (2) of the Act of 1883, like s. 51 (2) of the Act of 1914, but unlike s. 90 of the Act of 1869, referred also to " half-pay ", " pension ", etc., in addition to " salary or income ". In other words, there is now more of a catalogue in the subsection than there had been in the Act of 1869.

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(24) (1884), 14 Q.B.D. 301.
(25) [1934] All E.R. Rep. 130; [1934] Ch. 549.
(26) (1882), 21 Ch.D. 85.
(27) (1884), 14 Q.B.D. at p. 307.
(28) (1884), 14 Q.B.D. at p. 308.
(29) (1884), 14 Q.B.D. at p. 309.
(30) [1892] 1 Q.B. 522.

Lord Esher, M.R., referred to *Ex p. Benwell* (31) and said (32):

> " We have held that the word ' income ', as used in this section, does not mean all income, or all that property of a man which is generally called his income; for, in most cases, income of that kind would vest in the trustee on his bankruptcy, and thus go to the creditors. But the Act assumes that there is some income of a bankrupt which is not part of his property so as to vest in the trustee in his bankruptcy. It follows, to my mind, that the income to which s. 53 refers must be income in the nature of a salary."

To the same effect was the language of Bowen, L.J. (33):

> " It was said by this court in *Ex p. Benwell* (31), that the word ' income ' in s. 53 (2) must be construed by the light of the word ' salary '—that it is ejusdem generis with it. What is meant by ejusdem generis? Not that ' income ' is identical with ' salary ', but that there is a genus under which, in common with ' salary ', it might be classified. In other words, it possesses some of the same qualities which ' salary ' does ".

Fry, L.J., was of the same opinion and opened his judgment with these words (34):

> " With regard to the question whether this payment is ' salary or income ' within the meaning of s. 53, I am of opinion that it is ' salary ', and, if it is not, it is clearly ' income ' in the nature of salary ".

What I have read from Lord Esher's judgment indicates that the court was apparently proceeding on the view—as I venture to think, a view which may have led to some confusion—that what the actor was receiving was something which did not vest in the trustee, and that s. 53 of the Act of 1883 was limited to that class of case—the same confusion which (if I may so put it) appeared in *Re Landau* (35). But I do not think that that element can in any way disable the clear statement in *Re Shine* (32), following *Ex p. Benwell* (31), that the income, in Lord Esher's language, " does not mean all income, or all that property of a man which is generally called his income ", but is limited to income of the genus which Bowen, L.J., defined (33) as having some, at any rate, " of the same qualities " as a salary.

Those cases have stood unchallenged ever since they were decided. There is one other, *Hollinshead* v. *Hazleton* (36), the only case in which this matter has come before the House of Lords. That case concerned a member of the House of

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(31) (1884), 14 Q.B.D. 301.

(32) [1892] 1 Q.B. at p. 527.

(33) [1892] 1 Q.B. at p. 529.

(34) [1892] 1 Q.B. at p. 531.

(35) [1934] All E.R. Rep. 130; [1934] Ch. 549.

(36) [1916] 1 A.C. 428.

Commons representing a constituency in Ireland; and it may well be that only a case from Ireland could find its way to the House of Lords on this subject. This gentleman had become bankrupt, and the question arose as to the availability for his creditors of his remuneration of £400 a year as a member of Parliament. It therefore became necessary for the House to say whether that £400 a year was salary or income within s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, which was practically identical with s. 51 (2) of the Act of 1914. Various other points were raised and dealt with at some length, including questions of public policy; but it is, I think, quite plain that LORD ATKINSON approved the limitation which had been put on the word " income " in *Re Shine* (37). After referring to four possible purposes of the payment of the remuneration of £400 annuity to members of Parliament as such, LORD ATKINSON said (38):

> " If the first, I should be inclined to hold that the sum paid was a salary. If any one of the other three [i.e., the second, third and fourth possible purposes, as a matter of public policy, to be served by paying this remuneration] I should be inclined to hold it was ' income ' in the nature of a salary, but I think, as the judges thought in *Shine's* case (37), it must be either the one or the other."

We have been through all the speeches in *Hollinshead* v. *Hazleton* (39), and I do not think that it will assist if I make further citation from them. I find in none of them anything which qualified the conclusion laid down in *Ex p. Benwell* (40) and *Re Shine* (37). Indeed, the passage which I have read from LORD ATKINSON'S speech seems to me to approve it. As I pointed out in my judgment in *Re Tennant's Application* (41), if certain language of LORD PARKER OF WADDINGTON (42) had been accepted as defining the scope of what is now s. 51 (2) of the Act of 1914, it might have very much assisted the result in this and other cases—the suggestion being that the scope of s. 51 (2) should be confined in all cases to salaries or other income which was by its nature at common law inalienable. But, as I observed, that suggestion was not necessary in the decision in *Hollinshead* v. *Hazleton* (39) and was not reflected in anything said by the other noble Lords.

The citations which I have made, as I think, justify the conclusion that the word " income " in this subsection is limited, and is limited in the way that I have already more than once defined. If that is so, then, as I said at the beginning of my judgment, the result adverse to the bankrupt seems to me inevitably to follow, and I repeat also that that result appears to me to be in accordance with common sense, and what I believe to be the intention underlying this legislation. I think that the general effect is not entirely satisfactory. The intrusion of *Landau's* case (43), and what followed it, has perhaps added some confusion to this branch of the law; and it may be that it is a matter which on some future occasion Parliament will reconsider. It seems unlikely that the matter can again come before the House of Lords, except possibly from Northern Ireland; but, if in any circumstances it did, I hope that the House would consider carefully the reasoning in *Re Landau* (43) and its correctness, and also the correctness of the decision in *Tennant's* case (44), which this court felt itself bound to decide as it did (as did UPJOHN, J. (45)), because of the decision in *Re Landau* (43). Without saying more, in the present case I emerge from the jungle on the side of counsel for the trustee, and, therefore, would dismiss the appeal.

UPJOHN, L.J.: I agree, and I desire to add only a very few words. LORD EVERSHED, M.R., has reviewed the authorities, and has shown clearly the conflicting views which have been taken in this court as to the precise ambit of the word " income " used in s. 51 (2) of the Bankruptcy Act, 1914. No doubt, " income " shorn of all context is as wide a word as one could desire to use; and, broadly speaking, that seems to have been the construction adopted in *Ex p. Huggins* (46) and *Re Landau* (47); but, as my Lord has pointed out, in the intermediate cases of *Ex p. Benwell, Re Hutton* (48) and *Re Shine, Ex p. Shine* (49), a much more limited view of the ambit of the word " income " has been adopted in this court. In those circumstances a critical appreciation of the actual section itself cannot be out of place. I desire to draw attention only to the fact that the section is in that part of the Bankruptcy Act, 1914, which is dealing with the realisation of property (50). It follows s. 50. Section 50 is dealing with the sequestration of the profits of a benefice on bankruptcy, and it provides that the bishop may nevertheless appoint to the bankrupt a stipend for carrying out his duties. It is then, I think, material to read the marginal note to s. 51, although I appreciate that it cannot control the language used in the section itself. The note is in these terms: " Appropriation of portion of pay or salary to creditors ". Section 51 (2) then starts in this way: " Where a bankrupt is in receipt of a salary or income other than as aforesaid ", that is, other than pay or salary of those in the service of the Crown which is dealt with by sub-s. (1). I should have thought that in that context the word " income " would plainly have a somewhat limited meaning; and that the draftsman of the Act was not dealing with income generally, such as income arising under a settlement. But if there were any doubts at that stage, it would seem to me that they are removed by the additional description as to the ambit of the subsection indicated by the words immediately following:

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(37) [1892] 1 Q.B. 522. (38) [1916] 1 A.C. at p. 449. (39) [1916] 1 A.C. 428.
(40) (1884), 14 Q.B.D. 301. (41) [1956] 2 All E.R. at p. 758.
(42) [1916] 1 A.C. at p. 458. (43) [1934] All E.R. Rep. 130; [1934] Ch. 549.
(44) [1956] 2 All E.R. 753. (45) [1956] 1 All E.R. 425.

> " or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury . . ."

That appears to me to indicate quite clearly that there is some limit to be put on the word " income " where it occurs in the subsection. Of course, I appreciate that the " compensation granted by the Treasury " may be income or capital, but I do not think that that affects the present matter. The matter is then summarised at the end of the subsection by a comprehensive description of the matters on which the court is empowered to

> " make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation . . ."

I cannot think for one moment that, in using that description, and in sandwiching the word " income " in between " salary " and " half-pay ", the draftsman of the Act intended the word " income " to have the wide ambit which counsel for the bankrupt has tried to persuade us that it bears; and I agree with my Lord in thinking that the proper limit is to describe it as income in the nature of salary, but without attempting any further definition. I share my Lord's doubts whether *Re Landau* (47) was correctly decided, though, of course, it and *Re Tennant's Application* (51) bind this court in cases to which they are properly applicable. Like him, I hope that it may be possible (although it would seem unlikely) that the matter may be reviewed in a higher court. I agree that this appeal should be dismissed.

PEARSON, L.J.: I agree with both the judgments which have been delivered, and I have nothing to add to them.

Appeal dismissed.

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(46) (1882), 21 Ch.D. 85.
(47) [1934] All E.R. Rep. 130; [1934] Ch. 549.
(48) (1884), 14 Q.B.D. 301.
(49) [1892] 1 Q.B. 522.
(50) " Realisation of Property " is one of the sub-headings to Part 2 of the Act, and the sections under the sub-heading are s. 48 to s. 61 inclusive.
(51) [1956] 2 All E.R. 753.

[An application was then made by counsel for the trustee in bankruptcy that a sum of £20, which had been paid into court on behalf of the appellant (the bankrupt) as a security for costs of the appeal, should be paid out to the trustee.

Muir Hunter: The bankrupt is an assisted person and his contribution to the legal aid fund is nil. There is no provision in regard to the legal aid fund that covers the matter of giving security for costs. Application to dispense with security for costs of the appeal was made to the Divisional Court on the occasion of the appeal to that court. The application was refused. The bankrupt's solicitor provided the money for the payment into court out of his own pocket. On the conclusion of the appeal to the Divisional Court an order was made for the payment out of the £20 to the bankrupt's solicitor. Application to dispense with security for costs of the appeal to the Court of Appeal was subsequently made and dismissed; and, in dismissing the application, as I am instructed, the court (LORD EVERSHED, M.R., PEARCE and HARMAN, L.JJ.) indicated that the same attitude might be adopted in regard to the £20 security as had been adopted by the Divisional Court. The legal aid fund does not recognise obligation to reimburse the sum deposited as security for costs of an appeal. In fact the legal aid committee gave a civil aid certificate for the purposes of applying to the Court of Appeal to dispense with security, intimating that they would not provide the security.

D. S. Forrester-Paton: I do not wish to challenge the propriety of the appeal, but I should say that this case has involved the trustee in bankruptcy in considerable costs. I appreciate that it seems hard that the solicitor cannot get the amount of the deposit from the legal aid fund but, if I may say so, he took the chance.

UPJOHN, L.J.: In an ordinary case I should be entirely against ordering any repayment even if made by a solicitor, but this is a very exceptional case. No doubt the appellant, fortified by certain decisions of the court, thought that perhaps the law was not quite what we have held it to be and came to this court with that in mind in what is, from some points of view, a difficult case.

PEARSON, L.J.: If there is a case which ought to be argued, but cannot be brought to appeal unless the solicitor for the appellant deposits £20, it seems a little hard that the solicitor has to forfeit his £20 because, after much argument and consideration of authorities on which possibly previous decisions of this court were in some respects open to question, the decision is against his client.

LORD EVERSHED, M.R.: One comment on the matter is that it might be thought that the legal aid fund in a case of this sort ought to find the deposit. There is a matter of principle involved here. This is, however, rather an exceptional case. We will direct that half of the £20 be paid back to the appellant's solicitor and that half be paid to the trustee in bankruptcy. I am sorry that the solicitor should be out of pocket £10 but we relieve him of the risk, which perhaps he may be said to have taken, to the extent of fifty per cent.]

Solicitors: *E. B. V. Christian & Co.*, agents for *Joseph Lester & Co.*, Leeds (for the bankrupt); *Paisner & Co.*, agents for *J. S. & P. Walsh*, Leeds (for the trustee in bankruptcy).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

IMPERIAL CHEMICAL INDUSTRIES, LTD. v. CARO (INSPECTOR OF TAXES). A

[Court of Appeal (Lord Evershed, M.R., Upjohn and Donovan, L.JJ.), November 30, December 1, 1960.]

Income Tax—Double taxation—Relief—Company acquiring foreign shares—Shares constituting new source or addition to source of income—Case V assessment of dividends—Based on initial year's income in that and ensuing year—Claim for allowance of foreign tax in initial year against both assessments—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 347, *Sch.* 16, *para.* 13—*Double Taxation Relief* (*Taxes on Income*) (*Australia*) *Order*, 1947 (*S.R. & O.* 1947 *No.* 806), *Schedule, art.* XII, *para.* 1. B

The taxpayer company owned shares in an Australian company and in 1952 it subscribed for 1,805,468 more ordinary £A1 shares, which constituted either a new source or an addition to an existing source of income within the meaning of the Income Tax Act, 1952, s. 134. It first received dividends on the newly acquired shares in 1953-54. For each of the second and third years of assessment, 1954-55 and 1955-56, the taxpayer company was assessed to United Kingdom income tax on the basis of the dividends actually received in 1954-55. Australian tax borne by the Australian company in respect of the year 1954-55 and ranking for credit against United Kingdom income tax amounted to £49,212. Article XII* of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, provided that Australian tax in respect of income derived from sources in Australia should be allowed as a credit against "any United Kingdom tax payable in respect of *that income*". The taxpayer company claimed that the amount of £49,212, Australian tax, should be allowed as a credit twice, viz., once in respect of 1954-55 and again in respect of 1955-56. It was assumed for the purposes of this case that the words "that income" in art. XII meant actual income of the Australian company in Australia and not income of a year of assessment computed on English income tax principles. C D E F

Held: under the terms of art XII, the Australian tax should be allowed once only for the two years 1954-55 and 1955-56, and, in so far as it exceeded the tax otherwise chargeable for 1954-55, was allowable against tax chargeable for 1955-56 in respect of the dividends received in 1954-55.

Decision of Wynn-Parry, J. ([1959] 3 All E.R. 750) affirmed.

[As to double taxation relief, see 20 Halsbury's Laws (3rd Edn.) 456-458, paras. 857-859; and for cases on the subject, see 28 Digest (Repl.) 305-308, *1335-1350*. G

For the Income Tax Act, 1952, s. 347 and Sch. 16, para. 13, see 31 Halsbury's Statutes (2nd Edn.) 333, 542.

For a summary of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Schedule, art. XII (1), see 11 Halsbury's Statutory Instruments 104, 105.] H

Case referred to:

Barron v. *Littman*, [1952] 2 All E.R. 548; [1953] A.C. 96; 33 Tax Cas. 373, 398; *affg.*, [1951] 2 All E.R. 393; [1951] Ch. 993; 28 Digest (Repl.) 220, *947*. I

Appeal.

The taxpayer company appealed to the Special Commissioners of Income Tax against an objection to its claim for an allowance by way of credit against income tax for the years of assessment 1954-55 and 1955-56 for foreign tax under the Income Tax Act, 1952, Sch. 16, para. 13, in respect of income from dividends received from an Australian company. The company, a United

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* The relevant terms of art. XII are printed at p. 663, letter H, post.

Kingdom public company, had shares in overseas companies, including Imperial Chemical Industries of Australia and New Zealand, Ltd., which was incorporated and controlled in Australia. It received dividends from the Australian company which constituted income arising from a possession out of the United Kingdom. The dividends were assessed to United Kingdom income tax under Case V of Sch. D to the Income Tax Act, 1952, s. 123 (1), and also formed part of the profits of the company assessed to the United Kingdom profits tax. They therefore constituted income derived from a source in Australia on which Australian tax was payable, and the Australian tax was allowable as a credit against any United Kingdom tax payable in respect of that income by virtue of the Income Tax Act, 1952, s. 347, Sch. 16, and art. XII (1) of the schedule to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806).

In 1952 the company held 5,158,481 fully paid ordinary shares in the Australian company. In that year it subscribed for a further 1,805,468 ordinary £A1 shares. This new holding constituted either a new source or an addition to a source of income within the meaning of s. 134 of the Income Tax Act, 1952, and dividends on it were first payable in the year ending on Apr. 5, 1954. Under s. 133 (1) (b) of the Income Tax Act, 1952, the Case V assessment in respect of the dividends fell to be computed for 1954-55 on the actual income for that year, and for 1955-56 on the income arising in the year preceding the year of assessment (s. 132 (1)), no notice having been given under s. 133 (1) (c). For each year, therefore, the assessment was computed on the dividends payable in the year ending Apr. 5, 1955.

The dividends paid on the company's new holding in the Australian company during the year ending on Apr. 5, 1955, were £A51,343 (£40,911 sterling), in September, 1954, and £A66,012 (£52,600 sterling) in March, 1955, totalling £A117,355 or £93,511 sterling. Australian tax in respect of which credit could be given under art. XII (1) of the schedule to the order amounted to £64,836, and consisted of £16,307 charged directly on the dividends of £93,511 for the Australian fiscal year to June 30, 1956, and £48,529 not charged directly or by deduction, being the appropriate proportion of Australian tax paid by the Australian company provided for in the Income Tax Act, 1952, Sch. 16, para. 9. The United Kingdom profits tax attributable to these dividends payable in the year ending on Apr. 5, 1955, was £6,835 (£40,911 grossed at 6s. 10d. to £62,143 at eleven per cent.; para. 7 (2) of Sch. 16 to the Act of 1952) for the chargeable accounting period ending Dec. 31, 1954 (the September dividend) and £8,789 (£52,600 grossed at 6s. 10d. to £79,897 at eleven per cent.) for the chargeable accounting periods ending on Oct. 31, 1955 (ten months) and Dec. 31, 1955 (two months) (the March dividend), total £15,624. This was the credit against the profits tax required to be given first under the Income Tax Act, 1952, Sch. 16, para. 2. The sum in respect of the dividends required to be included in the Case V assessment of the taxpayer company was £142,040, comprising £93,511 plus £48,529, the amount of Australian tax not charged directly or by deduction (under the Income Tax Act, 1952, Sch. 16, para. 8 (3) (b)). For the year of assessment 1954-55 United Kingdom income tax at 9s. in the £ on £142,000 amounted to £63,918 and for the year of assessment 1955-56 at 8s. 6d. in the £ it amounted to £60,367. If credit for Australian tax did not fall to be given in one of these two years of assessment, pursuant to the contention of the Crown, the Crown conceded that a deduction of the Australian tax less the amount credited against the profits tax would be allowed from the sum assessed in that year, whether or not it could be claimed as of right.

In a supplemental Case Stated on an order of the High Court made on Dec. 10, 1958, when the case first came before it, it was found that the dividends paid on the new holding during the year ending on Apr. 5, 1956, were £A63,191 (£50,352 sterling) in September, 1955, and £A99,301 (£79,124 sterling) in March, 1956, totalling £A162,492 (£129,476 sterling). The Australian income tax and social services contribution in respect of which credit could be given under art. XII (1) of the schedule to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, amounted to £93,286, comprising £24,837 charged directly on the dividends, and £68,449 not charged directly or by deduction, being the appropriate proportion of the Australian tax paid by the Australian company provided for in the Income Tax Act, 1952, Sch. 16, para. 9. Under s. 17 of the Income Tax and Social Services Contribution Assessment Act, 1936-56, the Australian tax was levied and paid for a financial year beginning on July 1 yearly on the taxable income derived during the year of income by any person whether a resident or a non-resident. In the case of a company such as the taxpayer company which had not adopted an accounting period ending on a date other than June 30, "the year of income" meant the financial year next preceding the year of tax. "The year of tax" meant the financial year for which income tax was levied (s. 6 of the Act).

The Australian tax of £24,837 was levied for the year ending June 30, 1957, on the taxable income of the taxpayer company derived during the year ending June 30, 1956, such taxable income consisting of the dividends of £129,476. The United Kingdom profits tax attributable to these dividends was £8,467 (£76,971 at eleven per cent.) for the chargeable accounting periods ending on Oct. 31, 1955 (ten months), and Dec. 31, 1955 (two months), and £16,329 (£120,954 at 13.5 per cent.) for the chargeable accounting periods ending Mar. 31, 1956 (three months), and Dec. 31, 1956 (nine months), total £24,796.

The taxpayer company claimed credit in respect of the Australian taxes, so far as not allowed against the profits tax, against United Kingdom income tax for both the years of assessment 1954-55 and 1955-56. The Crown objected to this claim but was prepared to allow the balance of credit remaining, after the allowance of credit against the profits tax against United Kingdom income tax for 1954-55 or 1955-56, or for both years up to the limit of £49,212 total, at the option of the company.

The taxpayer company contended as follows: (i) that, income tax being an annual tax, it was proper to consider each of the years of assessment 1954-55 and 1955-56 separately for the purpose of claims under the Income Tax Act, 1952, Sch. 16, para. 13: (ii) that on a proper construction of Sch. 16 and of art. XII (1) of the order, the taxpayer company was entitled to claim in respect of the income tax assessments for each of the years 1954-55 and 1955-56 that a sum of £64,836 Australian tax was payable directly or by deduction or under arrangements to which para. 9 of the Schedule applied, in respect of income derived from sources in Australia and assessed to income tax in each of those years; (iii) that, on a proper construction of these provisions, the taxpayer was entitled to a credit against United Kingdom income tax payable in respect of that income for each of the years 1954-55 and 1955-56; (iv) that the construction of Sch. 16 for which the company contended was consistent with the language of the Schedule and was the only construction which gave relief in respect of foreign tax for each year of assessment during which a foreign source of income was possessed and taxed both in the United Kingdom and in Australia; (v) that a consideration of the scheme of the Schedule showed the intention of the legislature to grant relief for every year of assessment in which income was taxed both in this country and elsewhere; and (vi) that after deducting £15,624 of the £64,836, required to be given against the profits tax under Sch. 16, para. 2, a sum of £49,212 should be allowed as a credit against United Kingdom income tax in each of the years 1954-55 and 1955-56.

The Crown contended: (i) that, on a proper construction of Sch. 16 and of art. XII (1) of the order, the total sum allowable as a credit to the company was £64,836, that being the Australian tax payable whether directly or by deduction or under arrangements to which Sch. 16, para. 9, applied, in respect of the income derived from sources in Australia; (ii) that £15,624 of the sum of £64,836 being first applied in accordance with the provisions of Sch. 16, para. 2, in reducing the profits tax payable, a balance of £49,212 only remained and was applicable to the reduction of any United Kingdom income tax charged in respect of that income; and (iii) that, United Kingdom income tax being chargeable in respect of that income for both the years of assessment 1954-55 and 1955-56, the balance of £49,212 was applicable to the reduction of the income tax so chargeable, i.e., either that for the year of assessment 1954-55 or that for the year of assessment 1955-56 or partly the tax for one year and partly that for the other.

The commissioners rejected the contention of the company, which they held was not reconcilable with the provisions of Sch. 16 and in particular para. 2. As they construed the paragraph, and in particular sub-para. (2), in determining the amount of the credit against United Kingdom income tax, the question was what was the Australian tax payable whether directly or by deduction in respect of the income, i.e., in the particular case the dividends payable to the company on its holding of 1,805,468 ordinary £A1 shares in the year ended Apr. 5, 1955. The answer being by common consent £64,836, that sum was the credit to be applied first in reducing any profits tax chargeable in respect of the income, viz., £15,624, and to the extent that it could not be so applied, viz., £49,212, in reducing the income tax chargeable in respect of the sum. If that were right, £49,212 represented the maximum credit which the company could claim against the United Kingdom income tax assessments, and, as the Crown conceded, as United Kingdom income tax was chargeable in respect of the relevant income from the dividends for both 1954-55 and 1955-56, the company could elect to claim that sum for either of those years or partly for one and partly for the other. The claim of the company for an allowance by way of credit for Australian tax for 1954-55 and 1955-56 was limited to £49,212 after deducting the sum of £15,624 properly given against the profits tax. They dismissed the appeal. The company appealed by way of Case Stated to the High Court. On Nov. 11, 1959, WYNN-PARRY, J., dismissed the appeal ([1959] 3 All E.R. 750). The company appealed to the Court of Appeal.

Heyworth Talbot, Q.C., and *P. Shelbourne* for the taxpayer company.
H. B. Magnus, Q.C., and *A. S. Orr* for the Crown.

LORD EVERSHED, M.R.: As learned counsel on both sides have stated, the point involved in this appeal is a short one and, in the circumstances, having reached a conclusion, we have thought that we could and should properly state it at once. If the decision of WYNN-PARRY, J., is right, as we think it is, the result may involve a certain artificiality in taxing provisions which in this case may also be said to work somewhat harshly on the taxpayers; but the problem for us is to interpret as best we can the taxing provisions relevant to the appeal.

Relief is sought against what is called double taxation in the case of the taxpayers, Imperial Chemical Industries, Ltd., who control, though they do not wholly own, a company with a somewhat similar name operating in Australia. The profits of this Australian company are liable to assessment to Australian income tax, which may take the form both of tax on the trading profits of the company and also of tax at the source on dividends declared and distributed by it. Those two forms of taxation are relevant to the figures that the commissioners have found in the Case Stated. Those figures are not in dispute and they involve the process of what is called grossing-up. As owners of a large number of shares in the Australian company, the taxpayers received dividends during the relevant years and in respect of those dividends there has been Australian tax assessment.

In 1947 an agreement was come to between the government of the United Kingdom and the Australian government (in common with many other similar agreements) designed to give relief to persons or corporations in the United Kingdom and in Australia against having to pay both United Kingdom and Australian taxes in respect of dividends or other income sources. An Order

A in Council contains the agreement in its schedule. So far as the United Kingdom is concerned, the effect of it was made part of the fiscal law of this country by what is now s. 347 of the Income Tax Act, 1952, formerly s. 51 of the Finance (No. 2) Act, 1945. By virtue of that section the provisions of what is now Sch. 16 to the Income Tax Act, 1952, formerly Sch. 9 to the Finance Act, 1947, were made applicable for the purposes of arriving at the tax liability.

B I turn first, however, to the schedule to the Order in Council. As counsel for the taxpayers observed, it is proper to notice the avowed object of that schedule as stated in its heading

> " Agreement between the government of the United Kingdom and the government of the Commonwealth of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income." C

Counsel for the Crown properly fastened an argument on the fact that in the case of the United Kingdom the taxation intended to be covered and, indeed, referred to, is not confined to what we call income tax, but extends also, among others, to what was then called the national defence contribution, now better known as the profits tax.

D The schedule contains sixteen articles. Paragraph (3) of art. II provides:

> " In the application of the provisions of the present agreement by one of the contracting governments any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that contracting government relating to the taxes which are the subject of the present agreement."

E What lies behind my reading of that last paragraph, is that, in the assessment of persons, actual or fictitious, there is in this country a rule of computation well established which is unlike the rule applicable, according to our information, in Australia. For example, for the taxation in this country of dividends under Sch. D, though one is taxed in respect of that income, that source of profit, for a given tax year, say 1959-60, as a general rule the computation is made by F reference to the income received during the preceding year; so that, although for tax purposes a taxpayer's income from this source for the tax year 1959-60 is considered as being £x and he is taxed on that sum, the figure is in fact derived from the receipts had not in that year but in the previous year—subject to certain exceptions.

G In Australia, we were informed—and I do not doubt correctly informed—there is a different rule. The tax year is different, but we were assured as a matter of arithmetic that that makes no matter, for which I am grateful. In Australia it seems that the tax year runs from July 1 to the ensuing June 30. In any year, e.g., the year ending June 30, 1960, a taxpayer will be taxed in respect of the income in fact received in that year, and will be assessed not long after the H close of the year and during the ensuing year beginning July 1, 1960. Thus the rate of tax he will pay on his income for the year up to June 30, 1960, will depend on the rate of tax imposed for the ensuing fiscal year, called the year of tax. The preceding year is called the year of income, and the income in fact received in that year will always provide the sum thereafter to be taxed. In other words, in Australia, unlike England, there is no artificial calculation of I the amount of the income for the year of assessment: the taxpayer is assessed in all cases on the actual income for the year of assessment.

The present case has arisen out of that divergence in administration, if that be the proper way to describe it. The control, perhaps creation—I know not—of the Australian company was so dated that it was for the first time, in the English tax year 1953-54, that certain dividends from the Australian company were received by the parent company. We are concerned with the third year in which such dividends were received. The effect of the English income tax law is that during the first two years during which such a source of income exists (contrary to the general rule) the taxpayer is taxed as he would be in Australia on the actual receipts in respect of that year. It follows, therefore, that during the first two years, 1953-54 and 1954-55, the taxpayer company had to bring in for tax purposes dividends received during those respective years. But for the third year there is a change. When income from this source has been received for three years, the general rule comes into operation, and in the third year—in this case 1955-56—the income from this source which is to be brought into account for income tax purposes is not the actual income received in that fiscal year but is quantified by reference to the income from that source received during the previous year, i.e., in this case 1954-55.

What is at first blush a somewhat surprising result follows from this administrative principle in that for two years running the taxpayer company brings in for income tax purposes in respect of this source of revenue the sum actually received from the Australian subsidiary during the same one year 1954-55. In a sentence, the problem presented by this appeal is this: In respect of the former of the two years, 1954-55 and 1955-56, the credit is indisputably the proper amount of Australian tax paid in respect of that year's actual income. For 1955-56 for English income tax purposes the 1954-55 income figure must again be introduced. Can the Australian tax paid in respect of that income be claimed for a second time as a credit ?

During the period which corresponds to the English income tax year 1954-55 the dividends actually received by the taxpayer company from the Australian company amounted to £A117,355, or £93,511 sterling. The proper amount of Australian tax for that period, i.e., the income tax with which the Australian company was charged, was £64,836. That figure is made up in part of tax on the trading profits of the Australian company, and in part of tax deducted at the source on payment of dividends by the Australian company. The amount of profits tax with which we are concerned is a sum which fell due in respect of the year ended April, 1955, and amounted to £15,624. For United Kingdom income tax purposes for this year 1954-55 the total or " grossed-up " sum, representing the dividends received from the Australian company, is £142,040, made up of the figure of £93,511 plus £48,529, which is that part of the Australian tax (£64,836) not charged directly or by deduction, and on that sum the calculation for English income tax fell to be made.

During the first year, 1954-55, English income tax was rated at 9s. in the £ and the English tax, therefore, on that grossed-up figure of income is £63,918. During 1955-56 the calculation again, for the reasons stated, had to be worked out on the basis of the same £142,040 figure; but since the rate of tax had been reduced by 6d. in the £, it resulted in the smaller figure of £60,367. The question is whether the credit of £64,836, having been invoked in the first year, can be brought in again at its full amount, so far as it goes, in respect of the second year, 1955-56, against the sum of £60,367. I have referred to the figures merely to show their actual effect, and they are not in dispute.

Article XII, para. (1), provides:

> " Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom, [a reference to Sch. 16 to the Income Tax Act, 1952] Australian tax payable, whether directly or by deduction, in respect of income derived from sources in Australia shall be allowed as a credit against any United Kingdom tax payable in respect of that income."

When the matter first came before him, HARMAN, J., raised the question whether, for the purposes of applying these provisions, the figure brought into computation for United Kingdom income tax purposes for 1955-56 should be taken, or whether the income for 1955-56 should be treated as having been the actual income of that year instead of the figure (being the figure for the previous year) on which the charge was calculated: and whether on that alternative the Australian tax in respect of the 1955-56 income should be brought in by way of credit. The learned judge accordingly directed that the matter should be sent back to the Special Commissioners for the necessary further findings of fact in regard to the 1955-56 figures and we have those further findings before us.

If this alternative view were right, then I take it that for present purposes the relevant figure for 1955-56 would depend on the true income of that year. Moreover, if the sum for the previous year is treated as being for English income tax purposes the income of the second year (1955-56), then it might still be argued that the credit would be derived from the tax in fact charged on a different sum, viz., the Australian 1955-56 figure.

I think that counsel for the Crown is entitled to say in a case of this kind, where prima facie there is a clear tax liability on the taxpayer, that if the taxpayer is going to say " I claim relief by virtue of certain statutory provisions or their equivalent " it is for the taxpayer to establish that he is entitled to that relief. In support of that view we were referred to a passage in the judgment of COHEN, L.J., in this court in *Barron* v. *Littman* (1).

Counsel for the taxpayer company, on the instructions of his client—though, as he said, with some personal reluctance—has not desired to argue this case save on the basis of the facts and figures that I have stated: in other words, it is his case that for the year 1955-56 he has been taxed in respect of income of £140,040 and claims to be entitled as a credit to £64,836, being the same figure derived from the same source and by the same computation as was properly used as a credit in respect of the previous year. His argument is that he is entitled to do this, i.e., to use the same credit twice, for two successive years.

I am in agreement on this argument with the learned judge. Having regard to the instructions which counsel for the taxpayer company has received, I express no view on what might be the effect of an argument based on a different premise: that case has not been put and I conceive that it is not our duty, even if we had a view about it, contrary to the submissions of counsel to try to state what the result might be on a different basis. I therefore say no more about it.

In construing the terms of art. XII, I do not forget that the earlier article lays it down that, unless the context otherwise requires, the words used must be given the meaning in the United Kingdom which the fiscal statutes attach to them. None the less, I have felt compelled by the language to come to the same conclusion as that which commended itself to WYNN-PARRY, J. Let me read again the relevant words:

> " Australian tax payable . . . in respect of income derived from sources in Australia shall be allowed as a credit against any United Kingdom tax payable in respect of that income."

As a matter of English, it appears to me to be an inevitable, an inescapable, conclusion, that the taxpayer is told that, from *any* United Kingdom tax which he may be called on to pay in respect of any particular item of income (i.e., in this case, income derived from sources in Australia) on which income Australian tax has been paid, he may deduct such Australian tax.

The United Kingdom tax payable in respect of the income derived from the Australian source in 1954-55 has consisted of three items of tax, viz., profits tax £15,624 and two sums of English income tax, £63,918 and £60,367. The total of those figures is just under £140,000, and what the article directs by its language is to allow as a credit against that sum the Australian tax which was payable in respect of that same source of income.

To avoid that conclusion, it seems to me that some language would have to be interpolated into the article. It would be necessary either to say that any income tax payable in respect of that income means every assessment of income tax that falls to be made in respect of it; which is not what the words say; or to read the words " any United Kingdom tax " as though they said " any annual assessment of United Kingdom tax ". Counsel for the taxpayer company has preferred the latter alternative. If he adopts the former, he is faced with this difficulty and he naturally shrinks from the result. Suppose that in 1954-55, after assessment and payment of the income tax under the ordinary Finance Act of that year, there had been a supplementary budget which involved an obligation to pay any additional impost in respect of the 1954-55 income, he would then be entitled to bring in this credit again against that supplementary budget. He does not seek to do that, and he therefore says that this language in the article should be treated as though it was a reference to each annual assessment, so that every time there is an annual assessment the Australian tax in respect of the income subject to the assessment may be brought into credit, even though that sum of tax has already been brought in against a previous year's assessment.

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(1) [1951] 2 All E.R. at p. 398; 33 Tax Cas. at p. 386.

In my judgment, the language is too plain to admit of that result. To my mind, the strongest argument that the taxpayer company raised is derived from para. 5 of Sch. 16 to the Act of 1952. This Schedule is in terms expressed to contain provisions for relief not only from income tax but also from profits tax. That introduction, supported as it is by the definition of " income " in the first paragraph, leads to this difficulty if one departs from the ordinary meaning of art. XII. As regards profits tax, there is no artificial looking back for the purpose of arriving at the taxable income. The credit which art. XII allows is a credit not only against income tax but against all United Kingdom tax including profits tax. As I think, it would lead to great difficulties if, for the purposes of applying that credit, different income figures, different years of assessments, are to be looked at for profits tax and for income tax. In other words, I think that the comprehension of both types of tax in Sch. 16 to the Act and in art. XII of this order lends appreciable support to the view of construction for which the Crown contends and which, to my mind, reflects the natural meaning of the language of the article. The relevant terms of para. 5 (1) of Sch. 16 are these:

> " The amount of the credit to be allowed against income tax in respect of any income for foreign tax shall not exceed the sum which would be produced by computing the amount of that income in accordance with this Act, and then charging it to income tax for the year of assessment for which the credit is to be allowed, but at the following rate . . ."

The purpose of that paragraph is to state the maximum figure for which credit may be taken; and that figure may vary from year to year, by reason of a change in the rate of tax. As I have said, that happened in the present case.

However, counsel for the taxpayer company emphasised the point that the paragraph appears to contemplate making a calculation for the purpose of getting at the limit of the credit, as it were, according to the income for each year of assessment; i.e., by taking as the relevant income figure each year the sum arrived at for assessment purposes for that year and then seeing how far the credit will go, based on the computation of the relevant income for the same year. " You can only make that fit in (says counsel) if you are entitled to look at each year and make a fresh start, quite independently of any previous year. If that is right, then I am entitled to bring in a proper sum of credit for each year and I am not in the least concerned whether I have done the same thing or a similar thing in regard to the same figures for the previous year."

I see the force of the argument, but I do not think it sufficient to prevail against what I regard as the ordinary sense of art. XII. After all, what this para. 5 in Sch. 16 is concerned with is not a calculation of the credit or a statement of the circumstances in which it is allowed to be brought in. It is concerned only to say that, if the taxpayer is entitled to the credit, then the amount he can bring in by way of credit in any year is not to exceed the sum reached in the way indicated in the paragraph. In my judgment, it is therefore consistent with the view that, if a particular credit has already been exhausted in one year and is therefore not available for the next year, this provision of art. XII will not have effect in respect of the second year. I get support for this conclusion from reading the immediately preceding paragraph, para. 4, which contains a similar provision (though in much briefer form) in reference to the limit of permissible credit in the case of profits tax.

Counsel for the taxpayer company also referred to para. 13 of the same Schedule which, in conjunction with para. 15, sets the time limit within which a claim for relief must be made under this double taxation provision. But I have been unable to find in those paragraphs any sufficient ground for supporting his argument that the vital words of art. XII—" any United Kingdom tax "—must be read as meaning " any annual assessment of United Kingdom tax ".

As I have said, I agree with the learned judge that the permitted sum of credit can be brought in only once and for all against any United Kingdom tax which may have to be paid in respect of any figure of income taxed in Australia. For these reasons, this appeal fails and must be dismissed.

UPJOHN, L.J.: I agree with the judgment that has just been delivered. This is a short point of construction and depends on the meaning to be given to a few words in art. XII, para. (1) of the Australian Double Taxation Relief Agreement. It is very short and I will read it, omitting the immaterial words:

> " Australian tax payable, whether directly or by deduction, in respect of income derived from sources in Australia shall be allowed as a credit against any United Kingdom tax payable in respect of that income."

The case has been argued before us on the footing that the phrase " that income " means the actual income received in Australia and does not refer to income of a year of assessment computed in accordance with British income tax principles. Whether it is correct to regard " that income " as the income actually received is a matter which has not been argued before us and this case is no authority for the proposition that that is a true and proper meaning to be attributed to that phrase. That will have to be determined if and when it arises in some other case. Giving that phrase that meaning, it is clear that " that income " is a sum of £93,000 received from dividends in Australia and it is agreed that the Australian tax payable as computed under the relief agreement is the sum of £64,836. That sum is to be allowed as a credit for the purposes of the agreement and no difficulty arises there.

It is necessary to turn to para. 2 of Sch. 16 to the Income Tax Act, 1952, to see how that credit is to be dealt with. Paragraph 2 (1) is in these terms:

> " Subject to the provisions of this Schedule, where, under the arrangements, credit is to be allowed against any of the United Kingdom taxes chargeable in respect of any income, the amount of the United Kingdom taxes so chargeable shall be reduced by the amount of the credit."

The words " any income " in that paragraph, it has been argued before us, have the same meaning as the words " that income " in art. XII, para. (1), and again I am content to assume that that is so without deciding it. Paragraph 2 (2) is in these terms:

> " The credit to be allowed shall be first applied in reducing the amount of any profits tax chargeable in respect of the income and, so far as it cannot be so applied, in reducing the income tax chargeable in respect thereof."

The process, therefore, is a simple one. This credit has to be allowed first as against profits tax. We know what the profits tax for the relevant chargeable accounting period was: it was £15,624. When that has been allowed, the balance may be set against the British income tax chargeable in respect of the actual

A income received in Australia. That is brought into charge to tax for 1954-55. We know what the amount of that tax is. That leaves a small balance still available as a credit and that balance can then be allowed against British income tax for 1955-56, as the Australian income is, in the peculiar circumstances of this case, used to measure the income tax for British tax purposes, not only for 1954-55, but for 1955-56. The balance can be brought in and exhausted against B income tax for that later year, and that having been done it seems to me clear that the credit is exhausted.

The argument of counsel for the taxpayer company involves bringing the credit into account twice over, once for 1954-55 and once for 1955-56. On the plain wording of the agreement and the Schedule, I cannot see how that can be admitted. It is one credit that has to be allowed against United Kingdom tax and when it C is exhausted that seems to me to be the end of the matter. Admittedly, this is a hard case and counsel for the taxpayer company has argued that the true intention of the agreement was to avoid double taxation and, admittedly, in this case one year of double taxation relief is omitted. That is conceded by the Crown and it arises owing to the fact that under Case V, Sch. D, the income for 1954-55 has to be used as the measuring rod for two years of assessment. Un- D fortunately, hardship and anomalies are no safe guide in taxation matters. It very frequently happens, owing to the complexity of modern taxation, that anomalies and hardships do arise. There is only one safe guide, and that is to give effect to the plain meaning of the words which Parliament has thought fit to use. I can feel no doubt, in the circumstances of this case, that credit can only be allowed once.

E A large part of the taxpayer company's argument bears on para. 5 of Sch. 16, which my Lord has read, but I would point out that the relieving provisions are to be found in para. 2 of Sch. 16. Paragraphs 4 and 5 are merely limiting provisions to the relieving provisions; they are not themselves provisions which define the credit or say how it is to be computed. I feel no difficulty about the operation of para. 5; it merely puts a ceiling to the amount of the credit F which can be set against British income tax. If the Australian income is used to measure British income tax for two years of assessment, the credit can be exhausted against British tax for both years but cannot be had twice.

I agree that this appeal should be dismissed.

DONOVAN, L.J.: I, too, desire to emphasise that the court is accepting, G without deciding its correctness, the common view of the parties that, for the purpose of the Double Taxation Relief (Australia) Order, income tax in the United Kingdom is to be regarded as payable on the income of the basis year, i.e., the year the income for which is taken as the measure of the assessment. Ordinarily, of course, income tax is payable on the income of the year of assessment for which the tax is granted by Parliament, the amount of liability simply H being measured by the income of the preceding year.

I agree that there is a good deal to be said for the view on which the parties here have agreed, inasmuch as the order has to be applied to profits tax as well as income tax and also, in the earlier years for which the order was operating, to excess profits tax. Profits tax is levied on the actual income of an accounting period as was also excess profits tax in past years. The same is true, we are told, I of Australian income tax, though such tax is actually collected in the following year. Therefore, it is said, one has to find a construction of the words " tax payable in respect of income " where they appear in the order, which will fit all these taxes; and the solution may well be the one which the parties here have adopted. As I say, however, this is not a concluded view.

Then comes the controversial question which has given rise to this case. I need not repeat the various figures of tax liability here and in Australia on the dividend in question. The question that has to be decided is this: is the credit for Australian tax to be allowed twice if the same Australian income pays United

Kingdom income tax twice. When I say "pays United Kingdom income tax twice", I am referring to the situation which arises here, where the Australian income is directly assessed to United Kingdom tax in one year, and used as the measure of United Kingdom income tax in the next year.

The taxpayer company, which wants that question answered in the affirmative, says that such a result conforms to the obvious intention of the relieving order; and, according to the company, it follows from the language of art. XII of the agreement scheduled to the order, which agreement has been given statutory force. That article says that credit for Australian tax shall be allowed "against any United Kingdom tax payable in respect of that income." United Kingdom tax was payable (in the agreed sense of that word) for both 1954-55 and 1955-56 in respect of the same Australian income, and therefore on the plain language of the article it is said that a credit should be given for both years.

Arguments in favour of this view are also based on the wording of para. 5 and para. 13 of Sch. 16 to the Income Tax Act, 1952, but they are subsidiary to the main argument and I need not deal with them in detail, though I bear them in mind. In particular, on the Crown's contention, it may not be easy to determine the rate of United Kingdom tax to be adopted to find the ceiling of relief under para. 5, where in successive years the standard rate of United Kingdom income tax changes. For the same reasons as those given by Lord Evershed, M.R., I do not attribute to this circumstance any paramount significance.

One comes back in the end to the root question: Does the direction in art. XII of the agreement on its true construction allow the credit to be given more than once? I think that question can be answered either way without doing violence to the express language of the agreement; and one must seek the answer, I think, from the general tenor of that document, and its subject-matter. The subject-matter includes among other things profits tax, and, since that is levied on the actual income of a period and not on the conventional basis of the income of some other period, there never could be any question of allowing a credit for Australian tax twice against profits tax. So the taxpayer company has to argue in this case that its claim to relief from income tax is a different claim from that in relation to profits tax, though the language of the agreement really lends no support to such a distinction. The situation would be the same if excess profits tax were still in force. Further, it is not without significance that Sch. 16 to the Act of 1952 refers throughout to "the credit to be allowed", i.e., in the singular number throughout.

The view which has commended itself to the Special Commissioners and to the learned judge was this: that the credit is to be allowed once and once only against the aggregate of United Kingdom tax (i.e., profits tax and income tax) payable in respect of the same Australian income. I find myself in the end to be of the same opinion. It is true that this may produce an anomaly: for example, if the Australian income arises first in year one and ceases in year six, no relief in some cases will be obtained for year five for the reason explained by counsel for the taxpayer company. But, in this particular field, which deals with different taxes levied in different countries on different lines, perfection in any system of double taxation relief must be almost impossible to achieve. If Parliament had intended that credit for Australian tax could be given more than once, I think much more specific language would have been used in the relevant instruments. It would have been simple to say that such credit should be allowed against United Kingdom tax if and so often as that tax was payable in respect of the same Australian income whether that income was itself the subject-matter of the assessment or the measure of it. I do not think that this result can be spelled out of the words " any tax " in art. XII alone. I agree, therefore, that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *J. W. Ridsdale* (for the taxpayer company); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* BRADLEY.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Winn and Widgery, JJ.), February 13, 1961.]

Criminal Law—Sentence—Company director—Disqualification—Fraudulent trading and fraudulent conversion when director—Sentence of imprisonment and disqualification for being a director for five years—Date from which disqualification should run—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 188.

An order made under s. 188 of the Companies Act, 1948*, on the occasion of an accused's conviction on indictment and imposing disqualification for being a director of or in any way concerned with the management of a company without the leave of the court, should impose the disqualification from the date of the conviction, not from a future date.

[As to restraint on fraudulent persons managing companies, see 6 HALSBURY'S LAWS (3rd Edn.) 283, para. 582; 708, para. 1409, especially note (*l*); and as to the penalty for fraudulent trading, see ibid., 708, para. 1408.

For the Companies Act, 1948, s. 188, see 3 HALSBURY'S STATUTES (2nd Edn.) 607.]

Cases referred to:

R. v. *Graham*, (1955), Cr. Law Review 319.

R. v. *Phillips*, [1955] 3 All E.R. 273; 119 J.P. 499; 39 Cr. App. Rep. 87; [1955] 1 W.L.R. 1103; 3rd Digest Supp.

Appeal.

This was an appeal by Amos Frederick Bradley against a sentence of six years' imprisonment in all (consisting of two years for fraudulent trading and six years on each of nine counts of fraudulent conversion, the sentences to run concurrently) and an order under s. 188 (1) of the Companies Act, 1948*, disqualifying him from being a director of a company for a period of five years from the termination of his prison sentence. These sentences were passed on him at the Central Criminal Court on Sept. 12, 1960, by SIR GERALD DODSON, Q.C., sitting as a special commissioner, after the appellant had pleaded guilty to fraudulent trading contrary to s. 332 (3) of the Companies Act, 1948, and to nine offences of fraudulent conversion contrary to s. 20 of the Larceny Act, 1916. Leave to appeal against sentence was granted by GLYN-JONES, J., on Dec. 9, 1960.

The facts appear in the judgment of the court.

J. W. Harkess for the appellant.

Sebag Shaw for the Crown.

LORD PARKER, C.J., gave the following judgment of the court: This appellant pleaded guilty at the Central Criminal Court to fraudulent trading and nine offences of fraudulent conversion. He was sentenced by the commissioner to two years' imprisonment on the count for fraudulent trading, and six years on each of the other counts, concurrent, and he was also made the subject of an order under s. 188 (1) of the Companies Act, 1948, for five years to commence on the day of his discharge from prison. He now appeals to this court by leave of the single judge against that sentence. In particular, the single judge thought it right that the court should consider whether the commissioner had jurisdiction to make the order under s. 188 (1) of the Companies Act, 1948, to date from the discharge from prison rather than from the date of his conviction. The appellant was the sole director of a company known as Basic Materials, Ltd., which carried on business as merchants and suppliers of industrial raw materials. The company was wound-up in December, 1957, when it was found to have liabilities of some £33,000 and assets of only £600, and the statement of affairs disclosed that most of the deficiency had been paid to and used by the appellant. It also appeared that during the three years of the company's existence the creditors of the company, who had supplied goods to the value of about £30,000, received no more than £1,600. It was, accordingly, a bad case, and although the commissioner took into consideration the fact that this man of forty-seven was previously of good character, he felt that in all the circumstances he was constrained to give a sentence of six years. A B C

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* The relevant part of s. 188 (1) is set out at p. 670, letter E, post.

The court has very carefully considered the matter. As has been said many times, this court will only interfere when they feel that the judge has gone wrong in principle. This was a serious case. It is quite impossible to say that the commissioner erred in principle and, accordingly, the court will not reduce that sentence. D

So far, however, as the order under s. 188 (1) of the Companies Act, 1948, is concerned, counsel for the prosecution has frankly admitted that he cannot support the order. Section 188 (1), so far as it is material, reads: E

> "Where—(a) a person is convicted on indictment of any offence in connexion with the promotion, formation or management of a company; or (b) in the course of winding-up a company it appears that a person . . . (ii) has otherwise been guilty, while an officer of the company, of any fraud in relation to the company or of any breach of his duty to the company; the court may make an order that that person shall not, without the leave of the court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of a company for such period not exceeding five years as may be specified in the order." F

The learned commissioner felt that an order under that section could play no useful part in this case unless it was made to date from the time he had served his sentence, and it does appear that similar orders have been made on occasion in the past. It seems to this court, however, that in principle, unless the statute contains express words to that effect, a disqualification must date from the date of conviction. Thus, in the case of disqualification under the Road Traffic Act, (1), where somewhat similar words occur, it has always been held by this court that the disqualification must date from the date of conviction: see in that connexion *R.* v. *Graham* (2), and, in the same year *R.* v. *Phillips* (3). Accordingly, the court will set aside that order in so far as it was expressed to run from the date of the appellant's discharge from prison and substitute an order for five years as from the date of conviction. G H

Appeal allowed in part. Sentence varied.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Board of Trade* (for the Crown). I

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(1) See Road Traffic Act, 1930, s. 6, and, now, Road Traffic Act, 1960, s. 104.

(2) (1955), Cr. Law Review 319.

(3) [1955] 3 All E.R. 273.

CHING GARAGE, LTD. *v.* CHINGFORD CORPORATION.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Denning, Lord Morris of Borth-y-Gest, and Lord Guest), January 31, February 1, 2, 22, 1961.]

Highway—Access—Proposed erection of raised paving on access to garage—Refuge in the nature of a footway—Refuge in highway but not in carriageway—Highway authority's statutory powers—Highways Act, 1959 (7 *&* 8 *Eliz.* 2 *c.* 25), *s.* 67 (2).

In 1932 the appellants erected a garage which was sited at the junction of two highways and, pursuant to s. 18 of the Public Health Acts Amendment Act, 1907, works of construction were carried out by way of altering the kerb on one of the roads so as to provide means of access to the garage. The works comprised both the construction of a thirty-foot wide way (double that width at the carriageway of the highway) giving access across the verge and footpath of the highway to the carriageway, and the construction of a way of similar width (much wider at the carriageway) also across the verge and footpath to the curve of the road at the corner. The respondents, the highway authority, proposed to erect a pedestrian refuge in the centre of the access way at the corner. The refuge was to be a pear-shaped island, the centre being filled in with paving stones and grass, with kerbing (some four inches in height) all round it, and would not be in the carriageway. The appellants claimed that the refuge would interfere with their means of access to the garage. The respondents had not invoked their powers under the town and country planning legislation, but relied on their powers of constructing footways and raised pavings under s. 67 (1), (2), and places of refuge under s. 68, of the Highways Act, 1959*. Works under s. 67 (2) alone attracted, by s. 67 (6), a right to compensation.

Held: the respondents had power to erect the refuge under s. 67 (2) of the Act of 1959, because the work proposed was a "raised paving" in the highway for the purpose of safeguarding persons using the highway within that subsection.

Per LORD RADCLIFFE, LORD MORRIS OF BORTH-Y-GEST and LORD GUEST: there was no necessity for the respondents to seek planning permission under the Town and Country Planning Act, 1947, since proviso (b) to s. 12 (2) of that Act specifically exempted from control of development works required for the improvement of a road.

Decision of the COURT OF APPEAL ([1960] 3 All E.R. 79) affirmed.

[**Editorial Note.** In the course of the hearing before the House of Lords the respondent corporation conceded that the measure of compensation which would be payable to the appellants under s. 67 (6), if the respondents' right to construct the works were under s. 67 (2) of the Highways Act, 1959, would be the same as that applicable if the works had been carried out under town and country planning legislation (see e.g., p. 674, letter A, post).

As to statutory powers of highway authorities affecting access, etc., of adjoining owners, see 19 HALSBURY'S LAWS (3rd Edn.) 80, 81, paras. 122, 123, and for cases on adjoining owners' right of access, see 26 DIGEST (Repl.) 347-353, *639-677*.

For the Highways Act, 1959, s. 67, see 39 HALSBURY'S STATUTES (2nd Edn.) 487.]

Cases referred to:

Caledonian Ry. Co. v. *Walker's Trustees*, (1882), 7 App. Cas. 259; 46 L.T. 826; 46 J.P. 676; 11 Digest (Repl.) 149, *274*.

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* The relevant portions of s. 67 are set out at p. 673, letters C to F, post. By s. 68 (1): "A highway authority may, in relation to a highway maintainable at the public expense by them, being a highway which consists of or comprises a made-up carriageway, construct and maintain works in that carriageway for providing places of refuge for the protection of pedestrians crossing the carriageway."

East Fremantle Corpn. v. *Annois*, [1902] A.C. 213; 71 L.J.P.C. 39; 85 L.T. 732; 67 J.P. 103; 26 Digest (Repl.) 524, *2010*. A

Edgington, Bishop & Withy v. *Swindon Corpn.*, [1938] 4 All E.R. 57; [1939] 1 K.B. 86; 108 L.J.K.B. 51; 159 L.T. 550; 102 J.P. 473; 38 Digest (Repl.) 11, *41*.

Goldberg & Son, Ltd. v. *Liverpool Corpn.*, (1900), 82 L.T. 362; 16 T.L.R. 320; 26 Digest (Repl.) 584, *2087*. B

Marshall v. *Blackpool Corpn.*, [1934] All E.R. Rep. 437; [1935] A.C. 16; 103 L.J.K.B. 566; 151 L.T. 286; 98 J.P. 376; 26 Digest (Repl.) 348, *651*.

Sellors v. *Matlock Bath Local Board*, (1885), 14 Q.B.D. 928; 52 L.T. 762; 26 Digest (Repl.) 348, *645*.

Appeal. C

Appeal by Ching Garage, Ltd., from an order of the Court of Appeal (SELLERS, PEARCE and DEVLIN, L.JJ.), dated July 4, 1960, and reported [1960] 3 All E.R. 79, reversing an order of LORD PARKER, C.J., dated July 10, 1959, and reported [1959] 3 All E.R. 175, the decision of the Court of Appeal being based on provisions of the Highways Act, 1959, that came into operation after the date of his judgment. The facts are set out in the opinion of VISCOUNT SIMONDS. D

G. D. Squibb, Q.C., *D. P. Kerrigan* and *M. S. Rich* for the appellants.
C. E. Scholefield, Q.C., and *D. G. H. Frank* for the respondents.

Their Lordships took time for consideration.
Feb. 22. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the short question in this appeal is whether the respondents, as highway authority, are entitled in the manner that I shall describe to obstruct or interfere with the appellants' means of access to a road junction formed by the Sewardstone and Lea Valley Roads at Chingford. It appears from an agreed statement of facts that the appellants are the owners of a garage known as Ching Garage which is sited at the junction of the roads that I have mentioned. The verge (which is of considerable width) between their land and the carriageway of Sewardstone Road was formerly in the control of the Conservators of Epping Forest and was dedicated by them as part of the highway in 1928. There is no kerbed or paved footway on the Sewardstone Road frontage, and never has been. The Lea Valley Road has had a paved and kerbed footway since before 1932. Up to a certain point it is now kerbed, and beyond that point a dropped kerb in the form of granite setts continues for a certain distance. The appellants' garage was erected in 1932 in accordance with planning permission given under the Town Planning Act, 1925. Permission for the lay-out and construction of the present means of access was duly given, and the means of access was duly laid out and constructed as prescribed by s. 18 of the Public Health Acts Amendment Act, 1907. A plan which makes these facts more clear was annexed to the agreed statement of facts. The respondents, as highway authority, now propose to erect a structure (if it can be called a structure) at the junction of the two roads in the middle of the stretch where the access from the appellants' garage emerges onto the carriageway. It is to consist of the restoration of the kerb at a certain point to its former height of four inches at the road edge and to continue it round a pear-shaped plot of land extending some distance towards the garage, the centre portion being filled in with paving stones and grass. Its purpose is to provide an island or refuge for pedestrians proceeding along the Lea Valley Road. That it may interfere in some degree with the appellants' access from their garage to the carriageway can be assumed. So, at least, it appeared to the appellants, who brought their action against the respondents claiming an injunction and damages. The action has taken an unusual course. By their original defence, the respondents relied on a number of statutes, but, after

E F G H I

some vicissitudes, these were at the trial before the Lord Chief Justice (LORD PARKER) reduced to two, viz., s. 149 of the Public Health Act, 1875, and s. 45 of the Road Traffic Act, 1956. On a consideration of these statutes, the learned judge held that the respondents were acting in excess of their statutory powers. It is unnecessary to consider whether his decision was correct, for, before the appeal brought by the present respondents reached the Court of Appeal, the law was altered by the Highways Act, 1959, which repealed the sections of the two Acts to which I have referred and replaced them by s. 67 and s. 68. It is on those sections alone that the respondents relied before the Court of Appeal and before this House. They were given leave by the Court of Appeal to amend the defence accordingly.

I must set out the relevant parts of s. 67. It occurs in that part of the Act which is entitled " Safety provisions " with the sideheading " Footways and guard-rails ". The relevant provisions are as follows:—

> " (1) It shall be the duty of a highway authority to provide, in or by the side of a highway maintainable at the public expense by them, being a highway which consists of or comprises a made-up carriageway, a proper and sufficient footway as part of the highway in any case where they consider the provision thereof necessary or desirable for the safety or accommodation of pedestrians; and a highway authority may light any footway provided by them under this subsection.
>
> " (2) A highway authority may provide and maintain in a highway maintainable at the public expense by them, being a highway which consists of or comprises a carriageway, such raised paving, pillars, walls, rails or fences as they think necessary for the purpose of safeguarding persons using the highway.
>
> " (3) The powers conferred by the foregoing provisions of this section to provide any works shall include power to alter or remove them.
>
> " (6) A highway authority or council shall pay compensation to any person who has sustained damage by reason of the execution by them of works under sub-s. (2) of this section."

It may be noted that a " highway " is defined to mean, except where the context otherwise requires, the whole or a part of a highway (1).

It is obvious on the barest inspection of the plan that the highway authority would be justified in thinking that the safety of pedestrians demanded some break in the broad expanse of carriageway which constituted the approach from the garage to the main highway. The physical features are somewhat unusual, an island refuge for pedestrians being more usually found in the middle of the highway than in an access to it. But the need for a refuge is the same in either case and, if the language of s. 67 covers such a case, the authority should not hesitate to make use of it. My Lords, in my opinion, whatever may be said of sub-s. (1), the language of sub-s. (2) is amply wide enough to authorise the work that the respondents propose to do. The whole of the area which includes the carriageway of Lea Valley Road and Sewardstone Road and the verge between it and the garage, now partly formed as the access to the garage, is a " highway which consists of or comprises a carriageway ". The work that is proposed is a " raised paving " which is thought " necessary for the purpose of safeguarding persons using the highway ". It is true that, at present, the proposal is that only the surround of the refuge plot and a part of the inclosure are to be paved, the remainder being grass, but the respondents have stated their willingness to pave the whole of it if the appellants want them to. But this seems to me a triviality with which the House need not concern itself.

I have treated the proposed work as falling within s. 67 (2), not within s. 67 (1), and I emphasise this because it is in respect of work falling under sub-s. (2) that compensation is payable under s. 67 (6). The appellants will, therefore, be entitled to recover compensation for the damage sustained by them by reason of the execution by the respondents of the works. I cannot help thinking that, if this had been made clear to them at the outset and, moreover, that the measure of such damage would, as learned counsel for the respondents was eventually constrained to admit, be precisely the same as it would be if the works were carried out under the Town and Country Planning Act, 1947, these protracted proceedings would not have been necessary.

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(1) See the Highways Act, 1959, s. 294 (1).

Others of your Lordships deal with the interrelation of the Town and Country Planning Acts and the Highways Act, 1959, and certain other aspects of the case, and I will say nothing about them. I am content to say that the respondents as highway authority propose to do no more than the Highways Act, 1959, authorises.

The appeal must, in my opinion, be dismissed, and the appellants must pay one-half of the respondents' costs of the appeal to this House.

LORD RADCLIFFE: My Lords, I do not think that, in the end, this is a case that presents much difficulty, but certainly one of the difficulties that we have met on the way is that of ascertaining what is the real position of the appellants and the respondents with regard to the subject-matter of the suit, and what exactly it is they want to achieve by their arguments before this House. The respondents' attitude seems to come down to this: they wish to go ahead with their project of constructing a pedestrian refuge, partly paved and partly turfed, raised in height above the surrounding highway surfaces and on and behind the line of the existing foot pavement, and they say that they are entitled in law to do that without obtaining anyone's permission, either public authority or private owner. They say further that, if the law gives the appellants a right to compensation for any damage done to them by the execution of these works, which will cause some, though, perhaps, not much, interference with an existing carriage crossing giving access to the appellants' premises, they are ready to pay whatever the law requires. I do not think that they can always have been quite consistent in what they have said about compensation, and it is not, properly speaking, a matter for concession (2). If they can do what they want to without having to pay compensation, they have no business to use public funds in paying over money to an objector who is not entitled to it; and, if they have to pay compensation, they must pay according to the proper legal measure, and it is no good their saying that they are ready to treat the compensation provision of s. 67 (6) of the Highways Act, 1959, if it applies, in the broadest possible terms or according to some such phrase. The real trouble is, I suppose, that there is more than one section of the Highways Act, 1959, which might apply to their proposed work and, pending final decision, they have not been certain whether to found their rights on the claim that they are constructing a " raised paving " in a highway (s. 67 (2)), a work which does involve compensation for damage, or a pedestrian refuge in a made-up carriageway (s. 68), for the execution of which no compensation is provided.

I do not think that they are altogether to be blamed for a certain ambiguity in their claims. The appellants have throughout made it their case that the respondents have no power to execute this work at all, and have asked for relief on that basis, so that the right to compensation or its measure has always been subordinate to this main point. Moreover, the statutory powers that were relevant to the issue have changed during the course of the action, and the Highways Act, 1959, which is central to the issue determined by the Court of Appeal and argued before us, is not referred to at all in the judgment of the learned Lord Chief Justice (LORD PARKER). Lastly, the actual lay-out and construction of what is called the " means of access " of the appellants is, I believe, so unusual and creates a situation so anomalous in some respects that I do not wonder at some hesitation on the part of the respondents in deciding which of their statutory powers they were to think of themselves as exercising. I am not surprised if they thought that what they meant to do was to construct a refuge in a made-up carriageway. That was what it looked like on the plan, and I am not myself persuaded that the part of the highway which is coloured grey and lies to the west of the proposed work is not a made-up carriageway for this purpose. But it has not been argued before us that it is anything but a footway, however unlike a footway in the ordinary sense it may be; so I think that the respondents must now stand or fall by their rights under s. 67, and we must leave s. 68 out of account.

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(2) See [1960] 3 All E.R. at p. 81, letter E.

The appellants do not appear ever to have allowed that the respondents had any power at all to execute the works proposed. In their statement of claim, they asked for a declaration and injunction to this effect; that is what they obtained by the judgment of LORD PARKER, C.J.; and it is that judgment that they seek to restore by their appeal to this House. Their argument, therefore, involves the proposition that s. 67 does not authorise the execution of works where those works constitute any interference with a means of access to premises which has been formed as a carriage crossing under such statutory authority as that given by s. 18 of the Public Health Acts Amendment Act, 1907. It was this section that was invoked to provide access to their garage. Their interest in the question of compensation appears to have been throughout confined to an argument either that it would not be available at all, if s. 67 (1) of the Highways Act, 1959, applied, or that it would be so inadequate, if s. 67 (2) applied, that the court ought to hold for this reason alone that s. 67 does not authorise the works. Finally, they take their stand on what I think that we must regard as a separate and independent ground of objection that, as means of access to a highway is subject to planning control under the Town and Country Planning Act, 1947, such discontinuance of its present user as would result from the proposed construction can only be brought about by an order of the local planning authority under s. 26 of that Act. Admittedly, the respondents have not obtained or asked for such an order —they say that it is not necesssary —but, if the appellants were right on this point, without succeeding on their main point as to the ambit of the powers given by s. 67 of the Highways Act, 1959, I am not clear to what form of declaration and injunction they would think themselves entitled. It is not a point which has been dealt with in the judgments in either of the courts below, and I do not think that it lies on anything but the fringe of the case.

At the present time, the highway close to the junction of Lea Valley Road and Sewardstone Road is so constructed on its south side that there is a break in the pavement which runs beside the carriageway, so that, through this break and over the portion of highway that lies behind it, motor cars and other wheeled vehicles can drive onto the appellants' land and so up to their garage. The pavement is broken in this way because, in the year 1932, the then owners of the garage obtained the approval of the local authority for their plan to create a new " means of access " for their premises under the provisions laid down in s. 18 of the Public Health Acts Amendment Act, 1907. This section applied to any case where the owner of premises adjoining a street wanted to have vehicular access to and from the street, and found that the making or use of such access would interfere with a kerbed or paved footway which, in effect, cut him off from the central part of the highway. He had to send in a plan to the authority, get it approved and then carry out the works at his own expense under the supervision and to the satisfaction of that authority. This was done and, at any rate so far as concerns the site of the construction now proposed, the existing pavement was taken up, its line being indicated by granite setts sunk flush with the level of the carriageway. The new means of access then became open to user for the intended purpose subject to the same conditions as would apply under highway law to any carriageway forming part of a highway repairable by the inhabitants at large (see s. 18 (c)). The appellants seem to think that such user of the means of access was confined to the owners of the premises and persons visiting, doing business with them, etc. I am not satisfied about this. The statute does not say who is to be free to use it, and I think it quite possible that such a means of access, once constructed, has the status of an ordinary carriageway and confers no private rights. There is nothing in the present appeal which makes it necessary to decide this, though, of course, it might result in letting in s. 68 of the Highways Act, 1959.

An owner who proceeded under the Act of 1907 obtained no property interest in the means of access. It remained a highway. What he did get was the physical make-up of the street re-arranged to his advantage; and, whoever else could benefit from the re-arrangement, it was the service of his premises that was the interest primarily and substantially concerned. On the other hand, there must be innumerable cases of formed means of access to premises adjoining highways that are not formed under, or derived from, the special powers of s. 18 of the Act of 1907 (or its successor, s. 155 of the Highways Act, 1959). These means of access can arise in various ways. I should think that one of the most common must be the breaks left in a line of pavement when the footway is first formed as a paving raised above the level of the carriageway. In such cases, it is not that a footway, kerbed or paved, is broken into to make the access; it is that the access is left as part of the carriageway and the paved or kerbed footway is formed on each side of it. Again, there may, I suppose, be a footway formed at the edge of a highway but on a level with it. When it has to be crossed to give access from adjoining premises to the carriageway, it is a footway for the public but also a carriage crossing for the owner of those premises. There is a well-known statement of a frontager's general common law right of access to the highway in LORD ATKIN's speech in this House in *Marshall* v. *Blackpool Corpn.* (3). I think, however, that it needs to be remembered in connexion with this statement that the full extent of the common law right to enter the highway at every point of the frontage for any highway purpose must have been modified in very many cases by the exercise of statutory powers with regard to the highway and that, apart from local Acts, s. 155 (5) of the Highways Act, 1959, is now the controlling enactment.

It is plain, therefore, that, certainly in any built-up area, there are numerous rights of access to the streets from adjoining premises, and that they are rights derived from common law or statute, general or local, or, perhaps, from a combination of the two sources. In my opinion, it is well-settled law that a highway authority exercising statutory powers to improve or maintain a street or highway, such as to raise or lower its level, to form a footpath, to pave or to erect omnibus shelters, is empowered to carry out its works, even though by so doing it interferes with or obstructs frontagers' rights of access to the highway. See, for instance, *Sellors* v. *Matlock Bath Local Board* (4), where the highway authority, acting under s. 149 of the Public Health Act, 1875, partially obstructed the frontager's openings from his inn yard to the road by placing kerbstones and a raised footpath across some part of the width; *Goldberg & Son, Ltd.* v. *Liverpool Corpn.* (5); *Edgington, Bishop & Withy* v. *Swindon Corpn.* (6); *East Fremantle Corpn.* v. *Annois* (7). The fact that an exercise of the statutory power involves the payment of compensation for damage done may support the argument that private rights are intended to be affected, just as its absence may be an argument for the view that they are not; but in neither event is it decisive. In the first case, compensation was available under s. 308 of the Public Health Act, 1875; in the other three cases no compensation was provided.

The appellants' argument, to succeed, must, therefore, show either that

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(3) [1934] All E.R. Rep. at p. 439; [1935] A.C. at p. 22.
(4) (1885), 14 Q.B.D. 928.
(5) (1900), 82 L.T. 362.
(6) [1938] 4 All E.R. 57; [1939] 1 K.B. 86.
(7) [1902] A.C. 213.

A there is something special about this particular carriage crossing, because it originates under the Public Health Acts Amendment Act, 1907, which makes it invulnerable where other means of access are not; or that s. 67 of the Act of 1959 does not itself confer the power to execute works in derogation of means of access at all. I regard both of these as difficult propositions to sustain. As to the first, I cannot see any good reason why a means of access formed under the B statutory power, which is a way of limiting and controlling the original common law right of a frontager, should be exempted from the effects of executing highway powers when the common law rights themselves are not. One is not higher than the other. It is pointed out that an access formed under the Act of 1907 is constructed at the expense of the frontager. But, where compensation is available, financial outlay can be made good by financial compensation; C and many persons who suffer damage by injury to their rights have paid in one way or another for the acquisition of the right. I find it impossible to read s. 67 as if it did not empower the highway authority to affect rights of access. There is very little that can be done to a highway that does not to some extent affect, for better or worse, public rights; and, when it comes to powers to make up a footway and to construct such works as raised paving, walls and rails, I think D that it must be taken that the legislature did contemplate that private rights of access to and from the highway might be prejudiced by the works and impliedly authorised this to be done. Such a construction is consistent with the previous run of authority. It is not easy to see what is intended to be the precise relationship between sub-s. (1) and sub-s. (2) of this section, and the point is of some importance, since it is only for damage caused under sub-s. (2) E that compensation is provided. Generally speaking, I do not think that the two subsections are meant to be read as alternatives. The function of sub-s. (1) seems to be to define the scope of a highway authority's duty in respect of the provision of footways. In itself, it is not meant, I think, to confer powers adverse to existing private rights. One would not say, for example, that, because the authority is directed to provide a footway in or by the side of a F highway, it was authorised without more to construct a public footway in some private land adjoining. Subsection (2) is meant, on the contrary, to confer certain powers supplementary to the duty under sub-s. (1), and these powers are such that some (though, perhaps, quite trivial) interference with private rights is almost certain to be involved. For any damage caused by the exercise of these powers compensation is given.

G In the present case, the respondents are proposing to make up part of the footway to its former condition, and for this purpose to make a raised paving on the line of the footway. In my opinion, they are entitled to do this under s. 67 (2), and the appellants are entitled to compensation for any damage caused. It was suggested that the measure of compensation provided by sub-s. (6) would be less than a full measure of the damage that they might suffer. I have been H unable to find any ground for this misgiving; I think that they are entitled to the same measure as that outlined in *Caledonian Ry. Co.* v. *Walker's Trustees* (8). Strictly speaking, the turf part of the proposed refuge is not a paving at all. But I do not think that anything ought to be allowed to turn on this. It does not seem to have been relied on at any stage of the case; and it could always be met by extending the pavement to cover the surface of the whole of the I raised site. The appellants placed some reliance on the fact that there are other sections of the same Act, the Highways Act, 1959, which make much more scrupulous provision for the recognition of private rights of access than the mere right of compensation given by s. 67. They point to s. 18 (stopping up of highways) and s. 85 (fences or posts to prevent access to a highway). In my opinion, however, this argument can lead to no conclusion as to the scope of s. 67 itself. The other two sections relate to operations that, by their own nature, involve serious obstruction, their purpose being denial of access. It is only to be expected that, in such sections, more detailed attention would be paid to protecting private rights of access than in a section such as s. 67, in which the works involved do not necessarily involve any appreciable form of obstruction at all.

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(8) (1882), 7 App. Cas. 259.

There remains the argument based on planning control. I do not think that this can help the appellants. It does not seem to be an argument that is noticed in any of the judgments below, but, so far as I follow it, it is defeated by the fact that, though " development " in s. 12 of the Town and Country Planning Act, 1947, includes the formation and laying out of means of access to highways, the control of development imposed by that same section does not extend to the works carried out by a highway authority in pursuance of its statutory duties. If, then, the respondents can make up this pavement in the way proposed by virtue of their powers under s. 67 of the Act of 1959 and are exempt from planning control in so doing, I do not think that any fetter on their power thus to affect the carriage crossing is imposed by s. 26 (1) of the Act of 1947, which allows a local planning authority to make an order for the discontinuance of an existing " use " of land. Such an order is not needed if the highway authority is exempt from planning control.

For the reasons I have given, I agree that the appeal must be dismissed, and I agree with the order as to costs proposed by my noble and learned friend on the Woolsack.

LORD DENNING: My Lords, it is plainly desirable in the interests of safety that a refuge should be provided at the place proposed by the respondents; and it is somewhat surprising that the appellants should object to it, seeing that it is not being put on their land but on the highway; and it does not look from the plan as if it would inconvenience them or their customers to any marked degree. There would appear still to be quite reasonable means of getting to the garage by going on either side of the refuge. But your Lordships gave leave to appeal, as I recollect, because of a question raised about compensation. It was suggested by the appellants—and assented to by the respondents—that, if the right to provide a refuge arose under s. 67 of the Highways Act, 1959, the compensation might be confined to the damage sustained by the appellants whilst the refuge was being made—which would be very small—and did not extend to the damage sustained by them after it was completed. At the hearing before your Lordships, the respondents abandoned any such suggestion and conceded that s. 67 (6) should be interpreted in the broadest possible terms. Compensation would be given for any damage sustained by the appellants by reason of their means of access being obstructed by the refuge.

Notwithstanding this concession, it is still necessary for your Lordships to determine what is the proper procedure to be adopted by a highway authority which wishes to erect a refuge for pedestrians in the highway. If the refuge is to be erected in a made-up carriageway, the highway authority can proceed under s. 68 of the Highways Act, 1959. But, if the refuge is to be erected in any other part of the highway, the Act is not very clear on the point. I suspect that Parliament only envisaged street refuges in made-up carriageways, and nowhere else. But now that the matter has been argued, I think that the words " raised paving " in s. 67 (2) are wide enough to cover a refuge such as that proposed here. It is open to the authority to proceed under s. 67 (2); and they must, of course, pay compensation as provided by s. 67 (6).

I would, therefore, dismiss the appeal but, in view of the changing attitude adopted by the respondents towards compensation, I agree that they should only get half their costs in this House.

LORD MORRIS OF BORTH-Y-GEST: My Lords, the land on which the appellants' garage was erected in the year 1932 lies at the junction of Sewardstone Road and Lea Valley Road. Before the garage was erected, the land was occupied agriculturally and there were field gates which gave access to the two roads. There were two gates which gave access to Sewardstone Road. Passage from the land through those two gates did not, however, prior to 1928, bring anyone immediately onto the highway. The reason was that there was a verge which lay to the east and north of the land. Before 1928, that verge was in the control of the Conservators of Epping Forest. To reach the road from the land the verge had to be crossed. In the year 1928, the verge was formally dedicated by the conservators as part of the highway. So far as concerns the verge on the Sewardstone Road side of the land, there was, in 1932, no kerbed or paved footway on any part of it. The position as regards Lea Valley Road is not made entirely clear in the agreed statement of facts on the basis of which the case has been fought. It is, however, common ground that, prior to 1932, Lea Valley Road had a kerbed and paved footway and that, in 1932, prior to the erection of the garage, the kerbing extended to a point further east than it extended after that time. Before the garage was erected in 1932, planning permission was given under the Town Planning Act, 1925. The location of the proposed garage was such that, if the lay-out of the highway had remained as it then was, the driver of a motor car who wished, after leaving the area of the garage land, to drive to a point quite near to the actual junction of the two roads would first cross an area of highway that had previous to 1928 been a part of the verge and would then find the kerbing above-mentioned in his path. To obviate such a situation, resort was had to the provisions contained in s. 18 of the Public Health Acts Amendment Act, 1907. At the expense of those who were erecting the garage (the appellants' predecessors), the divisional highway surveyor carried out works of construction by way of altering the lay-out of a part of the highway which had previously been the verge. The works involved altering the kerb, with the result that it did not extend as far east along Lea Valley Road as previously it had done. As a consequence of this, anyone who thereafter walked in an easterly direction on the south side of Lea Valley Road could, for the most part, walk on a kerbed and paved footway until he neared the garage. There was a section of footway on the north side of the garage but, if anyone wished to walk round the line of the corner to Sewardstone Road, he would, after leaving that section of footway, traverse a distance of some sixty feet before reaching a grass verge on the Sewardstone Road side of the garage. On that part of the line where, previous to 1932, there had been kerbing, there has since then been a dropped kerb in the form of granite setts.

The respondents, as the highway authority, are concerned to improve highways, and to that end to avail themselves of powers conferred by Part 5 of the Highways Act, 1959. Believing it to be necessary or desirable for the purpose of ensuring the safety of persons using the highway, they propose to erect a structure near to the corner of the two roads. It is designed to contain a footway for pedestrians. It is planned to take the form of a pear-shaped island with kerbing (some four inches in height) all round it. The setting of the outer part would involve restoring a section of the kerb at what was the eastern limit of the kerbing that existed prior to 1932. The result of doing what is proposed would be that motor cars being driven from the garage and using this particular part of the highway would have to pass on one side or the other of the island formed by the kerbing; whichever way they went they would have a minimum passageway of twenty feet between the proposed kerbing and any existing grass verge or other kerbing. The proposed erection forms only a part of other works of highway improvement in the vicinity which the respondents either have done or propose to do. The appellants challenged the right of the respondents to construct the proposed kerbed island, and sought to restrain them from proceeding to do so. When the work was proposed and when the action was begun, the Highways Act, 1959, had not been passed, and the respondents relied on various other statutory provisions as their authority for what they proposed to do. The Act was not in force when the action was heard. The Act was, however, in force before the hearing in the Court of Appeal, and it has been common ground that the appellants are not entitled to an injunction or declaration if the Highways Act, 1959, endows the respondents with power to do what they propose, and if the respondents need not seek either an order for the discontinuance of existing use or permission to develop.

The appellants pleaded that the respondents had not sought an order under s. 26 of the Town and Country Planning Act, 1947, but no argument relating to this section appears to have achieved enough prominence in the Court of Appeal to merit consideration in the judgments. The agreed facts do not clearly show whether, after the verge was dedicated as part of the highway in 1928, such area could be regarded as being footway or carriageway as those words are defined in the Highways Act, 1959, or as being partly one and partly the other. It is sufficient to say that what the divisional highway surveyor did in 1932 was regarded as the laying-out and construction of means of access to the carriageway, and the provision in s. 18 (c) of the Public Health Acts Amendment Act, 1907, became applicable, which read that

> "After the completion of the works the new means of access may be used, subject to the conditions which, in pursuance of any provisions of the law relating to highways, attach to the use for the like purpose of any carriageway forming part of a highway repairable by the inhabitants at large."

The area which would be within the kerbing of the proposed new construction has, since 1932, been used in the manner denoted by these words; it has undoubtedly been a part of the highway. Is there then any obligation to seek and obtain, pursuant to s. 26, an order of the local planning authority for the discontinuance of the use of that area of land or for the altering of any works? If there is, then one public authority (the highway authority) charged with certain special responsibilities in regard to safety could only discharge them if it succeeded in persuading the local planning authority that the interests of proper planning required that the proposed action should be taken and if, possibly after a local inquiry, the Minister confirmed an order or if, pursuant to the Act, the Minister gave directions or made an order. It is, however, to be noted that s. 12 of the Town and Country Planning Act, 1947, provides that certain operations or uses of land are not to be deemed to involve development for which permission under the Act is required. The expression " development " is defined to mean

> " the carrying out of . . . engineering . . . or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

Engineering operations include the formation or laying out of means of access to highways (see s. 119 (1)). In the proviso to s. 12 (2), the operations or uses of land which are not to be deemed to involve " development " of the land include

> "(b) the carrying out by a local highway authority of any works required for the maintenance or improvement of a road, being works carried out on land within the boundaries of the road."

If, therefore, what the respondents plan to do can be regarded as comprising works required for the improvement of a road, planning permission is not required. If the work which the respondents plan to do is authorised by s. 67 (2) of the Highways Act, 1959, then it constitutes " improvement " both for the purposes of the Highways Act, 1959 (see s. 295 (1)) and for the purposes of the Town and Country Planning Act, 1947 (see s. 119 (1) of that Act, as amended by s. 309 of, and Sch. 22 to, the Highways Act, 1959).

Though the respondents previously found it necessary to rely on other statutory provisions, the case may now be approached (in consequence of what the respondents have made clear) by considering whether, as they submit, they may proceed on the basis that, in doing what they propose, they will be acting under

s. 67 (2). They acknowledge that they will have to pay compensation to any person who sustains damage by reason of the execution by them of the proposed works. When the case was before Lord Parker, C.J., and the respondents were relying on statutes in force previous to the passing of the Highways Act, 1959, they claimed to be entitled to do what they proposed to do without being under any obligation to pay any compensation. I see no reason to doubt that the respondents' purpose is that of safeguarding persons using the highway, and that what they propose to provide will be in the highway. Though a consideration of the exact nature of the proposed raised part may give rise to issues of detail (though not of principle), there is, in my view, no doubt that they may achieve their aim by providing a " raised paving ". The proposed work is, in my view, within the scope of s. 67 (2), and is fully warranted by the wording of that subsection and can fairly be characterised as an " improvement ". As planning permission is not required, I see no necessity for the respondents to obtain any order under s. 26. The substantial submission and claim of the appellants is that they are entitled to have the existing lay-out left unaltered and unobstructed. They point to the circumstance that the work of constructing it was done at the expense of their predecessors and that, for all effective purposes, it can be considered as a means of access or a carriage-crossing leading to the carriageways at the road junction. There are, however, no exclusions or limitations in s. 67 comparable to those which are contained in s. 85 (3), and that section (which gives power to erect fences so as to prevent access to highways) is not applicable to the plans now being considered. It is not applicable, for the reason that what the respondents wish to do will not prevent access to the highway or to any part of the highway; it will merely have the result that there will be a small island area round which vehicles will be able to pass and onto which pedestrians will be able to step.

In my judgment, no reason has been shown why the respondents should not, in reliance on s. 67 (2), construct an island of raised paving in the position that is proposed. I cannot see that the appellants have any proprietary or any other rights which entitle them to restrain the respondents from carrying out the intended highway improvement. I would dismiss the appeal on the terms as to costs proposed by my noble and learned friend on the Woolsack.

LORD GUEST: My Lords, the question in this case is whether the respondents, who are the Borough of Chingford and the highway authority, are entitled to interfere with the appellants' means of access to their garage in Lea Valley Road by the construction of what has been described as a " street refuge " at the corner of Sewardstone Road and Lea Valley Road. It is proposed to construct this street refuge on what has been described as a " carriage crossing ". This refuge is part of general works of highway improvement, including the installation of traffic lights, kerbs and grass verges on which the respondents are engaged. The verge between the appellants' land and the carriageway was formally dedicated by the Conservators of Epping Forest as part of the highway in 1928. There is no kerbed or paved footway on Sewardstone Road, but Lea Valley Road has had a kerbed and paved footway since before 1932. At the corner of the two roads, there is a dropped kerb in the form of granite setts, which affords a means of access over the footway and extends over the site of the proposed street refuge. The garage was erected in 1932 under the necessary planning permission, and the means of access from the carriageway over the footway and the intervening ground were laid out and constructed for the appellants' predecessors by the divisional highway surveyor at their expense in 1932 pursuant to s. 18 of the Public Health Acts Amendment Act, 1907.

The appellants have at common law a right of access from their land to the highway which cannot be diminished or interfered with unless under statutory authority (*Marshall* v. *Blackpool Corpn.* (9) per Lord Atkin). Although in the courts below various statutes were relied on by the respondents, the only statutory authority which they now claim entitles them to execute the works is contained in s. 67 (2) of the Highways Act, 1959. Section 67 provides as follows:

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(9) [1934] All E.R. Rep. at p. 439; [1935] A.C. at p. 22.

> "(1) It shall be the duty of a highway authority to provide, in or by the side of a highway maintainable at the public expense by them, being a highway which consists of or comprises a made-up carriageway, a proper and sufficient footway as part of the highway in any case where they consider the provision thereof necessary or desirable for the safety or accommodation of pedestrians; and a highway authority may light any footway provided by them under this subsection.
>
> "(2) A highway authority may provide and maintain in a highway maintainable at the public expense by them, being a highway which consists of or comprises a carriageway, such raised paving, pillars, walls, rails or fences as they think necessary for the purpose of safeguarding persons using the highway.
>
> "(6) A highway authority or council shall pay compensation to any person who has sustained damage by reason of the execution by them of works under sub-s. (2) of this section."

The appellants conceded that, were it not for other provisions affecting means of access from land adjoining the highway on to the highway, the respondents would be able to execute the works under the powers contained in s. 67 (2). This concession could hardly have been withheld. The ground on which it is proposed to construct the street refuge is part of the highway, and the street refuge is to consist of a raised kerb, which will surround an area partly covered by grass and partly covered by paving. The paving will, in fact, restore the footpath to the condition which existed before it was levelled by the insertion of dropped granite setts to allow for the appellants' means of access being constructed in 1932. It was, however, maintained by the appellants that the respondents would require to go through certain procedure before they could proceed with the works. Under the Town and Country Planning Act, 1947, planning permission is required for any development which includes constructing a means of access (s. 12). I have considerable doubt whether it lies in the mouth of the appellants to appeal to this section. The granting of planning permission is a matter for the planning authority with which the appellants have no concern. There are provisions in the Act of 1947 under which the planning authority can deal with unauthorised development (s. 23). But, in any case, proviso (b) to s. 12 (2) specifically exempts a highway authority from the necessity of obtaining planning permission in respect of works required for the improvement of a road. These works are obviously designed for that purpose.

Section 26 of the Act of 1947 was also referred to by the appellants. This section is to be operated by the planning authority for the purpose of discontinuing the use of any land or altering or removing buildings or works. The planning authority may, or may not, decide to invoke this section, but I can see no necessity for the respondents securing the co-operation of the planning authority before proceeding with the execution of the works under s. 67 (2) of the Act of 1959. They are exempt from the necessity of obtaining planning permission under s. 12, and they are, therefore, unaffected by the provisions of s. 26. There is thus no fetter on the highway authority's powers to construct the street refuge by reason of the provisions of the Town and Country Planning Act, 1947.

Section 85 of the Highways Act, 1959, was referred to by the appellants, but it has, in my opinion, no bearing on the case. This section entitles a highway authority to prevent access to a highway by the erection of fences or posts. It is sufficient to say that there is no question of preventing access to the highway. The most that can be said is that the access is being interfered with to a minimal extent. In any case, no fences or posts are being erected. There is, in my opinion, no obligation on the respondents to have resort to s. 85. They have the power to do the work in question under s. 67 (2), and compensation is payable to the appellants for any damage sustained by reason of the execution of the works under s. 67 (6) of the Act of 1959.

I would dismiss the appeal. I agree with the order as to costs proposed by my noble and learned friend on the Woolsack.

Appeal dismissed.

Solicitors: *Hillearys* (for the appellants); *C. G. Dennis* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

WORKMAN *v.* COWPER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, JJ.), February 2, 1961.]

Animal—Dog—Killing of dog—Alleged justification protection of other people's property—Foxhound living wild—Foxhound shot dead when asleep by person believing himself unable to catch it—No lawful excuse for shooting—Malicious Damage Act, 1861 (24 *&* 25 *Vict. c.* 97), *s.* 41.

A foxhound escaped from a pack and lived wild on a common for three months. It was not known to whom it belonged. The master of the foxhounds hunting the area, having failed to catch the hound, which he knew had not escaped from his pack, authorised the respondent to kill the hound if he could not catch it. At a time when the lambing season was approaching, the respondent found the hound asleep, and, believing that he could not catch it, shot it dead. The hound was not known to have done any injury to livestock. The justices dismissed an information charging the respondent with maliciously killing the hound contrary to s. 41 of the Malicious Damage Act, 1861, on the ground that he had acted reasonably and not maliciously. On appeal,

Held: (i) the principles* determining when the protection of property formed lawful justification for killing a dog were the same whether the property protected was the accused's or another person's; the hound was not shown to have presented any real danger to animals and the defence of protection of property was not established.

Principles in *Cresswell* v. *Sirl* ([1947] 2 All E.R. 730) applied.

(ii) no other lawful excuse than the protection of property could possibly be put forward in the present case, and accordingly the case would be remitted to the justices with a direction to convict.

Observations of LORD GODDARD, C.J., in *Goodway* v. *Becher* ([1951] 2 All E.R. at p. 350) explained.

Appeal allowed.

[As to when the killing of a dog may be lawful, see 1 HALSBURY'S LAWS (3rd Edn.) 689, para. 1314; and for cases on the subject, see 2 DIGEST (Repl.) 373, 374, *503-514*.

For the Malicious Damage Act, 1861, s. 41, see 5 HALSBURY'S STATUTES (2nd Edn.) 769.]

Cases referred to:

Cresswell v. *Sirl*, [1947] 2 All E.R. 730; [1948] 1 K.B. 241; [1948] L.J.R. 654; 112 J.P. 69; 2 Digest (Repl.) 374, *513*.

Goodway v. *Becher*, [1951] 2 All E.R. 349; 115 J.P. 435; 2 Digest (Repl.) 374, *509*.

Case Stated.

This was an appeal by Bernard Workman by way of Case Stated by the justices for the county of Oxford, from the dismissal of an information which he had preferred on Mar. 10, 1960, that on Feb. 28, 1960, the respondent, Cecil Featherstone Cowper, maliciously killed a foxhound, the property of a person or persons unknown, the same not being cattle but being the subject of larceny at common law or being ordinarily kept for a domestic purpose, contrary to s. 41 of the Malicious Damage Act, 1861. The following facts were found. A foxhound had been living wild in and around Peppard Common since about the end of December, 1959. Unsuccessful attempts to catch it had been made. Amongst others, officers of the National Canine Defence League were engaged in attempting to catch it and employed methods which had succeeded in other cases. In December, 1959, the presence of the hound had been reported to Robert Douglas Norman Phillips, Master of the South Berkshire Hounds, a pack which hunted in the area of Peppard Common but no hound was missing from that pack. He, as master of the pack hunting the area, considered himself responsible for any hound whether or not it came from his pack and for all damage done by any hound in the area in which he hunted. On a Sunday in February he went armed with a shot-gun with others, including a police constable, to try to find the hound, intending to shoot it if he was unable to catch it, but he failed to find it. On that Sunday he, as the master, authorised the respondent to kill the hound if he could not catch it. The lambing season was approaching and a stray hound was likely to cause damage to livestock, but no damage was known to have been done by this hound. The hound had been fed by various persons leaving meat for it and it was in very good condition. On Feb. 22, 1960, Robert James Horsfall informed the respondent that if he shot the hound he would be committing an offence. Mr. Horsfall was not the owner of the hound and was not acting on the authority of the owner and the respondent knew that he had no authority from any person purporting to be the owner of the hound. On Feb. 28, 1960, the respondent found the hound asleep and, believing that he could not catch it, he deliberately shot it dead. After it was dead the hound was found to have ear marks indicating that it came from the Craven Farmers pack of hounds. A hound from this pack had been lost in November, 1959, but this was not known to the respondent or to the Master of the South Berkshire Hounds up to the time the hound was killed. Ian Lomax, one of the joint Masters of the Craven Farmers pack, when informed of the action taken, approved it.

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* For these, see p. 685, letters E to G, post.

It was contended by the appellant that the onus of proof was on the respondent to justify the killing of the hound. A justification might be that the hound was actually attacking, or was about to attack or was likely to renew an attack on a person or property. The test was whether, in shooting the hound, the person was acting reasonably in regarding the shooting as necessary for the protection of the person or property. None of these circumstances existed in this case. It was contended by the respondent that he acted reasonably and that there was a danger to livestock through the hound living abroad. He admitted that there might be a technical offence.

The justices were of opinion that the owner of the hound was not known and that the respondent acted reasonably on the best authority he could obtain, and that in all the circumstances he acted reasonably. They relied on the explanation of the word "maliciously" in s. 41 of the Malicious Damage Act, 1861, given by LORD GODDARD, C.J., in *Goodway* v. *Becher**.

The question for the opinion of the court was whether the justices came to a correct determination of the law.

E. D. Sutcliffe, Q.C., and *H. F. Newman* for the appellant.

J. K. Wood for the respondent.

LORD PARKER, C.J., having referred to the facts and emphasised the finding that the lambing season was approaching and that a stray hound was likely to cause damage to livestock but there had been no known damage done

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* [1951] 2 All E.R. at p. 350.

A by this hound, continued: The justices dismissed the information, and in doing so they said this:

> "We were of the opinion that neither the complainant nor Robert Douglas Norman Phillips nor the respondent was the owner of the said hound; that the owner could not reasonably have been ascertained while the hound was at large; that the defendant acted on the best authority he could reasonably
> B obtain, namely that of the master of the pack of hounds which hunted in the district, the said Robert Douglas Norman Phillips; that the respondent acted reasonably in all the circumstances; and we relied on the explanation of Lord Goddard, C.J., in the case of *Goodway* v. *Becher* (1), that the word 'maliciously' in the section must be given some meaning and if in all the circumstances the respondent acted reasonably he could not be said to have
> C acted maliciously in killing the hound and accordingly we dismissed the information."

The law in regard to the right of a man to shoot a dog for the protection of his own property has been settled by *Cresswell* v. *Sirl* (2). There had been a number of old cases dealing with the matter, but this was the first time for more than a hundred years that the matter had come up for decision of the court, and in this
D case, the Court of Appeal. Scott, L.J., said this (3):

> "After a consideration of all the authorities above mentioned (to many of which, as already stated, the attention of the court below was not directed), we come to the conclusion that the law applicable to the facts of the present case is less narrow than the county court judge holds in his judgment. Chasing by dogs which causes any real and present danger of serious
> E harm to the animals chased constitutes an 'attack' which entitles the owner to take effective measures of prevention. We think the relevant rules of law may be thus stated: (1) The onus of proof is on the defendant to justify the preventive measure of shooting the attacking dogs. (2) He has by proof to establish two propositions, but each proposition may be established in either of two ways: Proposition No. 1: That at the time of shooting, the
> F dog was either (a) actually (in the above sense) attacking the animals in question, or (b) if left at large, would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented. Proposition No. 2: That either (a) there was, in fact, no practicable means, other than shooting, or stopping the present attack or preventing such renewal, or (b) that the defendant, having regard to all the
> G circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack."

That is now settled law, and it is accepted by counsel for the respondent, to whom the court is indebted for his argument, that in a case where an owner shoots a dog in protection of his property, he would only be acting lawfully and with
H lawful excuse if it were shown that Proposition No. 1 and Proposition No. 2 in the judgment of Scott, L.J., in *Cresswell* v. *Sirl* (3) were complied with. The present case is different because here the man who shot the dog was not purporting to do so in defence of his own property. At the highest he was doing it to protect other people's property, and it is suggested that in such a case some other test than that laid down by Scott, L.J., should be applied.
I As far as I know, there is no decided case in which this point has arisen, but logically I can see no difference between the case of a man shooting a dog to protect his own property, and a man shooting a dog to protect his neighbour's property. It seems to me that the test must be the same in both cases.

Applying the test laid down to the circumstances of this case, it is quite clear that this hound presented no real and present danger to the sheep or lambs, or any other animals. The most that can be said is that it might in the future chase sheep which were in lamb, or attack the lambs when born; but there was no indication at the point of time when the dog was shot that there was any real or imminent danger of that occurring. Accordingly, applying the test in *Cresswell* v. *Sirl* (4) to the facts of this case, no lawful excuse has been shown.

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(1) [1951] 2 All E.R. at p. 350. (2) [1947] 2 All E.R. 730; [1948] 1 K.B. 241.
(3) [1947] 2 All E.R. at p. 733; [1948] 1 K.B. at p. 249.

Counsel for the respondent, however, submitted that there must be many other cases than that of the protection of property which would raise lawful excuses for the killing of a dog. He instanced a number of such cases:—a dog is run over and in mercy it is killed; a dog is killed because it is thought to be mad, although it is not attacking any other animal or person, and there are other illustrations. It was suggested, therefore, that there must be some overriding test, a necessary element of which would be a reasonableness that would cover all the cases.

For my part I find it quite unnecessary to consider the wider proposition. It seems to me that in the present case the only possible excuse put forward is the protection of property. It is true, as the justices recite, that the respondent got the best authority that he could, namely, from the Master of the South Berkshire Hounds, but it is quite clear that there was no one who could give the respondent lawful authority to shoot this dog. Accordingly, in the present case I find it unnecessary to consider any wider proposition.

I would only add this, that in the passage that I have recited at the conclusion of the justices' opinion, they relied on what Lord Goddard, C.J., said in *Goodway* v. *Becher* (5) and particularly to the passage in which Lord Goddard, C.J., was referring to a man acting reasonably in all the circumstances. It is enough to say that reference to that case shows perfectly clearly that Lord Goddard's reference to reasonableness was directed, and directed solely, to the second proposition laid down by Scott, L.J., in *Cresswell* v. *Sirl* (4), and that Lord Goddard's remarks in no way affect the test laid down by Scott, L.J., in Proposition No. 1.

In these circumstances, though having every sympathy with the respondent in this case, I have come to the conclusion that an offence was committed; indeed, in the contentions that are set out in the Case, it is stated that the respondent admitted "that there might be a technical offence." The justices may well consider that this is a very trivial and technical offence, and impose a sentence which reflects that view.

The case must, however, go back to the justices with a direction that they should convict.

WINN, J.: I agree, and desire only expressly to guard against being supposed to say that defence of property, whether one's own or the property of another, is the only justification which could be raised in answer to such a charge as this. Whether or not any such justification of another kind, such as Lord Parker, C.J., referred to, would be relevant to the issue whether the act done was unlawful, or relevant to the issue whether it was done maliciously, or to the cumulative effect of the double phrase as used in s. 41 of the Malicious Damage Act, 1861, I would desire to consider if and when that problem presents tself.

WIDGERY, J.: I, also, agree.

Appeal allowed.

Solicitors: *Hyde, Mahon & Pascall*, agents for *Knight & Maudsley*, Maidenhead (for the appellant); *Simpson, North, Harley & Co.*, agents for *Collins, Dryland & Thorowgood*, Henley-on-Thames (for the respondent).

[*Reported by* Jenifer Sandell, *Barrister-at-Law.*]

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(4) [1947] 2 All E.R. at p. 733; [1948] 1 K.B. at p. 249.
(5) [1951] 2 All E.R. at p. 350.

SOWA *v.* SOWA.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), February 9, 10, 1961.]

Magistrates—Husband and wife—Jurisdiction—Potentially polygamous marriage—Marriage by proxy in Ghana valid by local law but potentially polygamous—Failure to have second ceremony before registrar or in church to make marriage monogamous union—Whether wife can obtain matrimonial relief in England—Marriage Ordinance, 1884 (c. 127 *of Laws of the Gold Coast* (1951) *Revised*), *s.* 44.

The parties were domiciled in Ghana, though the husband had been living in England for fourteen years. In 1955 he returned to Ghana and became engaged to the applicant, giving her a Bible and a ring, which was a symbol of an intention to convert their subsequent tribal marriage into a Christian monogamous marriage. In October, 1955, the husband returned to England, and in November, 1955, a marriage by proxy was carried out in Ghana which was valid according to the customs of the tribe to which the husband and the applicant belonged. The marriage was a potentially polygamous marriage. Under s. 44* of the Marriage Ordinance of 1884, c. 127 of the Laws of the Gold Coast (now Ghana), 1951, Revised, the parties could go before a registrar or could go through a church ceremony, either of which second ceremonies would make the potentially polygamous marriage become a monogamous union. In January, 1956, the applicant joined the husband in England. He refused to carry out his promise to convert the potentially polygamous union into a monogamous one. Subsequently, the husband being in desertion, the applicant took proceedings under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, for maintenance on the ground of his desertion.

Held: the matrimonial jurisdiction of magistrates' courts, like the matrimonial jurisdiction of the High Court, did not extend to giving relief in relation to marriages that were not monogamous, for the union between the parties being potentially polygamous, was not a marriage to which the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, applied; accordingly there was not jurisdiction to make a maintenance order in favour of the applicant.

Hyde v. *Hyde and Woodmansee* ((1866), L.R. 1 P. & D. 130) and *Baindail* v. *Baindail* ([1946] 1 All E.R. 342) applied.

Decision of the DIVISIONAL COURT ([1960] 3 All E.R. 196) affirmed.

[**Editorial Note.** This case may be compared with *Ohochuku* v. *Ohochuku*, [1960] 1 All E.R. 253, where a second ceremony took place, and it was held that the court had power to dissolve the bond of the second ceremony, thus recognising the second ceremony as a marriage in respect of which English law would afford relief.

The Summary Jurisdiction (Separation and Maintenance) Acts, 1894 to 1949, are repealed and replaced by the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, which was brought into force on Jan. 1, 1961, by the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (Commencement) Order, 1960 (S.I. 1960 No. 2223); s. 1 of the Act of 1960 replaces s. 4 of the Act of 1895.

As to marriages recognised as valid by English law, see 7 HALSBURY'S LAWS (3rd Edn.) 88-90, paras. 161, 162; and for cases on the subject, see 11 DIGEST (Repl.) 455-458, *906-912*, *919-924*.]

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* Section 44, so far as material, reads as follows: "Any person who is married under this ordinance . . . shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but save as aforesaid, nothing of this ordinance shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted ".

Cases referred to: A

Baindail (otherwise Lawson) v. *Baindail*, [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320; 11 Digest (Repl.) 457, *921*.

Bamgbose v. *Daniel*, [1954] 3 All E.R. 263; [1955] A.C. 107; [1954] 3 W.L.R. 561; 3rd Digest Supp.

Hyde v. *Hyde and Woodmansee*, (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 11 Digest (Repl.) 455, *906*. B

Khoo Hooi Leong v. *Khoo Chong Yeok*, [1930] A.C. 346; 99 L.J.P.C. 129; 143 L.T. 25; 3 Digest (Repl.) 402, *22*.

Mehta (otherwise Kohn) v. *Mehta*, [1945] 2 All E.R. 690; 174 L.T. 63; 11 Digest (Repl.) 456, *910*.

Willoughby of Eresby & Oxford (Earl) Case, (1625), W.Jo. 96; 82 E.R. 50; sub nom. *Oxford (Earldom) Petitions*, Collins' Baronies by Writ, 173; C Co. Litt. 27a; 37 Digest 40, *158*.

Appeal.

This was an appeal by the wife, Janet Amerly Sowa, from a decision of a Divisional Court of the Probate, Divorce and Admiralty Division (Lord Merriman, P., and Marshall, J.), dated June 22, 1960, and reported [1960] 3 All E.R. 196. The Divisional Court allowed the appeal of the husband from an order D of the Liverpool stipendiary magistrate whereby the husband was ordered to pay maintenance for the wife and the child of the marriage on the ground that the marriage, being potentially polygamous, did not entitle the wife to relief under the matrimonial law of England. The facts appear in the judgment at letter G, infra, and are more fully stated in [1960] 3 All E.R. at p. 202.

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J. S. Watson, Q.C., and *W. G. O. Morgan* for the appellant wife.

R. Z. H. Montgomery for the respondent husband.

HOLROYD PEARCE, L.J.: The merits are entirely on the wife's side. The husband has behaved so badly that I fully share the regrets expressed by the Divisional Court at finding itself unable to uphold the magistrate's order. One is inclined to echo the words of Crew, C.J., in the *Earl of Oxford's Case* (1), F when he said that there was none but would "take hold of a twig or twine thread to uphold it". Unfortunately the point taken by the husband which goes to jurisdiction seems to me unassailable; and I cannot but agree with the clear judgment of Lord Merriman, P., which is founded on a vast experience of such matters.

The wife and husband are inhabitants of Ghana, and are domiciled there. G They went through a tribal customary ceremony of marriage which is potentially polygamous. The husband had promised the wife that he would go through a further ceremony of marriage which would by the laws of Ghana convert the potentially polygamous marriage into a monogamous or Christian marriage. He declined to carry out his promise. Therefore, although neither of the parties has in fact ever taken another spouse, and the husband admitted on H oath in court that she was his wife, the only tie that binds them is a potentially polygamous marriage.

In *Hyde* v. *Hyde and Woodmansee* (2) Lord Penzance held that such a marriage (in that case a Mormon marriage) although it was a valid marriage by

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(1) (1625), W.Jo. at p. 101; 82 E.R. at p. 53. These words are taken from the Resolution delivered by Crew, C.J., in Parliament, and the relevant extract is as follows: I

"I have laboured to make a covenant with my self, that affection may not press upon judgment; for I suppose there is no man that hath any apprehension of gentry or nobleness, but his affection stands to the continuance of so noble a name and house, and would take hold of a twig or twine-thread to uphold it: and yet time hath his revolution, there must be a period and an end of all temporal things, finis rerum, an end of names and dignities, and whatsoever is terrene, and why not of De Vere?

"For where is Bohun? where's Mowbray? where's Mortimer? etc. Nay, which is more and most of all, where is Plantagenet? they are intombed in the urnes and sepulchres of mortality."

(2) (1866), L.R. 1 P. & D. 130.

A the lex loci, and at the time the man and woman were single, would not be recognised by the English matrimonial court as a valid marriage in a suit instituted by one of the parties against the other for the purposes of enforcing matrimonial duties or obtaining relief for a breach of matrimonial obligations. He accepted that for various other purposes the courts might take a different view, and concluded in these words (3):

B
> "This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England." C

The learned judge supported that conclusion by careful and sound reasoning. He said (4):

> "... the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial D law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created."

He dealt with the various remedies and showed that they were inapplicable to polygamous marriage. He continued (4):

> "If, then, the provisions adapted to our matrimonial system are not E applicable to such a union as the present, is there any other to which the court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements."

He rejected an argument, which has been suggested in the present case also, that the court would be justified in treating the first union as a Christian marriage, and all subsequent unions as void. He pointed to the startling inconsistencies F that would flow from such a doctrine.

I find the reasoning of *Hyde* v. *Hyde and Woodmansee* (5) inescapable. It has been approved in this court in *Baindail* (*otherwise Lawson*) v. *Baindail* where LORD GREENE, M.R., said (6):

> "For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage it has always been accepted as the case, following G LORD PENZANCE'S decision, that the courts of this country exercising jurisdiction in matrimonial affairs do not and cannot give effect to, or dissolve, marriages which are not monogamous marriages. The word 'marriage' in the Matrimonial Causes Act, has to be construed for the purpose of ascertaining what the jurisdiction of the English courts is in these matters. The reasons are that the powers conferred on the courts H for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union."

And he concluded (7):

> "... rightly or wrongly ... the courts have refused to regard a polygamous marriage as one which entitles the parties to come for matrimonial relief to the courts of this country."

I It was argued that since in 1866, the date of the decision in *Hyde* v. *Hyde and Woodmansee* (5) no matrimonial jurisdiction similar to that which magistrates now have existed, we should regard the summary matrimonial jurisdiction as not subject to the principle set out in *Hyde* v. *Hyde* (5). The observations of

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(3) (1866), L.R. 1 P. & D. at p. 138. (4) (1866), L.R. 1 P. & D. at p. 135.
(5) (1866), L.R. 1 P. & D. 130.
(6) [1946] P. at p. 125; [1946] 1 All E.R. at pp. 344, 345.
(7) [1946] 1 All E.R. at p. 345; [1946] P. at p. 126.

A Lord Greene, M.R., however, which I have set out previously, apply to matrimonial relief in general, and are clearly not intended to draw any distinction between the High Court and the magistrates; nor could such a distinction be supported by any logic or principle. The same difficulties would arise in the magistrates' courts in applying to polygamous unions rights and remedies that are intended for and adapted to Christian marriages.

B It is argued that for practical convenience the courts could and should deal with marriages which, though potentially polygamous, are in fact monogamous. But the fact that a marriage happens at the moment to consist only of two formerly single spouses is irrelevant and may be altered at any time by the husband taking another wife. A husband could always invalidate a pending summons simply by so doing. Such a situation would be incongruous and C shows the undesirability of seeking to alter the principle on the ground of convenience in particular cases.

The essential question is what is the nature of the union, and what are the bonds and implications of the marriage ceremony in question. If the ceremony is polygamous then it does not come within the word " marriage " for the purposes of the Acts relating to matrimonial matters, nor do the parties to it D come within the words " wife ", " married woman " or " husband ". I find it impossible to read " married woman " in the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, as intended to have a wider meaning than the word " wife " in the Matrimonial Causes Act, 1950, or to read " husband " in the former Acts as having a different meaning from " husband " in the latter Act, or to interpret the marriage connoted in the former Acts by the E words " married woman " as a wider or looser tie than that intended by the word " marriage " in the latter Act. The fact that the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, provided somewhat different relief on sometimes different grounds from the Matrimonial Causes Act, 1950, is no ground for inferring that the former were not intended to be governed by the principle of *Hyde* v. *Hyde and Woodmansee* (8). Moreover, in the light F of the decision in *Hyde* v. *Hyde* (8) Parliament would have clearly expressed its intention that the principle of that case should not apply to the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, had it so intended.

Counsel for the appellant referred to the Family Allowances and National Insurance Act, 1956, s. 3, whereby for the purposes of family allowances the authority may treat a marriage performed outside the United Kingdom under a G law which permits polygamy as valid if and so long as the authority is satisfied that the marriage has in fact at all times been monogamous. That, it is said, shows that there is a real difference between polygamous marriages and marriages which, though potentially polygamous, are de facto monogamous. It is argued that we should by reason of that distinction allow the latter to be the subject of applications to courts of summary jurisdiction. I can see no justification for H such a departure from principle. That section shows that the words " marriage ", " wife " and " husband " had not theretofore been thought to cover a polygamous marriage, and Parliament, therefore, found it necessary to enact s. 3. Parliament, if it so desired, could make similar provision for courts of summary jurisdiction to that enacted in respect of family allowances. It would, however, be attended by many obvious incongruities and difficulties.

I Counsel for the appellant sought to obtain some help from *Baindail* v. *Baindail* (9), but that case does not affect the present. It was there held that a party to a previous potentially polygamous marriage could not validly contract a subsequent Christian monogamous marriage, and that our Divorce Court would recognise the existence of the potentially polygamous marriage for the purpose of pronouncing a decree of nullity in respect of a subsequent Christian marriage. That decision does not touch this point. The recognition of the

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(8) (1866), L.R. 1 P. & D. 130.

(9) [1946] 1 All E.R. 342; [1946] P. 122.

A fact of the previous polygamous marriage is no recognition of it as a marriage
suited to and within the matrimonial procedure and jurisdiction of our courts.
It is merely the recognition of a fact disabling a party from entering into a later
Christian marriage which as such was a proper subject for consideration and
decree by the courts.

Two cases in the Privy Council—*Khoo Hooi Leong* v. *Khoo Chong Yeok* (10),
B and *Bamgbose* v. *Daniel* (11) were relied on as showing that the courts have
narrowed the principle in *Hyde* v. *Hyde and Woodmansee* (12). Those cases
merely show, however, that (as envisaged in *Hyde* v. *Hyde* (12)) courts other
than matrimonial courts may take account of polygamous marriages for the
purpose of ascertaining such rights as those of succession. They do not affect
the principle that our matrimonial courts will not deal with polygamous marriages
C as a subject for the exercise of their jurisdiction.

Mehta (*otherwise Kohn*) v. *Mehta* (13) provides no help. There the marriage
in respect of which the court was prepared to consider granting a decree was
monogamous. The fact that the husband might by a change of faith have
possibly been able to take other wives did not make the marriage polygamous.

Although like the Divisional Court I have listened with every sympathy to the
D arguments put forward for the wife, I, too, find its conclusion inevitable. I would
therefore dismiss the appeal.

HARMAN, L.J.: I agree, and for the reasons which HOLROYD PEARCE, L.J.,
has given. It seems clear that the legislature takes the same view, hence s. 3 of
the Family Allowances and National Insurance Act, 1956, to which we have
been referred. Whether the legislature would think it right to make a similar
E provision in regard to matrimonial proceedings is for them and not for us.
Whether this complainant is without remedy of another sort again is not for us.
I can only say that it seems that this husband did promise by the gift of a Bible
and a ring (14) to marry this woman in a Christian union; and if that was the
contract which he made, and which he has not fulfilled, it may well be that her
advisers might think it worth while to sue him for damages for breach of that
F contract. Whether in that way some justice can be wrung from him I do not
presume here to pronounce. For the present I shall only concur in the dismissal of
the appeal.

DAVIES, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the appellant wife); *Michael Kramer & Co.*, agents for *Canter, Levin & Mannheim*, Liverpool (for the respondent husband).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(10) [1930] A.C. 346.
(11) [1954] 3 All E.R. 263; [1955] A.C. 107.
(12) (1866), L.R. 1 P. & D. 130.
(13) [1945] 2 All E.R. 690.
(14) See [1960] 3 All E.R. at p. 202, letter C, regarding this.

HINCHLEY *v.* RANKIN.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Lawton, JJ.), February 10, 1961.]

Education—School attendance—Duty of parent to secure regular attendance—Closing of attendance register half-an-hour after commencement of morning session—Certificate of absence—Whether evidence of failure of parent to secure regular attendance—Education Act, 1944 (7 *&* 8 *Geo.* 6 *c.* 31), *s.* 39 (1), *s.* 95 (2) (*c*).

A child of compulsory school age was a registered pupil at a primary school. The school's morning session started at 9.15 a.m. and the attendance register of the school closed at 9.45 a.m. Children who had not arrived by the time when the register closed were marked absent, although they might arrive later. The child was marked absent twenty-nine times in a period of six weeks. The child's father was convicted under s. 39 (1) of the Education Act, 1944, by a magistrates' court for the failure of the child to attend school regularly. Quarter sessions quashed the conviction on the ground that a certificate of the head teacher of the school, tendered under s. 95 (2) (c) of the Act of 1944, certifying that the child was absent twenty-nine times during the six weeks, might, in the circumstances, merely be evidence of unpunctuality, since the child might have attended after 9.45 a.m. on each day.

Held: the regular attendance of a child at school, required by s. 39 of the Education Act, 1944, was regular attendance for the times prescribed by the local education authority charged with the duty of providing the education; absence at the time when the attendance register closed was a failure in regular attendance, and accordingly the case would be remitted to quarter sessions on the basis that there was evidence for the child's father to answer.

Appeal allowed.

[As to the duty of parents to secure attendance of pupils at school, see 13 HALSBURY'S LAWS (3rd Edn.) 560, para. 1193; and for cases on the subject, see 19 DIGEST 564, *61-63* and Supplements.

As to the penalty for failure of attendance at school, see 13 HALSBURY'S LAWS (3rd Edn.) 562, para. 1195; and for cases on the subject, see 19 DIGEST 564, *64*, 567, *82*, *84*, *86*.

For the Education Act, 1944, s. 23 (3), s. 36, s. 39 (1), s. 40, s. 95 (2) (c), see 8 HALSBURY'S STATUTES (2nd Edn.) 170, 181, 183, 184, 221.]

Case Stated.

This was an appeal by the prosecutor, Leslie Rankin, by way of Case Stated from the decision of the assistant recorder for the city of Birmingham on June 23, 1960, whereby he allowed an appeal by Samuel Hinchley from his conviction on May 24, 1960, by a magistrates' court of the city that he was the parent of a child of compulsory school age, Stephen Hinchley, who was a registered pupil at Chandos Primary School, and that, since Feb. 15, 1960, the child had failed to attend regularly at the said school contrary to s. 39 (1) and s. 40 (1) of the Education Act, 1944.

On the hearing of the appeal the following facts were proved or admitted. (A) That Samuel Hinchley was the parent of the child Stephen Hinchley, and that the child was of compulsory school age and a registered pupil at the Chandos Primary School; (B) that a certificate under s. 95 (2) (c) of the Education Act, 1944, was produced in evidence; (C) that the time of commencement in the morning laid down for the said school was 9.15 a.m.; and (D) that Albert William Macknell, a school attendance and welfare officer, who handed in the certificate referred to above, gave evidence to the effect that the school attendance register was closed at 9.45 a.m. and that pupils arriving on any day after that time would be marked absent and shown as non-attendants for those sessions. The certificate referred to was as follows:

> " I hereby certify that Hinchley, Stephen, residing at 23 Upper Highgate Street is a registered pupil at Chandos Primary School, which is a county school, as defined by ' the Education Act, 1944 '; and that during the six weeks from Feb. 15, 1960, to Mar. 25, 1960, he was present 27 times and absent 29 times, the weekly attendance of the said child during that period having been as follows—$\frac{2}{10}$, $\frac{0}{8}$, $\frac{5}{8}$, $\frac{6}{10}$, $\frac{8}{10}$, $\frac{6}{10}$.
>
> Given under my hand this fifteenth day of June, 1960,
>
> B. B. Whelan
> Head Teacher
>
> This certificate is signed in pursuance of the Education Act, 1944, s. 95 (c)*."

The assistant recorder held that the certificate of non-attendance should be accepted as evidence of the matters stated therein, but that such evidence could be rebutted or taken in conjunction with other evidence before the court; that in view of the evidence of the attendance officer no provision was made in the certificate for partial attendance, if a pupil arrived late, but such a pupil would be shown as non-attending; that the certificate, if it stood by itself, would show evidence of non-attendance to such an extent that there would have been failure to attend regularly beyond all doubt, but that there was no system of showing late attendances; that the evidence of the attendance officer coupled with the evidence contained in the certificate showed that there was no real evidence of non-attendance other than non-attendance at or before the particular time of 9.45 a.m., and that such evidence was not sufficient to prove failure to attend regularly.

The question of law for the opinion of the High Court was whether on the facts stated the assistant recorder was right in allowing the appeal.

A. E. James, Q.C., and *M. Newell* for the appellant.

A. R. Churchill for the respondent.

LORD PARKER, C.J.: The facts are in a very short compass. It appeared that before the assistant recorder a certificate was put in, which is evidence under s. 95 (2) (c) of the Education Act, 1944, showing that during the six weeks from Feb. 15 to Mar. 25, 1960, this boy Stephen was present twenty-seven times and absent twenty-nine times. He should have been there on each day by 9.15 a.m. which was the morning session laid down by the said school.

Before the assistant recorder, however, Albert William Macknell, a school attendance and welfare officer, who handed in the certificate, gave it in evidence that the attendance register is closed at 9.45 a.m., and that pupils arriving on any day after that time would be marked absent, and shown as non-attendants for those sessions. The assistant recorder took the point that the certificate was no evidence at all of non-attendance, but might merely be evidence of unpunctuality—in other words that on all the twenty-nine times when the boy had been absent he might have arrived at 9.46 a.m. The assistant recorder took this point of his own motion; having come to the conclusion that the certificate was no evidence at all he held that no prima facie case had been made out, and he allowed the appeal.

For my part, I feel that that certificate, even on the view taken by the assistant recorder, was at any rate some evidence which called for an answer, but the real point for decision in this court is whether the construction which the assistant recorder put on the words of s. 39 (1) " fails to attend regularly " was correct. It is to be observed that under the scheme laid down in the Act, it is the local authority whose duty it is to provide secular instruction, and for that purpose, as is laid down in s. 23 (3), they have the power to determine the time at which the school sessions shall begin and end on any day, to determine the times at which the school term shall begin and end, and so on. Pursuant to their powers, 9.15 a.m. apparently was fixed as the commencement of the morning session. The obligation of the parent is to be found in s. 36 of the Education Act, 1944, in these terms:

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* The certificate, as printed, referred to s. 95 (c). Section 95 (2) (c) provided as follows—" (2) In any legal proceedings any document purporting to be— . . . (c) a certificate giving particulars of the attendance of a child or young person at a school or at a county college, and to be signed by the head teacher of the school or college . . . shall be received in evidence and shall, unless the contrary is proved, be deemed to be the document which it purports to be, and to have been signed by the person by whom it purports to have been signed, without proof of his identity, signature, or official capacity, and any such extract or certificate . . . shall be evidence of the matters therein stated."

> " It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise."

Counsel for the prosecutor, the appellant, has submitted to this court with force that regular attendance at such a school as this for the purpose of receiving efficient full-time education must be regular attendance for the times prescribed by the body, the local authority, charged with the secular instruction, and charged with the power to determine the times of each session.

It is further to be observed that it is the duty also of the local authority by s. 40 of the Act of 1944, to secure school attendance, and for that purpose it is said (1) in s. 40 (2) that

> " It shall be the duty . . . (b) in the case of an offence against s. 39 of this Act, of the local education authority . . . to institute proceedings for such offences are aforesaid wherever, in their opinion, the institution of such proceedings is necessary for the purpose of enforcing the duty imposed upon a parent by this Act to cause his child to receive efficient full-time education suitable to his age, ability, and aptitude, and no such proceedings shall be instituted except by or on behalf of a local education authority."

Finally, it is to be observed that for the purpose of enabling them to fulfil the duty laid down in s. 40, regulations have been made which provide for the keeping of an attendance register. The Pupils' Registration Regulations, 1956 (S.I. 1956 No. 357) provide, by reg. 3, para. 1, that:

> " The proprietor of every school shall cause to be kept:—(a) an admission register; and (b) except in the case of an independent school of which all the pupils are boarders, an attendance register."

By para. 4 of that regulation:

> " There shall be recorded in the attendance register at the commencement of each morning and afternoon session the presence or absence of every pupil whose name is entered in and not deleted from the admission register . . . "

Provision then follows for the inspection of registers, and for extracts from registers.

It seems to me that counsel for the appellant's argument must be right, and that when the Education Act, 1944, is providing for full-time education and regular attendance for that purpose, it must be regular attendance for the periods prescribed by the person on whom the duty to provide the education is laid. Looked at in that way, even if this boy had regularly arrived only a minute or two late, albeit he was only a few minutes after 9.45 a.m., there would be a failure to attend regularly within the meaning of the Act. I used the word " late " to mean after the time when the attendance register was closed at 9.45 a.m. because the boy should have been there at 9.15 a.m.

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(1) Section 40 (2) was partly substituted by the Education (Miscellaneous Provisions) Act, 1948, s. 11 and Sch. 1, Part 1.

It follows that the assistant recorder was wrong in saying that there was no prima facie case to be answered. The Case should go back to him with an intimation that he should hear the evidence for the father and boy, who of course have a right to challenge the accuracy of the attendance register, and who have the right to put forward the various excuses open to them under the Act.

WINN, J.: I agree.

LAWTON, J.: I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *T. H. Parkinson*, Birmingham (for the appellant); *Tuck & Mann*, agents for *David G. Barnett & Co.*, Birmingham (for the respondent).

[*Reported by* N. P. Metcalfe, Esq., *Barrister-at-Law.*]

HALL PARKE *v.* DAILY NEWS, LTD. AND OTHERS.

[Chancery Division (Wilberforce, J.), February 3, 1961.]

Company—Ultra vires—Compensation payments to employees on sale of principal assets—Gratuitous payments by way of compensation for loss of pension rights—Whether proposed payments ultra vires.

A limited company, which owned a national daily newspaper and a London evening newspaper, being unable to continue their publication, arranged the transfer of the newspapers on sale to another company, publication ceasing on the sale. The consideration for the sale was a payment of nearly £2,000,000. The majority of the shares of the company were owned by the chairman of the board of directors and his family. When arranging the sale the chairman intimated by letter to the chairman of the purchasing company, and subsequently to the public when the sale was made known, that the intention was to apply the greater part of the purchase price in making compensation or pension payments to employees of the company as well as payments to them in lieu of notice. The chairman of the purchasing company in reply welcomed the intention. The only other assets of the vendor company apart from the £2,000,000 were, apparently, an interest in a television company, trading rights in connexion with the programme journal of the television company, and a printing works which was not operating. The board caused notice to be given to shareholders of a general meeting of the vendor company to pass a resolution authorising £1,110,000 (the balance of the sale price after repaying a loan and satisfying claims of former employees in respect of payments in lieu of notice) to be applied in making payments to former employees as compensation for loss of pension rights. Former employees had, apparently, no enforceable right to such compensation. A circular accompanying the notice convening the meeting indicated that newsprint suppliers would release the company from contractual obligations provided that the company proceeded promptly to make the pension compensation payments to its former employees. There was no evidence before the court on behalf of the company or its directors of the nature of the agreement or arrangement with the newsprint suppliers, no evidence of the nature or effect of any assurance given to the chairman of the purchasing company regarding the compensation payments save the letter previously mentioned and no evidence of the trading assets remaining to the company after sale. On motion by a shareholder for an interlocutory injunction against passing the proposed resolution or applying the

£1,110,000 as proposed, on the ground that such an application of it would be ultra vires,

Held: where part of the business of a trading company was sold and part was retained and the company proposed to make a gratuitous distribution of assets to former employees, it was for the directors on the company's behalf to satisfy the court by evidence of sufficient particularity that the course proposed was in the interests of the trading that was to continue; in the present case there was no such sufficient evidence, nor was there sufficient evidence to show that the proposed payments were not gratuitous, and accordingly the interlocutory injunction sought would be granted.

Re Lee, Behrens & Co., Ltd. ([1932] All E.R. Rep. 889) and *Hutton* v. *West Cork Ry. Co.* ((1883), 23 Ch.D. 654) applied.

[As to the limits on a company's powers to deal with its assets, see 6 Halsbury's Laws (3rd Edn.) 170, para. 357; and for cases on the subject, see 9 Digest (Repl.) 558, 559, *3694-3700*.]

Cases referred to:

Hutton v. *West Cork Ry. Co.*, (1883), 23 Ch.D. 654; 52 L.J.Ch. 689; 49 L.T. 420; 9 Digest (Repl.) 658, *4360*.

Lee, Behrens & Co., Ltd., Re, [1932] All E.R. Rep. 889; [1932] 2 Ch. 46; 101 L.J.Ch. 183; 147 L.T. 348; 9 Digest (Repl.) 559, *3700*.

Interlocutory motion.

By notice of motion in an action begun by writ, the applicant, Hall Parke (suing on behalf of himself and all other shareholders of the defendant company, the Daily News, Ltd., save those who were defendants, the board of directors) sought (i) an injunction to restrain the defendant company until after trial of the action or further order from purporting to pass or in any manner act on or apply the assets of the defendant company in accordance with a resolution intended to be proposed, and, if thought fit, passed at a general meeting convened for Feb. 8, 1961; and (ii) an injunction to restrain each of the other defendants, the board of directors, until after trial of the action or further order from themselves, their proxies or agents or howsoever otherwise proposing to or putting to the vote of the meeting, or voting in favour of, the resolution, or any resolution to similar purport or effect.

By writ issued on Feb. 2, 1961, the applicant claimed against all the defendants (i) a declaration that the proposed resolution was, or would be if purported to be passed, ultra vires the defendant company and illegal, and (ii) injunctions in terms similar (mutatis mutandis) to those claimed by the notice of motion. In October, 1960, the defendant company had arranged for the transfer on sale of the two newspapers that it published to a purchasing company in consideration of a sum that was a little less than £2,000,000. The chairman of the board of directors and members of his family held, or were beneficially entitled to, a majority shareholding controlling the defendant company. The directors proposed that the greater part of the £2,000,000 should be disposed of for the benefit of employees of the defendant company. The proposals of the board of directors of the defendant company were set out in a circular letter, dated Jan. 20, 1961, which was sent to members of the defendant company by the chairman. By para. 5 of the said letter it was stated:

> "The amount of the basic consideration is £1,925,000 to which will be added an additional sum based on the increased sales of the 'Daily Mail' over a datum period; this latter sum is not yet ascertainable nor are the costs of cessation. The best estimate that can be made at the present time of the amount of the purchase consideration which will be available for the foregoing purposes, after meeting the costs of cessation, is a sum of the order of £2,000,000 which has been or will be applied approximately as follows:

(a)	In repayment of a loan made to [the defendant company] by the pension trustees for existing pensioners	£500,000
(b)	In discharging the liabilities to former employees in respect of payments in lieu of notice. These payments have been made	£390,000
(c)	In paying compensation for loss of pension rights representing basically one week's pay for each year of service	£1,110,000
		£2,000,000"

The appendix to the circular letter contained notice that a general meeting of the defendant company would be held on Feb. 8, 1961, for the purpose of considering and, if thought fit, passing the following resolution, namely:

> "That this meeting hereby confirms the proposal of the directors that the company should continue in business and authorises the directors to apply the balance of the purchase consideration receivable by the company . . . remaining after meeting such costs of cessation of such printing and publication as the directors think fit, generally in the manner set forth in para. 5 of the circular letter dated Jan. 20, 1961, . . ."

M. Finer for the applicant.

R. B. S. Instone for the respondents (the defendants in the action).

WILBERFORCE, J.: This motion arises out of the demise of two well-known newspapers, the "News Chronicle", a national daily, and the "Star", a London evening newspaper. The proprietor of those newspapers until the latter part of 1960 was the Daily News, Ltd., the first defendant in these proceedings, which, as is common ground, is controlled, by a large majority of shareholdings, by members of the family of the chairman, Mr. Laurence John Cadbury, or a trust which is administered by members of the same family.

In or about October, 1960, it became apparent that the newspapers could no longer be carried on and arrangements were accordingly made by the board for the transfer of the newspapers on sale to another group, viz., Associated Newspapers, Ltd., a company controlled, as I understand it, by Lord Rothermere. On Oct. 17, 1960, the defendant company ceased publication of both of the newspapers in question and on the same day it sent out to its shareholders a circular dated Oct. 17, 1960, informing them of the steps which had been taken. That circular enclosed an interchange of letters between Mr. Laurence Cadbury and Lord Rothermere explaining the reasons for the sale. The purchase price which was paid by Associated Newspapers, Ltd. was a little short of £2,000,000, and there were provisions in the agreement for an increase in this sum depending on the profitability of the newspapers subsequent to the sale.

Mr. Cadbury made no secret from the time when the agreement for sale was made public of his intentions with regard to that sum of money. Broadly, they were that the whole of it, apart from meeting certain liabilities, should be disposed of for the benefit of employees of the company. I wish to say at once here that I have no doubt at all that Mr. Cadbury and his fellow members of the board have acted throughout from entirely creditable motives, viz., to preserve so far as they could the employment of the members of the staff of the newspapers and, so far as that was not possible, to give them generous compensation. Moreover, having regard to the shareholdings in the company, any sacrifice which that might entail for members of the company would fall to a very great extent on the members of the family themselves.

On Oct. 5, 1960, Mr. Cadbury, writing to Lord Rothermere, made reference to the position of the staff and he said:

> ". . . it would be our intention to devote the whole of the purchase price to our staff and pensioners by giving compensation or pension benefits as well as the notice money that every employee will receive",

and that assurance was noted and welcomed by Lord Rothermere in his letter in reply of the same date. On Oct. 20, 1960, Mr. Cadbury made a statement to the Press and he was reported in " The Times " newspaper in its issue of Oct. 21, as having said that the basic price being £1,925,000 with provision for an increase,

> " Our employees were informed that the sum required to meet payments in lieu of notice, holiday payments, compensation for loss of employment, and provision for pensioners would be in excess of £1,500,000. It is the intention to devote the balance of the purchase consideration, after meeting the inevitable costs arising from the cessation of separate publication, to meet hardship cases, particularly as regards the older employees, in augmentation of the payments already referred to."

So that publicity was thus given at a very early date to the intentions of the company and there has never been any concealment about them.

Formal steps are now in the course of being taken in order to enable the proposals of the board to be carried out. On Jan. 20, 1961, a notice was sent out by order of the board to members of the company to the effect that a general meeting of the members would be held on Wednesday, Feb. 8, 1961, for the purpose of passing a resolution which, so far as material, is that the meeting authorises the directors to apply the balance of the purchase consideration receivable by the company under the contract of sale with Associated Newspapers, Ltd., remaining after meeting such costs of cessation of such printing and publication as the directors think fit, generally in the manner set forth in para. 5 of the circular letter, a copy of which accompanied the notice convening the meeting. With the notice convening the meeting there was a circular letter giving in some detail the history of the action taken by the board, the steps which they had taken to liquidate certain claims by creditors, being large paper companies, and in para. 5 of that circular setting out in broad detail the proposals for the disposal of the sum of £2,000,000. So that it is in accordance with para. 5 of that circular that the meeting of the members of the company was invited to authorise the directors to proceed.

There are three headings under which the sum of approximately £2,000,000 is proposed to be applied. First of all, it is said that £500,000 is to be used in repayment of a loan made to the Daily News, Ltd., by certain pension trustees for existing pensioners. Secondly, £390,000 is to be applied in discharging the liabilities to former employees in respect of payments in lieu of notice, and it is stated that those payments have in fact been made. Then, thirdly—and this is the item to which this present dispute mainly relates—a sum of £1,110,000, that is, over half the purchase price, is to be applied

> " in paying compensation for loss of pension rights representing basically one week's pay for each year of service."

That notice having been received, the plaintiff, Mr. Hall Parke, who is a shareholder in the company to the extent of fifty thousand £1 ordinary shares, brings this action against the company and against six individual defendants who are its directors asking for various relief which can be summed up by saying that he claims that the resolution and the proposed application of assets by the company would be ultra vires the company and illegal, and he asks for injunctions restraining the company and the directors from applying the assets in accordance with the resolution and with para. 5 of the circular.

Broadly, the case which he makes is that it is apparent from the terms of para. 5 (c) of the circular that the payments in question amounting to £1,110,000 are in the nature of gratuitous payments or ex gratia payments out of the company's assets which can only be justified if they are reasonably incidental to the carrying on of the company's business and if they are calculated to benefit and to promote the prosperity of the company. He says that there is no indication whatever that the sum in question is required for any such purpose and he points

A to the fact that the company has in fact given up the greater part of its business, i.e., the publication of newspapers, and is now left with only a small rump which consists of the holding of certain shares in a television company and the ownership of a printing works in Manchester which is at present not in operation.

The law on this subject has been clearly stated in two authorities to which I have been referred. I first take, although later in date, a decision by EVE, J., B in *Re Lee, Behrens & Co., Ltd.* (1). In that case the company was in the process of winding-up, but prior to the winding-up the board had entered into an agreement under which a pension of £500 a year was granted to the widow of a former managing director. It was held by the court that the transaction was not one for the benefit of the company or reasonably incidental to the company's business and was therefore ultra vires the company. EVE, J., states the tests to be applied C in cases such as these in the following way (2):

> " . . . the validity of such grants is to be tested as is shown in all the authorities by the answers to three pertinent questions: (i) Is the transaction reasonably incidental to the carrying on of the company's business? (ii) Is it a bona fide transaction? and (iii) Is it done for the benefit and to D promote the prosperity of the company?"

He then refers to certain previous authorities which are well known and comes to the conclusion that the desire of the board was to provide for the applicant, and that the question what, if any, benefit would accrue to the company never presented itself to the minds of the directors. That is similar to what the plaintiff says in this case, that the directors are actuated by philanthropic motives rather E than by considerations of the interests of the company.

The other case which has been referred to is the well-known decision of the Court of Appeal in *Hutton* v. *West Cork Ry. Co.* (3). That was a case where a company had disposed of its undertaking and was not, therefore, a going concern as a trading body. But, nevertheless, BOWEN, L.J., in his judgment (4), which has often been cited, lays down in general terms what principles ought to be F applied in cases where the company is carrying on business. Without quoting at length, I think that it is fair to sum up his judgment by saying that a gratuitous payment as such cannot be made. The test must be what is reasonably incidental and within the reasonable scope of carrying on the business of the company. In a later passage he says that charity may sit at the board for that purpose, for the purpose of promoting the company's interest, but not for any other purpose.

G Applying those authorities to this case, it is, first of all, necessary to consider whether the payments in question are gratuitous or not. A mere scrutiny of para. 5 (c) would indicate that as regards the employees, at any rate, the payments were gratuitous; it is apparent from the words in which that paragraph is drafted that the employees were not treated as having any existing legally enforceable pension rights and that the payments in question were to be ex gratia H payments to provide them with a pension to which they had no legal rights but, perhaps, to which they had a moral claim. However, it is said on behalf of the company that the payments had not a gratuitous character for two reasons, in support of which reference is made to earlier paragraphs in the same circular. In para. 3 the circular makes reference to substantial claims which might have been enforced against the company for breach of contract in respect of the I supply of newsprint to the company and it contains this passage:

> " In these circumstances arrangements were made with the newsprint suppliers that they would release Daily News from its obligations provided that Daily News proceeded promptly with the payments for or on behalf of its former employees which had been promised to them. I have publicly

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(1) [1932] All E.R. Rep. 889; [1932] 2 Ch. 46.
(2) [1932] All E.R. Rep. at p. 891; [1932] 2 Ch. at p. 51.
(3) (1883), 23 Ch.D. 654.
(4) (1883), 23 Ch.D. at p. 671.

> expressed my appreciation of this co-operative action taken by Sir Eric Bowater and the Canadian suppliers of newsprint."

What is said there is that that shows that there was a contract between the company and some suppliers of newsprint under which the creditors forbore to press their claims against the company for the full amount in consideration of an agreement by the company to make the payments which it had agreed to make to the employees promptly. I cannot possibly accept that contention in the form in which it has been presented. No evidence has been filed here on behalf of the board to establish the correctness of that paragraph or to give me any details as to such contract, if any, as was entered into between the two companies. I have no idea whether there was a binding contract; what the terms of it were; what benefits to the employees were contemplated, or what obligation was undertaken by the Daily News, Ltd. In the absence of any supporting evidence from the board that in fact an obligation was undertaken by the company in consideration of the forbearance of creditors, I am certainly not prepared on this motion to impart a non-gratuitous character to the payment to the employees on account of this particular transaction.

Similarly and secondly, in para. 4 of the same circular, reference is made to an assurance which the chairman of the company gave on the occasion of the sale of the newspapers to Associated Newspapers, Ltd. that it was the directors' intention "to apply the purchase consideration in the foregoing manner". There again, I have no evidence whatever as to the nature of the assurance except the passage to which I have already referred in Mr. Cadbury's letter to Lord Rothermere. In my judgment, the paragraph is quite insufficient to establish that there was any bargain or any contract, or the extent of any bargain or contract that there may be, and, again, I am quite unwilling to find from it that the company undertook any obligation to any third person as regards the payment of these pensions. I therefore proceed on the basis that the payments proposed are of a gratuitous character.

It is then said on behalf of the company that in fact the company is, as appears from the circular, left with profitable trading interests and that circumstance takes it out of the authority of such cases as the *Hutton* case (5) where no continuing business was carried on by the company. I am not prepared to deal with the matter on that formal kind of allegation. All I know is what is said in para. 6, and, again, not supported by any evidence from the company or from its directors; and all that para. 6 says is that the company is left with certain assets sufficient to cover its issued share capital and that the assets consist of a sixteen per cent. interest in Tyne Tees Television, Ltd.—that is to say, either an interest in the nature of shares or of a loan to that company—and its trading rights in connexion with the publication of "The Viewer", a programme journal of Tyne Tees Television, Ltd. A little more can be gleaned about that latter item from the annual reports of the directors which show that by arrangement with another company in the North of England the company publishes a programme journal, "The Viewer", which was launched in January, 1959. Apart from that, the only asset which is referred to in para. 6 of the circular is the printing works at Manchester which are at present idle. That seems to me to be entirely insufficient as a basis on which to ask the court to say that the payments in question are made for the benefit of the company's business. Even assuming that the assets which the company has retained are profit earning and can be treated as trading assets, it would require a great deal more to satisfy me that it was in the interests of the company as a trading concern of that character that a very large payment amounting to over £1,000,000 should have been made out of the proceeds of sale of the greater part of its business. I do not say that it is impossible that the court should be convinced that the payments are in the interests of the company's business as it is to be carried on in the future, but I say that, in the absence of some quite explicit evidence from the directors that the payments were regarded by them as being necessary in the interests of their business, I am quite unable to assume from the mere existence of these very minor trading interests that such was the case.

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(5) (1883), 23 Ch.D. 654.

I do not think that the *Hutton* case (6) is only to be applied where a company continues its existing interest and that there are only two types of cases, viz., on the one hand where a company carries on business and on the other hand where it ceases to carry on business. There must be intermediate cases where part of the business is sold and part retained and in such circumstances it is for the directors to come to the court and satisfy it, which they can do quite easily if they are prepared to make the necessary statements on oath with sufficient particularity, that what they have done is in the interests of the trading which is continued.

I therefore come to the conclusion, which I think is forced on me in the absence of any evidence to support what the directors have done, that the applicant makes out a strong prima facie case in saying that the application of this sum of money, which I should underline is of an unprecedentedly large amount, would be an ultra vires application of the company's assets.

There remains the question of the balance of convenience: whether it is right that I should at this stage grant an injunction against the company and its directors from disposing of this particular sum. I think that it would be right. I think that the normal course where an ultra vires action is threatened by a company is to prevent that ultra vires action from being carried out, and I propose to grant an injunction substantially in accordance with para. 1 of the notice of motion but to limit it to such portion of the resolution as relates to the application referred to in para. 5 (c) of the circular and not in any way covering the applications referred to in sub-paras. (a) and (b). The injunction relates not only to the application of the assets in the manner referred to in the circular but also to the passing of any resolution or vote in support of any resolution authorising the directors so to apply the assets. The injunction will be until judgment in the action or further order which leaves it open to the directors, if they think fit, to file evidence justifying their action or to file evidence which would show that continuation of the injunction would give rise to a claim on the part of Bowaters or any other paper company for damages, and to come to the court supported by suitable evidence and to ask the court to sustain or modify or to withdraw the injunction.

Order accordingly.

Solicitors: *Howe & Rake* (for the applicant); *Linklaters & Paines* (for the respondents).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(6) (1883), 23 Ch.D. 654.

R. *v.* SYKES.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Winn and Widgery, JJ.), February 13, 1961.]

Criminal Law—Sentence—Misprision of felony—Term of sentence.

On the assumption that the offence of misprision of felony exists, it is a common-law misdemeanour, and as such there is no limit to the number of years' imprisonment that can be given, save that in no case must an inordinate sentence be passed (see p. 704, letter C, post).

R. v. *Morris* ([1950] 2 All E.R. 965) and *R.* v. *Higgins* ([1951] 2 All E.R. 758) applied.

Several persons were involved in stealing firearms from a United States Air Force station in Norfolk, bringing them to Manchester and arranging for their sale, the suggestion being that they were going to the I.R.A. The appellant had played some part as a contact man and he was charged with misprision of felony in that knowing that others had received these firearms he failed to give any information about it to the police. He was convicted and sentenced to five years' imprisonment. He appealed against this sentence and it was contended on his behalf that no such offence existed and, alternatively, if there was such an offence, the punishment was limited in time and that on the old authorities the maximum sentence was imprisonment for one year.

Held: assuming the offence of misprision of felony existed a sentence of more than two years' imprisonment should not be imposed, even where the misprision was serious.

Appeal allowed in part.

[As to misprision of felony, see 10 HALSBURY'S LAWS (3rd Edn.) 293, para. 549; p. 315, para. 574; p. 632, para. 1201; and for a case on the subject, see 15 DIGEST (Repl.) 849, *8160*.

As to imprisonment in cases where no term is fixed, see 10 HALSBURY'S LAWS (3rd Edn.) 492, para. 896; and for cases on the subject, see 14 DIGEST (Repl.) 563, 564, *5627-5630*.]

Cases referred to:

R. v. *Higgins*, [1951] 2 All E.R. 758; [1952] 1 K.B. 7; 115 J.P. 564; 35 Cr. App. Rep. 130; 14 Digest (Repl.) 563, *5630*.

R. v. *Morris*, [1950] 2 All E.R. 965; [1951] 1 K.B. 394; 115 J.P. 5; 34 Cr. App. Rep. 210; 14 Digest (Repl.) 563, *5629*.

Appeal.

This was an appeal by Basil Landon Sykes against sentence. He was arraigned at Manchester Crown Court on May 9, 1960, before the recorder (SIR BASIL NIELD, Q.C.) and a jury, together with four other prisoners on charges arising out of the theft of firearms from a United States Air Force station in Norfolk on or about Mar. 18, 1960. One of the counts on which the appellant was charged was a charge of misprision of a felony, viz., that he and one Tucker had on Mar. 19, 1960, in the City of Manchester, well knowing that a felony had been committed by Thomas Kenny, in that the said Thomas Kenny had received one hundred automatic pistols, four sub-machine guns and 1,972 rounds of ammunition, the property of the United States Air Force, knowing the same to have been stolen, unlawfully concealed the commission of the said felony. Counsel for the appellant moved, before the appellant's arraignment, to quash two counts in the indictment against him, one being a count of receiving stolen goods and the other being the count for misprision of felony. The count of receiving was quashed, but the count charging misprision of felony was not quashed. The appellant was accordingly arraigned only on the charge of misprision of felony and on one further charge, not material hereto. At the conclusion of the trial on May 26 1960, the appellant was convicted of misprision of felony, but was acquitted on the second charge on which he had been arraigned. He was sentenced to five years' imprisonment. He appealed against conviction and sentence and his application for leave to appeal, together with his appeal in law against conviction, came before the Court of Criminal Appeal (Hilbery, Stevenson and Veale, JJ.) on Jan. 23, 1961. Stevenson, J., giving the judgment of the court dismissed the appeal against conviction, but granted the appellant leave to appeal against sentence on the ground that there might be a limitation on the sentence that could be imposed in respect of the offence of misprision of felony, namely, a limitation to a term of one year.

The authorities and cases enumerated below were cited in argument on the appeal in addition to those mentioned in the judgment*.

J. Hugill for the appellant.
W. D. T. Hodgson for the Crown.

LORD PARKER, C.J., gave the following judgment of the court: This is an appeal by the appellant against a sentence of five years' imprisonment imposed on him by the recorder at the Crown Court, Manchester, for misprision of felony. There was an appeal against his conviction partly on grounds of law, for example, that the offence of misprision of felony no longer existed and, secondly, that at any rate some active concealment was necessary to constitute the offence, and he applied for leave to appeal against his conviction on other grounds of mixed law and fact. His application and appeal in regard to conviction have been respectively refused and dismissed, but the court on that occasion gave leave to appeal against sentence, amongst other things desiring argument whether there was any express limitation by statute or otherwise on the length of the sentence that could be imposed.

It is unnecessary to refer to the full facts of the case. Suffice it to say that a number of people was involved in stealing firearms from a United States Air Force station in Norfolk, bringing them to Manchester and arranging for their sale, the suggestion being that they were going to the I.R.A. This appellant played some part as a contact man. He was charged before the justices with being an accessory after the fact, it being sought to prove that he had taken part in the re-sale of the goods. At the Crown Court, however, that was not persisted in and he was charged with misprision of felony in that knowing that others had received these firearms he failed to give any information about it.

Counsel for the appellant, who is in the embarrassing position of having as his main argument that there is no such offence, has nevertheless sought to persuade us that if there is, the sentence is limited in point of time. I find it unnecessary to go through the old authorities to which he has referred us, from Staundford's Pleas of the Crown in 1557 down to Chitty's Criminal Law

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* Fitzherbert's Office of Justice of the Peace (1583); Dalton's Country Justices (1618); Hale's Pleas of the Crown (1800 Edn.) 707; Coke's Institutes, Part III (1809 Edn.), c. 65, p. 139; Parke, B.'s charge to the Sussex Grand Jury, at Lewes Spring Assize, "The Times", Mar. 18, 1852, p. 6; Lord Westbury's definition in *Williams* v. *Bayley*, (1866), L.R. 1 H.L. at p. 220; *R.* v. *Castro*, (1880), 5 Q.B.D. 490; *R.* v. *Casserley*, "The Times", May 28, 1938, p. 7 (eleven days' imprisonment for misprision of felony); *R.* v. *Aberg*, [1948] 1 All E.R. 601; *R.* v. *Wilde*, (1960), Cr. Law Review 116 (where Slade, J., at Leeds Assizes stated passim that he was satisfied misprision of felony was still a common-law misdemeanour). In regard to the offence of misprision of felony Parke, B., had said, in the proceedings in 1852 cited above: "... this proceeding [i.e., where parties who were sufferers of felonies committed against them gave no information to the authorities or the police] which was known to the law as 'misprision of felony', was a very serious offence, and subjected the persons who were convicted of it to imprisonment for one year. The law with regard to this matter had certainly fallen into desuetude, but it was very necessary that it should be known that it still existed, and during the last twenty years he had himself been called upon to make use of it in the county of Durham, and he had sentenced two persons to a year's imprisonment for having wilfully withheld information relating to an act of felony that had been committed ..."

A in 1826. It is sufficient, I think, to read a passage from BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 4, p. 121 (1770 Edn.), where the law is stated thus:

> "Misprision of felony is also the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory. And the punishment of this, in a public officer, by the statute of Westm. 1, 3 Edw. 1, c. 9, is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, in both, fine and ransom at the king's pleasure . . ." B

Accordingly, counsel for the appellant contends that the maximum imprisonment is one year. The court is of the opinion, however, that on the assumption that the offence of misprision of felony exists, it is a common law misdemeanour. C As such there is in law no limit to the number of years' imprisonment that can be given, save only of course this, that in no case must an inordinate sentence be passed. That has been decided in this court in *R.* v. *Morris* (1) and in *R.* v. *Higgins* (2).

In judging what the limit of the sentence should be, in other words, when the sentence would become an inordinate sentence, there is, of course, a number D of criteria. In the case of conspiracy, which is a common law misdemeanour, it has been held that the limit is what could be given for the substantive offence. So here, it seems to this court, that a limit is to be found by at any rate two considerations: first, if, as might have happened here if the evidence had been a little stronger, he had been charged with being an accessory after the fact, the limit would have been two years' imprisonment; secondly, by the Statute E of Westminster (3) in the case of a sheriff, where one would think that the offence would be more serious, the maximum sentence laid down by the statute was one year and a day. Times have changed since the passing of that statute, and there may be cases, of which it is said that this is one, where the nature of the misprision is very serious; but at any rate it seems to the court that it would be impossible to give more than two years. It is, however, unnecessary to say F in this case whether more than one year was possible, since, on the facts of this case, it seems to the court that this man, who has been in custody since Mar. 29, 1960, has now served an appropriate sentence. Accordingly, the court proposes to set aside the sentence of five years and to substitute such a period of imprisonment as will allow him to be discharged tomorrow.

[Counsel for the appellant asked for leave to appeal to the House of Lords G under s. 1 of the Administration of Justice Act, 1960, against the dismissal of his appeal against conviction on Jan. 23, 1961.

LORD PARKER, C.J., giving leave to appeal, said that the appeal would be confined to such matters as counsel was entitled to argue before the court, namely, (i) whether there was such an offence as misprision of felony, and (ii) whether active concealment was an essential ingredient of that offence. The H court would certify that those two matters were points of general public importance for the purposes of s. 1 (2) of the Act of 1960.]

Appeal allowed in part. Sentence varied. Leave to appeal to the House of Lords granted.

Solicitors: *Cobbett, Wheeler & Cobbett*, Manchester (for the appellant); *Director of Public Prosecutions* (for the Crown). I

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law*.]

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(1) [1950] 2 All E.R. 965; [1951] 1 K.B. 394.
(2) [1951] 2 All E.R. 758; [1952] 1 K.B. 7.
(3) 3 Edw. 1 (1275), c. 9, repealed; now replaced by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29 (1); 23 HALSBURY'S STATUTES (2nd Edn.) 314.

LOUDEN *v.* BRITISH MERCHANTS INSURANCE CO., LTD.

[QUEEN'S BENCH DIVISION (Lawton, J.), February 6, 7, 8, 1961.]

Insurance—Accident insurance—Exception—Intoxicating liquor—Proviso excluding liability if injury sustained "whilst under the influence of intoxicating liquor"—Whether the word "whilst" connoted a causal connexion—What state was predicated by the words "under the influence of intoxicating liquor".

By a policy of insurance issued by the defendants they agreed that if L. should sustain injury caused by violent accidental external and visible means whilst travelling in a private motor car not belonging to him, the defendants would pay, if the injury resulted in his death, £1,000 to his personal representatives. The policy provided that the defendants should not be liable in respect of L.'s bodily injury "sustained whilst under the influence of intoxicating liquor". When travelling as a passenger in a private car belonging to G., L. sustained in a road accident bodily injury from which he died. At the time of the accident L.'s blood alcohol was at least 268 milligrammes per 100 millilitres and the court found that there was a high degree of probability that the higher centres of his brain had been so affected by alcohol as to cause him to lose control of his faculties of judgment and of controlling the finer movements of his limbs and extremities.

Held: as a matter of construction the words "under the influence of intoxicating liquor" in the exempting proviso of the policy meant such influence of intoxicating liquor as to disturb the quiet, calm and intelligent exercise of faculties, and the word "whilst" had a temporal not a causal significance; the defendants had shown on the evidence that L. at the time of the accident was under the influence of intoxicating liquor within the meaning of the proviso, so construed, and, therefore, were not liable to the plaintiff.

Dicta of LORD COLERIDGE, C.J., and of DENMAN, J., in *Mair* v. *Railway Passengers Assurance Co., Ltd.* ((1877), 37 L.T. at pp. 358, 359) applied.

[As to exemption clauses in personal accident insurance policies, see 22 HALSBURY'S LAWS (3rd Edn.) 300, para. 599; and for cases on the subject, see 29 DIGEST 396, 397, *3149-3157*.]

Case referred to:

Mair v. *Railway Passengers Assurance Co., Ltd.*, (1877), 37 L.T. 356; 29 Digest 397, *3153*.

Action.

By writ dated Sept. 16, 1959, the plaintiff, Mrs. Daisy Louden, as administratrix of the estate of her deceased husband, James Arnold Hamilton Louden (the deceased) claimed payment of £1,000 from the defendants, British Merchants Insurance Co., Ltd., by way of damages for breach of contract in failing to pay the sum under a policy of insurance dated Sept. 11, 1958, issued by the defendants to the deceased and in force at the material time. The policy, which was described as a private motor car policy, contained the following provision:—

> "If the insured [viz., the deceased] . . . shall sustain . . . whilst mounting into dismounting from or travelling in any private motor car not belonging to the insured or his wife any bodily injury caused by violent accidental external and visible means [the defendants] will pay to such injured person or his or her personal representatives the compensation herein specified."

The compensation, if the injury resulted in death, was £1,000. The policy contained the following proviso:—

> "Provided always that [the defendants] shall not be liable . . . in respect of bodily injury . . . sustained whilst under the influence of drugs or intoxicating liquor",

On Dec. 13, 1958, the deceased and one Gluck, travelled in Gluck's car from their home town, Millfield, to Weston-super-Mare to see a football match. After the match they went to a bar and had drinks. On the return journey to Millfield, at a point where the road bent at a right angle to the left, the car failed to negotiate the bend, knocked over a warning post and ended up in a ditch. Both Gluck and the deceased were killed. The court inferred that Gluck had been driving. Medical evidence established that at the time of the accident the deceased's blood alcohol was at least 268 milligrammes per 100 millilitres, or 0.268 per cent. On the evidence and expert evidence His Lordship (Lawton, J.) found that the deceased had habitually drunk large quantities of beer and had developed a tolerance to alcohol of a kind and degree which is common among persons who habitually consume such quantities of beer; but that when the blood alcohol figure is as high as 0.268 per cent. all but a few of such drinkers will very probably show, in addition to the clinical signs which would be manifest only to a doctor, some degree of incoordination of movement and will tend to stagger. The defendants did not dispute that the deceased sustained bodily injury caused by violent accidental external and visible means within the meaning of the policy, but contended that he died whilst under the influence of intoxicating liquor and that in consequence the exemption clause applied.

Marven Everett, Q.C., and *Michael Lee* for the plaintiff.
Martin Jukes, Q.C., and *Bernard Caulfield* for the defendants.

Cur. adv. vult.

Feb. 8. **LAWTON, J.**, having referred to the nature of the claim and having stated the facts and reviewed the evidence of expert witnesses, continued: I have had to consider whether the defendants have established that the deceased, within the meaning of the policy, sustained bodily injury whilst under the influence of intoxicating liquor. The words used in the exemption clause of the policy before me have probably been used for many years in policies giving assurance against injury. Counsel for the defendants referred to *Mair* v. *Railway Passengers Assurance Co., Ltd.* (1). The policy in that case provided that the assurance should not extend to any death or injury happening while the assured was under the influence of intoxicating liquor. The case came before Lord Coleridge, C.J., and Denman, J., by way of an application for a new trial on the ground that the verdict had been against the weight of evidence. Both learned judges construed the words, " while the assured is under the influence of intoxicating liquor ", although it may not have been necessary for the purposes of their judgments to do so. Neither seems to have thought that the words were so uncertain as to be incapable of construction. Both were of the opinion that these words connoted a disturbance of the faculties, Lord Coleridge, C.J., using the words (2), " as disturbs the balance of a man's mind ", and Denman, J., the words (3), " disturbing the quiet, calm, intelligent exercise of the faculties ". Counsel for the plaintiff, whose experience in matters of personal injury insurance is extensive, was unable to refer me to any case in which a different construction had been put on these words. In those circumstances, I find that the words are not so uncertain as to be incapable of construction, and I adopt the constructions in *Mair* v. *Railway Passengers Assurance Co., Ltd.* (1), albeit they have been expressed in mid-nineteenth century idiom. I add no gloss, as to do so might add confusion where none may have existed amongst insurance and policy holders during the past eighty-four years.

There remains the question of the construction in its context of the word " whilst ". In my judgment, it has a temporal meaning, and I am unable to read into the exemption clause any requirement of a causal connexion between the bodily injury sustained and the state of being under the influence of intoxicating liquor.

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(1) (1877), 37 L.T. 356. (2) (1877), 37 L.T. at p. 358. (3) (1877), 37 L.T. at p. 359.

A In those circumstances, the issue for decision is this: Have the defendants proved that the deceased sustained the bodily injury which resulted in his death whilst he was under such influence of intoxicating liquor as disturbed the quiet, calm, intelligent exercise of his faculties? In my judgment, they have. I am satisfied on the medical evidence that when the deceased sustained the bodily injury which resulted in his death, his blood alcohol then being at least 268
B milligrammes per 100 millilitres, there was a very high degree of probability that the higher centres of his brain had been so affected by the alcohol which he had consumed as to cause him to lose control of his faculties, particularly his faculty of judgment and of controlling the finer movements of his limbs and extremities. In such a condition, in my judgment, he was under the influence of intoxicating liquor within the meaning of the exemption clause of the policy.
C There will be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Abbott, Baldwin & Co.* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[*Reported by* KATHLEEN J. H. O'BRIEN, *Barrister-at-Law.*]

D

Ex parte HINDS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Streatfeild and Ashworth, JJ.),
E December 20, 1960.]

Criminal Law—Appeal—Court of Criminal Appeal—Practice—Appeal on several grounds of law, of fact, and of mixed law and fact—Adjournment for hearing of appeal on ground of law where leave refused on other grounds—Criminal Appeal Act, 1907 (7 *Edw.* 7 *c.* 23), *s.* 3.

F *Habeas Corpus—Appeal to Court of Criminal Appeal on point of law alleged denied—Whether such denial a ground for granting habeas corpus.*

If a prisoner, having several grounds of appeal, one of which is a ground of law and others of which involve questions of fact or mixed law and fact, applies for leave to appeal (which he needs only for the purposes of appeal on fact or mixed fact and law) the matter is listed as an application for leave to appeal; then, if the court is satisfied on hearing the application
G that a real point of law is involved on the first ground, but that leave to appeal should be refused on the other ground, the matter will be adjourned and will be listed as an appeal on the first ground (see p. 708, letter I, to p. 709, letter B, post).

H., who had been convicted at the Central Criminal Court, applied to
H the Divisional Court for a writ of habeas corpus alleging that he had had a right of appeal to the Court of Criminal Appeal on a point of law and that the appeal had never been heard. Apparently H. had put forward many grounds of appeal, including one ground of law, viz., wrongful admission of the evidence of one G. at H.'s trial, G. being a prisoner who had not been sentenced before he gave evidence. The whole matter had
I been before the Court of Criminal Appeal in May, 1954, when leave to appeal was refused and no part of the matter was adjourned for hearing as an appeal on a point of law.

Held: even if it had been the fact that H. had a right of appeal on a point of law and his appeal had not been heard, that would not have been a ground for granting a writ of habeas corpus; but, as at the hearing of the application for leave to appeal in 1954, no part of the matters then before the court had been adjourned for hearing as an appeal, the Divisional Court was satisfied that H.'s application in 1954 had not raised a real point of law.

[As to the right of appeal to the Court of Criminal Appeal, see 10 Halsbury's Laws (3rd Edn.) 521, para. 957.

As to grounds on which habeas corpus may be granted, see 11 Halsbury's Laws (3rd Edn.) 35, 36, paras. 62, 63; and for cases on the subject, see 16 Digest 250-255, *501-565*.

For the Criminal Appeal Act, 1907, s. 3, see 5 Halsbury's Statutes (2nd Edn.) 928.]

Motion for habeas corpus.

This was a motion to a Divisional Court of the Queen's Bench Division for a writ of habeas corpus brought by Alfred George Hinds who had been convicted of robbery at his trial at the Central Criminal Court, and had been sentenced, on Dec. 16, 1953. An application by him to the Court of Criminal Appeal for leave to appeal against conviction was dismissed, without adjournment, on May 10, 1954. The facts appear in the judgment.

The applicant was represented by his wife, Mrs. Hinds.

LORD PARKER, C.J.: This is an application made on behalf of one Alfred George Hinds, now detained in Her Majesty's Prison at Chelmsford, for a writ of habeas corpus. The application is made by Mrs. Hinds on his behalf, and although it is only in exceptional circumstances that the court will allow a wife to make an application for habeas corpus on behalf of her husband, the court will in this case treat this as an application made on his behalf.

The application is supported by two affidavits from the prisoner, a short affidavit of Dec. 10, 1960, and a very long affidavit of Dec. 19, 1960, and also by a letter which he has written to the registrar of the court, dated Dec. 17, 1960. The long affidavit from the prisoner sets out a great number of points on which he says that his trial, which was completed on Dec. 16, 1953, at the Central Criminal Court, was irregular and, indeed, that the proceedings in the magistrates' court were irregular. It is quite clear that he cannot, before this court, go into any such matters of irregularity, which are not for this court but for the Court of Criminal Appeal.

Looking at his affidavits as a whole, however, it appears, if we understand it aright, that the prisoner's grounds are not only that he did not have a fair trial in 1953, but also that he had a right of appeal to the Court of Criminal Appeal on a point of law, and that that appeal has never been heard. In the opinion of this court such a complaint, even if it could be justified, would not be a ground for habeas corpus, though it might well be a ground for applying to the Court of Criminal Appeal for the appeal on the point of law to be heard. It was in these circumstances that this court thought it right to adjourn the matter until today in order to see from the papers in the Court of Criminal Appeal Office what had occurred, and whether there was any ground for the prisoner's complaint.

First, as to the law; it is provided by s. 3 of the Criminal Appeal Act, 1907—

> "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—(a) against his conviction on any ground of appeal which involves a question of law alone; and (b) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal . . ."

Accordingly, if, for instance, a prisoner has three grounds of appeal, one on a point of law alone and two on matters of fact or mixed law and fact, he does not require any leave to appeal on the first ground, assuming that there is a real point of law, but he does require leave to appeal on the other two grounds. The prisoner cannot, of course, get a right of appeal merely by saying that there is a point of law alone, but must satisfy the court that there is such a point. Accordingly, for convenience, the whole matter is listed before the court in the first instance as an application for leave to appeal. If on such an application the court, while refusing leave on the second and third grounds, is satisfied that there is a real point of law alone involved in the first ground, it will then adjourn the hearing on that ground, grant legal aid and list the matter as an appeal.

In the case of this prisoner, it appears from the papers which the court has obtained that on the very next day after his conviction, namely, on Dec. 17, 1953, he applied for leave to appeal, and he stated as grounds for his appeal against conviction the following:

> "(a) On the ground that the verdict of the jury is unreasonable and cannot be supported by the evidence. (b) As a matter of law the details of which will be formulated by counsel in due course. (c) On such further and additional grounds of appeal as may be formulated when the transcript becomes available."

Later, on Mar. 31, 1954, he put in a long document containing further grounds of appeal on application for leave to appeal. The vast majority of those are clearly points of fact alone or mixed law and fact. He does, however, complain of wrongful admission of evidence, which might well be a point of law alone. His complaint, if I understand it aright, is mainly this, that a prisoner named Gridley, who gave evidence for the prosecution, had not been sentenced before he gave evidence. If I understand it aright, the prisoner is saying that as a matter of law that was wrong and Gridley ought to have been sentenced first. There is also a suggestion that Gridley gave hearsay evidence. It is quite true that as a matter of practice it has been said that a prisoner should be sentenced before he gives evidence, but there is nothing wrong in law if that is not carried out, and in this case the co-prisoner gave evidence before being sentenced. At any rate, the whole matter came before the Court of Criminal Appeal on May 10, 1954, when the application was refused. It will be seen, therefore, that the court had the whole matter before it, that leave was refused and that the court did not adjourn any part of it to be treated as an appeal because there was a ground raising a point of law alone. From this it is clear that the court must have been of the opinion that no point of law alone was involved or, if there was, that it was a merely frivolous point. That decision of the Court of Criminal Appeal is final, subject, of course, to the grant of a fiat by the Attorney-General. The prisoner in fact applied for such a fiat, and was refused. Accordingly, for my part, I am quite satisfied that the prisoner's complaint here is without foundation, and that these proceedings which, as I have said, the court is treating as an application for habeas corpus, must be refused.

STREATFEILD, J.: I agree.

ASHWORTH, J.: I agree.

Application refused.

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

Re MANIFOLD (*deceased*). SLATER *v.* CHRYSSAFINIS.

[CHANCERY DIVISION (Buckley, J.), February 3, 6, 1961.]

Administration of Estates—Distribution—Domicil—Two wills—Later will valid by law of English domicil of origin—Earlier will valid by law of Cyprus, the testatrix' domicil at date of her death—Probate of earlier will granted in Cyprus—Letters of administration with both wills annexed granted in England to attorney administrators—Whether administrators should hand over English assets to Cypriot administrator—Wills Act, 1861 (24 *&* 25 *Vict. c.* 114), *s.* 1.

A testatrix who had an English domicil of origin, but who was domiciled in Cyprus at the date of her death, made a will dated June 25, 1957, which was valid under Cypriot law. She made a subsequent will, dated June 18, 1958, by which she purported to revoke all former wills, but the execution of this will was defective under Cypriot law, though good under English law. In Cyprus probate of the 1957 will was granted to the first defendant and probate of the 1958 will was refused. Letters of administration to the estate of the testatrix were granted out of the Principal Probate Registry of the High Court in England to the two plaintiffs, as attorneys for the first defendant, with both wills annexed thereto. The scheme of both wills was the same, but the distributions were not entirely similar. The amount of the pecuniary legacies bequeathed by the 1957 will was £39,300; those bequeathed by the 1958 will amounted to £32,400. The plaintiffs had two funds in their hands, viz., £26,211 14s. 10d. representing personal estate, and £3,142 11s. 6d. representing the proceeds of sale of real estate. The first defendant had in his hands £25,000 cash and a sum of £10,000 representing immovable property, both being in respect of assets of the testatrix outside England.

Held: (i) the 1958 will, being executed in accordance with the testatrix' domicil of origin, had valid dispositive effect by virtue of s. 1 of the Wills Act, 1861 (see p. 718, letter B, post).

Re Grassi ([1905] 1 Ch. 584) applied.

(ii) although in general attorney administrators in England might be justified in paying over the balance of an estate to their principal abroad, they were not bound to do so in every case, and the court had a discretion to retain the administration of the estate under its control.

Eames v. *Hacon* ((1881), 18 Ch.D. 347), *Re Achillopoulos* ([1928] All E.R. Rep. 326) and *Re Lorillard* ([1922] All E.R. Rep. 500) considered and applied.

(iii) in the present case the plaintiffs should distribute the assets in their hands in accordance with the 1958 will and as if those assets were the whole of the testatrix' estate, notwithstanding that the consequence would be that movable property in England would not be distributed in accordance with the law of the deceased's domicil at the time of her death (see p. 720, letters D and E, and letters G to I, post).

[As to wills relating to immovables, see 7 HALSBURY'S LAWS (3rd Edn.) 51, para. 102; and for cases on the subject, see 11 DIGEST (Repl.) 390-393, *489-504*.

As to wills of movables, see 7 HALSBURY'S LAWS (3rd Edn.) 57-60, paras. 109-113; and for cases on the subject, see 11 DIGEST (Repl.) 393-395, *505-515*.

For the Wills Act, 1861, commonly known as Lord Kingsdown's Act, s. 1, s. 2, s. 4, see 26 HALSBURY'S STATUTES (2nd Edn.) 1356, 1357, 1358.]

Cases referred to:

Achillopoulos, Re, Johnson v. *Mavromichali*, [1928] All E.R. Rep. 326; [1928] Ch. 433; 97 L.J.Ch. 246; 139 L.T. 62; 23 Digest (Repl.) 205, *2423*.

Bremer v. *Freeman*, (1857), 10 Moo. P.C.C. 306; 29 L.T.O.S. 251; 14 E.R. 508; 11 Digest (Repl.) 336, *85*.

Eames v. *Hacon*, (1880), 16 Ch.D. 407; *affd.* C.A., (1881), 18 Ch.D. 347; 50 L.J.Ch. 740; 45 L.T. 196; 23 Digest (Repl.) 205, *2421*.

Earl, In the Goods of, (1867), L.R. 1 P. & D. 450; 36 L.J.P. & M. 127; 16 L.T. 799; 11 Digest (Repl.) 410, *640*.

Freke v. *Carbery* (*Lord*), (1873), L.R. 16 Eq. 461; 11 Digest (Repl.) 392, *500*.

Grassi, Re, Stubberfield v. *Grassi*, [1905] 1 Ch. 584; 74 L.J.Ch. 341; 92 L.T. 455; 11 Digest (Repl.) 393, *501*.

Lorillard, Re, Griffiths v. *Catforth*, [1922] All E.R. Rep. 500; [1922] 2 Ch. 638; 92 L.J.Ch. 148; 127 L.T. 613; 24 Digest (Repl.) 860, *8549*.

Meatyard, In the Goods of, [1903] P. 125; 72 L.J.P. 25; 89 L.T. 70; 11 Digest (Repl.) 410, *645*.

Adjourned Summons.

This was an application by originating summons dated Mar. 7, 1960, by the plaintiffs, Harry Cecil Gwyther Slater and Gladys Edna Curtis, the administrators in England of the estate of a testatrix, Christine Fanny Manifold, deceased, to determine whether, after paying her funeral expenses and the testamentary expenses incurred by them and the debts of which they had notice, they were at liberty to pay the funds respectively representing (i) the remaining personal estate of the testatrix in their hands (other than any articles specifically bequeathed by her last will dated June 18, 1958) and (ii) the proceeds of sale of the real estate of the testatrix in England not specifically bequeathed by her last will, to the first defendant, George Nicholas Chryssafinis as personal representative of the testatrix in Cyprus (where she was domiciled at the time of her death) notwithstanding that her last will was not validly executed by the law of Cyprus; or whether they should apply the funds, or either of them, in or towards payment of the pecuniary legacies bequeathed by the last will, and pay the balance (if any) to the first defendant or to the residuary legatees named therein. If the plaintiffs should be directed to apply the funds towards payment of the pecuniary legacies, the summons also sought determination of the question whether, and in what manner, the respective legatees ought to bring into account any, and which, of the benefits they might respectively have received or have been entitled to under the earlier will of the testatrix dated June 25, 1957, admitted to probate in Cyprus. The defendants were George Nicholas Chryssafinis, personal representative in Cyprus of the testatrix; Robert Cary Gilson, who claimed to be entitled to a legacy of £1,000 under the will dated June 18, 1958, and/or to a legacy of £500 under the will dated June 25, 1957; Joan Crawford, Elizabeth Lavender, and Vera Joan Clarke, who claimed to be interested under each of the wills as pecuniary legatees and as residuary legatees in equal shares. The facts appear in the judgment.

G. C. D. S. Dunbar for the plaintiffs.

L. H. L. Cohen for the first defendant.

A. A. B. Fuller for the second defendant.

E. G. Wright for the third, fourth and fifth defendants.

BUCKLEY, J.: The will with which I am concerned in the present case is the will of a lady who had an English domicil of origin, but at the date of her death she was domiciled in Cyprus. She made a will on June 25, 1957, by which she revoked all former testamentary dispositions and appointed the first defendant the executor thereof. After making a number of specific devises and bequests she gave her residue to the third, fourth and fifth defendants. That will was in a form and executed in a manner that accorded with the law of Cyprus and is in every way a valid will under Cypriot law.

On June 18, 1958, the testatrix made a further will by which she revoked or purported to revoke, any former testamentary dispositions and appointed the first plaintiff to be the executor thereof. By that will she made various specific dispositions and bequeathed pecuniary legacies and left her residue to the third, fourth and fifth defendants. That will, unfortunately, was in one respect defective as regards execution under Cypriot law. By Cypriot law, apparently, the attesting witnesses are required to place their initials on each sheet of the will, which was written on more than one sheet of paper, and that they omitted to do. Accordingly, when the first plaintiff sought to obtain probate of the 1958 will in Cyprus, the Probate Registrar in Cyprus refused to make a grant, and there has been no appeal from that decision. On Sept. 10, 1958, the Cypriot court granted probate of the 1957 will to the first defendant. On Feb. 25, 1959, letters of administration of the estate of the testatrix were granted by the Principal Probate Registry of this court to the two plaintiffs as attorneys for the first defendant, and both wills were annexed to those letters of administration.

The scheme of both the wills on broad lines was the same, but the details of the dispositions in the wills are not the same. There are properties which are specifically disposed of by one will and not by the other and vice versa. The pecuniary legatees in some instances take more under the 1957 will than under the 1958 will, while in some instances they take more under the 1958 will than under the 1957 will.

The testatrix' estate in England was sworn for probate purposes at £44,991 13s. 3d. gross and at £44,880 4s. net. It included personal chattels, stocks and shares and other investments and money belonging to the testatrix and certain immovable properties. The plaintiffs, as administrators in this country, have paid the funeral expenses and the few debts which the testatrix owed in this country. They have paid the estate duty payable in this country and they have paid certain testamentary expenses. They have also paid the first defendant a sum of £12,912 0s. 2d. for the purpose of enabling him to discharge the death duties payable in Cyprus. The plaintiffs, although they say that the net residue of the estate has not yet been finally ascertained, say that they have now in their hands the sum of £26,211 14s. 10d. representing the personal estate and a sum of £3,142 11s. 6d., representing the proceeds of the real estate of the testatrix. The first defendant says that the net estate of the testatrix in his hands, that is to say, representing assets other than those in England, at the date of the taking out of these proceedings, which was Mar. 7, 1960, amounted approximately to £35,000, of which approximately £25,000 is represented by cash and £10,000 is the value of immovable property. The 1957 will contained pecuniary legacies of an aggregate value of £39,300. The 1958 will contained pecuniary legacies of the aggregate value of £32,400.

The first defendant is a Queen's Counsel, practising in Cyprus, and he has sworn an affidavit in which he deposes to certain matters of Cypriot law. He says that the grant of probate of the 1957 will made to him operates as a judgment of the Cypriot court and, until revoked, is binding and conclusive in Cyprus. Accordingly, he can only act in Cyprus on the footing that the 1957 will was the last will of the testatrix and can have no regard to the provisions of the 1958 will, except so far as it affects the devolution of immovable property outside the jurisdiction of the Cypriot court, unless and until the grant of probate of the 1957 will to him is revoked. Then he goes on to say that notice to seek that grant of probate was given to all interested parties but that no one has applied to have the decision of the registrar varied or reviewed, and he goes on to point out that there has been a decision recently in the Cypriot courts which might, perhaps, indicate that the view taken by the registrar with regard to the invalidity of the execution of the 1958 will was mistaken, but the first defendant says:

> " Having regard to the lapse of time since the issue of the said grant to me it is most unlikely that the Cypriot court would now review the decision of the district registrar."

The first defendant then proceeds in his affidavit as follows:

> " If it should be held in the present proceedings that the plaintiffs were bound to distribute the estate in England in accordance with the terms of the 1958 will, difficult problems would arise. As stated by the plaintiff

Harry Cecil Gwyther Slater, the estate of the testatrix is unlikely to be sufficient to pay in full to each pecuniary legatee the larger benefit bequeathed by the 1957 will and by the 1958 will. The law of Cyprus applies the doctrine of abatement in the same way as the English courts would apply it. The doctrine of election does not exist under the law of Cyprus; but if any legatee under the 1957 will who resides in Cyprus is paid any sum of money from the estate of the testatrix out of funds not under my control, I should have to apply for directions to the Cyprus courts, and I apprehend that I should be directed either to take such payment into account in the distribution of the estate under my control or to take proceedings against such legatee to recover such sum (on the footing that the payer had no authority to intermeddle with the estate of the deceased). It may also be that a legatee outside the jurisdiction of the Cyprus courts who is paid out of funds not under my control, a sum larger than his legacy under the 1957 will, or larger than such legacy with any necessary abatement, would be ordered by the Cyprus courts to repay to me the excess: but I appreciate that there would be difficulties in enforcing such order. Lastly, I would confirm that as regards any assets which came to my hands as executor of the testatrix or as principal administrator, I would (except as hereinafter mentioned), be bound under the law of Cyprus to distribute the same under the terms of the 1957 will and without regard to the terms of the 1958 will. At the time of the grant to me, I swore an oath to the court undertaking that 'I will faithfully administer the property of the testator according to law and the tenor of the will' i.e., the 1957 will. The law of Cyprus would, however, follow the lex situs as regards the devolution of immovable property and, accordingly, if the proceeds of immovable property in England reach my hands, it is probable that I would be directed by the Cyprus courts to distribute the same, in accordance with the provisions of the 1958 will if that is the will which governs their devolution under the law of England. If this honourable court were to make an order which left me in any doubt as to my duties as such executor or administrator I would immediately apply to the court in Cyprus for directions as to how I should act."

Section 1 of the Wills Act, 1861, provides as follows:

> "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicil of origin."

In the present case the 1958 will was made in Cyprus, that is to say, out of the United Kingdom. It was made by a British subject and it was made by a British subject whose domicil of origin was England. Accordingly, the section is applicable to the present case.

I am asked by the summons first of all to decide

> "Whether the plaintiffs, after paying the funeral expenses and debts of the testatrix of which they have notice and the testamentary expenses incurred by them (a) are at liberty to pay the funds respectively representing (i) the remaining personal estate of the testatrix in the hands of the plaintiffs (other than any articles specifically bequeathed by her last will dated June 18, 1958) and (ii) the proceeds of sale of the real estate of the testatrix in England not specifically bequeathed by her said last will to the defendant George Nicholas Chryssafinis as personal representative

> of the testatrix in the island of Cyprus (where she was domiciled at the time of her death) notwithstanding that her said last will was not validly executed according to the law of that island, or, (b) ought to apply the said funds or either of them in or towards payment of the pecuniary legacies bequeathed by the said last will, and pay the balance (if any) to the defendant George Nicholas Chryssafinis as such personal representative as aforesaid, or (c) ought to apply the said funds or either of them in or towards payment of the pecuniary legacies bequeathed by the said last will and pay the balance (if any) to the residuary legatees named therein, or (d) ought to deal with the said funds or either of them in some and what other manner."

By question 2 of the summons I am asked if I should direct the plaintiffs

> "to apply the said funds or either of them in or towards payment of the said pecuniary legacies, whether and in what manner the respective legatees ought to bring into account any and which of the benefits which they may respectively have received or be entitled to under the earlier will of the testatrix dated June 25, 1957, admitted to probate in Cyprus."

The third question in the summons asks for directions and the fourth question asks if and so far as necessary that there may be administration of the estate of the testatrix.

Counsel who appears for the first defendant has submitted, first, that wherever there is ancillary administration in this country and the principal administration elsewhere, it is the duty of the English administrators to hand over the clear value of the English assets, after payment of debts and expenses properly incurred here, to the persons in the position of executors or administrators in the form of the Cypriot administration. He puts his case on the alternative ground, that where there are attorney-administrators in England it is their duty, as attorneys of their principal, to account to their principal for the clear balance of the English assets. In connexion with those submissions he referred me to various authorities, the first being *Re Achillopoulos, Johnson* v. *Mavromichali* (1). That was a case of a Greek residing in Alexandria and whether he was domiciled in Greece or in Egypt the distribution of his movable property was governed by Greek law. The administration was taken out in this country by an attorney-administrator on behalf of one of the persons who were heirs under Greek law to the movable property of the deceased. Before the case was finally disposed of, new letters of attorney were granted by all the heirs of the movable estate of the deceased in favour of two persons, and a new grant of administration was made in this country in favour of those two persons. The question was raised whether the attorney-administrators ought to hand over the surplus assets in this country to the persons who were the heirs to the movable property of the deceased under Greek law, there being no one under Greek law to whom as administrator any formal grant similar to the grant of administration in this country could be made. TOMLIN, J., said (2):

> "There is no question, I think, but that where a testator domiciled abroad has died, and the executors, under the law of the domicil, have procured a grant in this country by their attorneys for him, the court is free, in proper circumstances, to authorise the administrator to hand over the surplus of the assets in this country to the executors of the law of the domicil."

The problem in that particular case was whether the attorney-administrators could hand over to the heirs, being persons who had not any sort of formal grant of representation in their favour. TOMLIN, J., then said (3):

> "In this case, I am satisfied by the evidence to which my attention has

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(1) [1928] All E.R. Rep. 326; [1928] Ch. 433.
(2) [1928] All E.R. Rep. at p. 329; [1928] Ch. at p. 444.
(3) [1928] All E.R. Rep. at p. 329; [1928] Ch. at p. 445.

> been called that the three persons who were made original defendants to the summons are the persons who, by the law of the domicil, under the Greek law, are charged with the duty of administering the estate, paying the debts, and seeing that the surplus gets into the proper hands. That being so, I am free, if I see fit, to give to the administrators over here liberty to hand over any surplus to those defendants."

Then a little lower down on the page he said (4):

> "I take the view that the duty of an attorney-administrator for a foreign principal, who is the executor of the law of the domicil, is that he is to take the necessary steps for ascertaining and paying the English debts or the debts payable in the United Kingdom, but, having done that, he is free to hand over the surplus (unless he has notice of some foreign debt) without the necessity of foreign advertisements or taking any active steps abroad to ascertain the position in regard to the debts."

The effective part of the order which TOMLIN, J., made (5) was that the plaintiffs

> "are to be at liberty to pay or retain the costs, hereinbefore directed to be taxed, out of the assets of the testator in their hands as such administrators as aforesaid; and to pay or transfer to the defendants, Aristis Mavromichali, Maria Mpasia, and Helen Theotoki, the surplus of such assets remaining, after payment or retention of the said costs and payment of any further claims against the testator's estate of which the plaintiffs shall have received notice, prior to such payment or transfer as aforesaid . . ."

It is quite clear from that judgment that TOMLIN, J., was expressing the view that it was proper for the court to authorise the attorney-administrators to hand over the clear balance of the estate to their principals. It will be observed that the order is not mandatory. It merely says that they are "at liberty" to do so, and the language in which TOMLIN, J., expressed his decision, was language which suggests that the court had a discretion whether or not it would permit assets to be dealt with in that way. I do not think that that authority supports the proposition put forward by counsel in the more restricted way in which he has expressed it when he suggests that attorney-administrators or administrators in an ancillary administration are under a duty to hand over surplus assets to the principal administrator.

Counsel for the first defendant also referred me to *Eames* v. *Hacon* (6). It is only necessary for me, I think, to read the opening sentences of the judgment of FRY, J., in that case (7):

> "The property in question in this action is claimed by the legal personal representative of the intestate who was constituted by the Irish court, which, for the purposes of this case, I assume to be the forum of the domicil of the deceased. Prima facie, that person is, in my judgment, entitled to receive the moneys belonging to the personal estate of the testator, which represent the clear net receipts obtained in any country wherever it may be, and through the intervention of any letters of administration wheresoever granted."

FRY, J., there says that that is the prima facie right of the principal administrator, but the use of the words "prima facie" seems to me to be consistent with the language carefully adopted by TOMLIN, J., in *Re Achillopoulos* (8). I think that the position really is this: that the attorney-administrators in this country for the principal administrator in Cyprus, when they have paid those expenses which they have to meet in connexion with the administration of the deceased's estate in England, and when they have paid the debts of the deceased in England, A may be justified in paying over the balance to their principal, but I do not think that it follows by any means that in every case they are bound to do so.

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(4) [1928] All E.R. Rep. at p. 329; [1928] Ch. at p. 445. (5) [1928] Ch. at p. 446.
(6) (1880), 16 Ch.D. 407. (7) (1880), 16 Ch.D. at p. 408.
(8) [1928] All E.R. Rep. 326; [1928] Ch. 433.

Then counsel for the first defendant and counsel for the legatees who argued on the same side, contended that a testamentary disposition of movables was, by the ordinary rule of private international law governed by the law of the domicil of the deceased at the date of his death and that the Wills Act, 1861, did not B override that principle; and that in the present case, as, under Cypriot law, the movable property of the deceased must be distributed in accordance with the terms of the 1957 will, the effect of the Wills Act, 1861, could not be to render the 1958 will an effective disposition of assets in this country in the way provided by the 1958 will. They referred me, among other things, to a passage in TRISTRAM AND COOTE'S PROBATE PRACTICE (21st Edn.), at p. 84, where it is C stated:

> " Where a British subject left a will valid by the law of his domicil, which was revoked by a later will invalid by the law of his domicil, but which could have been proved as valid in accordance with Lord Kingsdown's Act, the court of domicil, when granting probate of the earlier will, retained the later will and refused to give it out. As the distribution of the personal estate in D England would be required to be made in accordance with the terms of the will declared valid by the court of the domicil, the registrar held that the grant of probate issued by the court of domicil could be resealed in England (9)."

That case appears to be very similar to the present case in this respect. There E was, first of all, a will valid by the law of the domicil (as in the present case the 1957 will is valid by Cypriot law) which was revoked by a later will invalid by the law of the domicil (as in the present case the 1958 will purported to revoke the 1957 will but was invalid by Cypriot law) and the later will was one which could have been proved as valid in accordance with Lord Kingsdown's Act, that is to say, the Wills Act, 1861 (as the 1958 will is valid under that Act). F Apparently in the case referred to in TRISTRAM AND COOTE'S PROBATE PRACTICE the court of domicil in granting probate of the earlier will retained the later will and refused to give it out, so that the later will was not available to those who wanted to use it in this country. Though I have not heard any discussion on this point, I apprehend that would not have made it impossible to obtain some sort of grant in this country of that will. However, the registrar there elected G to admit to probate the earlier will by resealing it and the grant was apparently made because, in the registrar's view the earlier will was the one which regulated the distribution of the assets according to the law of the domicil, and therefore was the only effective document, and it would not have been right to admit the later will to probate, notwithstanding that it complied with the requirements of the Wills Act, 1861.

When one comes to look at the language of s. 1, it is to be noted that it pro- H vides that a will which complies with the requirements of the section

> " shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate."

One argument which has been put forward is that the section does not validate the 1958 will for all purposes but merely for the purpose of being admitted to I probate, and that it does not validate that will so as to give it any dispositive effect which would conflict with the 1957 will, being the will which is recognised by the law of the domicil.

In that connexion I must refer to the decision in *Re Grassi, Stubberfield* v. *Grassi* (10). The testator in that case was a British subject who at the time of his death was domiciled in England, but he made a will in Italy which was a holograph will not attested by any witnesses and accordingly not a will which under the Wills Act, 1837, was duly executed according to English law. The question arose in that case whether, having regard to s. 1 of the Wills Act, 1861, the will was not a valid and effective will. Mr. Birrell, K.C., who appeared for the testator's widow, who was a beneficiary under the will in question, said, in the course of argument (11):

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(9) Andrew Bernard Coghlon (unreported).

(10) [1905] 1 Ch. 584.

> " Technical persons will no doubt say that the Act was only intended to enable wills to be admitted to probate, and that, although the legal title in the leasehold vests in the executor, the beneficial interest does not go to the intended donee pointed out in the will; but that is not the effect of the Act."

The object of s. 1 of Lord Kingsdown's Act, according to him,

> " . . . in saying that the will is to be ' well executed for the purpose of being admitted to probate ' is only to place such a restriction or limitation on the enabling words as are necessary to prevent its being said that the will is to be valid for all purposes—e.g., to render valid things which in other wills would contravene Thellusson's Act or the law against perpetuities."

On the other side Mr. Buckmaster, K.C., contended that some effect must be given to the words " for the purpose of being admitted to probate ", and that they were satisfied by holding that on probate being obtained here the executor obtained the legal title in the estate; and that " no beneficial interest in any personalty passes to the persons named as beneficial legatees in the will ". So the point whether the Act of 1861 merely validates the will for the purpose of obtaining a grant of representation or validates it as a disposition of the testator's property is clearly taken in argument. BUCKLEY, J., said this (12):

> " The first section of Lord Kingsdown's Act relates to wills made out of the United Kingdom by British subjects. The second section relates to wills made in the United Kingdom by British subjects. The framework of the two sections is substantially the same, but there are certain verbal differences between the two sections, which may, and I think must, have arisen from a want of scanning the language, and not from the existence of any purpose of producing different results. For instance, s. 1 refers to ' a British subject,' whereas s. 2 speaks of ' any British subject.' Section 1 refers to ' the law of the place '; s. 2 refers to ' the laws for the time being in force in that part of the United Kingdom where the same is made.' Again, there is a difference of language in the words pertinent to the matter which I have to decide, inasmuch as s. 1 says that the will shall, as regards personal estate, ' be held to be well executed for the purpose of being admitted . . . to probate,' whereas s. 2 says that the will ' shall, as regards personal estate, be held to be well executed and shall be admitted . . . to probate.' Does s. 1 mean that the will is to be well executed for the purpose only of being admitted to probate, and not for any other purpose? I cannot understand how that can possibly be held to be the meaning. The variance between the two sections is, in my judgment, one of words only, and not of meaning. What is the effect of being ' well executed for the purpose of being admitted to probate '? Does that extend to make a gift of leasehold property to a certain person effectual? I cannot see why it should not."

A little later he said (13):

> " A disposition by will to which Lord Kingsdown's Act applies is no doubt not effectual in any way other than that which results from its

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(11) [1905] 1 Ch. at p. 588.

(12) [1905] 1 Ch. at p. 591.

(13) [1905] 1 Ch. at p. 592.

> being admitted to probate; for example, although it might be admitted to probate it is clear, on the authority of *Freke* v. *Lord Carbery* (14) that provisions in a will infringing Thellusson's Act or the English law against perpetuities would not be validated by Lord Kingsdown's Act. Therefore s. 1 of that Act does not say that the will shall be valid for all purposes. The section says, in effect, that the will shall be valid for the purposes of being admitted to probate, and will then take its place and be effectual for such purposes following on probate as the law of England allows."

It seems to me that I am bound, following that decision, to hold that where a will is a will proper to be admitted to probate under either s. 1 or s. 2 of the Act of 1861, when admitted to probate it will be regarded by the courts of this country as being a valid and effective disposition of the testator's property in accordance with its terms, to the extent that the law of this country allows this disposition to take effect, and that the effect of the Act is to give to such a will a dispositive effect.

The general rule undoubtedly is that a will which is validly executed, which is valid as regards form in accordance with the law of the domicil of the deceased at the date of his death, will be admitted to probate in this country without reference to the Wills Act, 1861, at all. It may be that there are some cases in which the difficult question of renvoi arises in which that simple statement of the principle is not applicable. Counsel referred me to *Bremer* v. *Freeman* (15), which is referred to in DICEY'S CONFLICT OF LAWS (7th Edn.), at pp. 68 and 69, where it is suggested that that case led to the passing of the Wills Act, 1861. The Wills Act, 1861, in the great majority of cases, applies either where there is no will which is valid by the law of the domicil at the date of the testator's death, or where there is such a will which is valid by the law of the domicil at the date of the testator's death and not effectually revoked by any later will recognised by that law, but where there is a later will in existence which complies with the terms of the section so as to be a will capable of being admitted to probate in this country. In the first case there will be an inevitable conflict between the terms of the will recognised under the Act in this country but not recognised by the law of the domicil and the law of the domicil relating to the distribution of property in respect of which there is no effective testamentary disposition. In the second case there will be a conflict between the terms of the will recognised as being valid and effective by the law of the domicil and the terms of the later will which is recognised by the courts of this country under the Act. Where there is no such conflict (for instance, where the disposition contained in the will happened to conform precisely to the distribution on intestacy recognised by the law of the domicil) the section will have no operative effect. Although there may be some basis for the suggestion that questions arising out of the law of renvoi may have something to do with the passing of this Act, I think that I have to recognise the fact that the great majority of cases in which the Act is likely to apply are cases in which there will be a conflict between the law of the domicil and the effect of the will which is to be admitted to probate under this Act. I think that this is consistent with, and supported by, the terms of s. 4 of the Wills Act, 1861, which provides:

> "Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed . . ."

The 1957 will in the present case would undoubtedly be a will which would have been valid for all purposes if this Act had not been passed, because the 1958 will, not having been executed in accordance with Cypriot law, would not, but for the Act, be admitted to probate in this country. Then the section goes on:

> "except as such will or other testamentary instrument may be revoked

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(14) (1873), L.R. 16 Eq. 461.

(15) (1857), 10 Moo. P.C.C. 306.

> or altered by any subsequent will or testamentary instrument made valid by this Act."

The 1958 will complies exactly with the terms of s. 1 and is, in my judgment, a will which is made valid by this Act. Section 4 appears to me to recognise the fact that such a will may conflict with an earlier will recognised by the law of the domicil, and so operate to revoke, or to vary, the provisions of the earlier will. That the Act does not validate the will merely for the purpose of obtaining a grant is further established, I think, by the decision *In the Goods of Meatyard* (16). In that case the testator by a will in English form made in September, 1898, and duly attested by two solicitors' clerks of a London firm of solicitors, revoked all former wills and testamentary dispositions theretofore made by him, and appointed certain persons as executors and trustees, and after giving certain legacies he disposed of his real and personal estate in the United Kingdom of Great Britain and Ireland. He next made a will in Brussels in Belgian form dealing with his property in Belgium which purported to revoke all wills previous to that will. Later again he made a codicil to his English will in which he confirmed the English will. The President, SIR FRANCIS JEUNE, held that the deceased was domiciled in Belgium. A grant had been obtained in Belgium in relation to the Belgian will. The executors of the English will applied for a grant in England of the English will. What JEUNE, P., said there was this (17):

> "The duty of this court is to follow, so far as it can, the law of the testator's domicil, namely, the law of Belgium, by recognising the persons whom the Belgian court has invested with the power and duties of administrators. This is in accord with more than one authority, the strongest of which is, perhaps, *In the Goods of Earl* (18), in which LORD PENZANCE had before him a very similar case; and the principle there laid down is that this court ought to act in accordance with the law of the testator's domicil."

Accordingly, in that case, a grant having been made in Belgium, the English grant was refused to the executors of the English will, but the grant, in respect of that will, was made to the Belgian administrators or executors notwithstanding that the case was one to which s. 2 of the Wills Act, 1861, was applicable.

It is clear from that, I think, that the fact that a will is one to which the Act of 1861 applies does not mean that whoever may be named in the will as executors have a right to a grant. The operation of the Act is, therefore, not merely to validate the will as a document which nominates somebody to have the right of administering the estate in this country. That is fully consistent with the views taken in *Re Grassi* (19), that the Act has the much wider effect of making effective a will which confers beneficial interests on the persons who are legatees or devisees under it.

So I reach this position. I have here a will recognised by law as having been duly executed and as being admissible to probate as regards personal estate, which in terms revokes an earlier will, the 1957 will. The 1958 will is one which, on the authorities which bind me, I regard as conferring a beneficial interest on those who claim under it. It seems to me that the duty of this court is to see that the persons charged with the administration of the estate in this country carry the dispositions contained in that will into effect as far as it lies in their power to do so. That the court has a discretion to retain the administration of an estate in this sort of case under its control is, in my judgment, clear from *Re Lorillard, Griffiths* v. *Catforth* (20). In that case a testator who was domiciled in New York died in England, leaving assets and creditors both in England and America, and the estate was in course of being administered by the courts in both countries. In the English administration, after all the creditors whose debts were capable of being proved by English law had been paid, the English administrators had a surplus in their hands. There were still creditors who were unpaid but their debts were debts which were statute-barred by English law and, therefore, could not be effectively relied on in this jurisdiction. They were not, however, statute-barred by American law. The question which arose in that case was whether in those circumstances it was the duty of the English administrators to hand over the surplus in the English administration to the American administrators who were the principal administrators of the estate. The result of that would have been that the amount which was handed over would have been used to pay the creditors in the United States. Both Eve, J., and the Court of Appeal came to the conclusion that the court in England had a discretion in the matter, and that the proper exercise of that discretion was to direct the English administrators not to hand over the surplus to the American administrators, but to retain it and to distribute it to the beneficiaries under the authority of the order of the court in England. Just as in that case the court considered itself justified in retaining control of the administration of the estate, notwithstanding that there were claims on it by creditors which might have been successfully asserted in the United States of America; so in a case like the present, I think, the court is justified in saying that the English attorney-administrators ought not to hand over money which they have available in their hands to the first defendant, who would be unable to give effect to the dispositions contained in the 1958 will, because Cypriot law would not permit him to do so. It seems to me that the right course in such a case as this is for the English administrators to proceed to distribute the assets which they have in their hands in this country in accordance with what I think is the result of the provisions of the Wills Act, 1861, that is to say, on the footing that the 1958 will is a valid and effective will and does effectively revoke the 1957 will. They will have to distribute those assets as though they were the whole of the estate, because they are the whole of the assets so far as the English administrators are concerned, and all the legacies will have to abate to the extent that is necessary, having regard to the amount of the funds available to the English administrators.

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(16) [1903] P. 125. (17) [1903] P. at p. 129. (18) (1867), L.R. 1 P. & D. 450.
(19) [1905] 1 Ch. 584. (20) [1922] All E.R. Rep. 500; [1922] 2 Ch. 638.

What the result of that will be on the distribution of the assets in Cyprus I do not know, and I do not think that I am concerned to know. It may be that the Cypriot court will take into account, in the distribution of those assets in accordance with the dispositions contained in the 1957 will, the amounts which the various legatees under the will of 1957 will have received by reason of the distribution made by the English administrators; or it may be that the Cypriot court will proceed in some other way. That, I think, is entirely a matter for the authorities in Cyprus.

I think that I am bound by the provisions of the Wills Act, 1861, to see that the assets that are being administered in this country are administered in accordance with what I think is the result of the provisions of that Act. It is true that the result of this will be that the movable property in England will not be distributed in accordance with the law of the domicil of the deceased at the date of her death; that is to say, movable property in England will not be distributed in the way in which the normal rule of private international law applicable to such cases would require. That is the result, as I think, of the Act of Parliament, and Parliament is, of course, able to say how assets that are administered by the courts of this country shall be applied, and it is perfectly within the capacity of Parliament to say that in certain circumstances the rule that movables shall be distributed in accordance with the law of domicil of the deceased at his death shall not apply, and I think this is such a case.

[His Lordship made a declaration on question 1 that the plaintiffs, after paying funeral expenses and debts of the testator of which they had notice and the testamentary expenses incurred by them, ought to apply the said funds in or towards the payment of the pecuniary legacies bequeathed by the 1958 will and pay the balance, if any, to the residuary legatees named therein, and that the pecuniary legacies should abate rateably so far as necessary.

On question 2 HIS LORDSHIP declared that, in making the distribution, the plaintiffs were not to take into account any benefits which persons interested under the 1958 will might be entitled to under the 1957 will, or otherwise under the estate of the testator.]

Declarations as stated above.

Solicitors: *Slaughter & May* (for the plaintiffs); *Neish, Howell & Haldane* (for the first defendant); *Gibson & Weldon*, agents for *Roberts & Andrew*, Exeter (for the second defendant); *Bird & Bird* (for the third, fourth and fifth defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

MORECAMBE AND HEYSHAM CORPORATION *v.* ROBINSON (VALUATION OFFICER).

[COURT OF APPEAL (Holroyd Pearce and Harman, L.JJ., and Sachs, J.), January 17, 18, February 7, 1961.]

Rates—Valuation—Foreshore, esplanade and gardens—Profits basis yielding low value—Finding that occupying local authority would give higher rent.

Rates—Lands Tribunal—Appeal—Powers—Method of valuation agreed by parties—Evidence supporting value higher than that yielded by the agreed method—Power to fix higher figure—Local Government Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 26), *s.* 48 (4).

Morecambe Corporation through its "entertainments undertaking" occupied a hereditament, which was described in the valuation list as "beach and premises" and comprised a foreshore, sea wall, esplanade, ornamental gardens and shelters and various entertainment facilities. The corporation incurred expenditure in advertising the amenities which the hereditament provided. The need for preserving the amenities and for constructing and maintaining the sea wall and promenade was referred to in the preamble to the Morecambe Corporation Act, 1928. On appeal to the Lands Tribunal against an assessment of the hereditament for rating purposes at £1,750 rateable value, the parties agreed that the proper method of valuation was the profits basis. The valuer giving evidence supporting the assessment stated that where the profits basis would produce a nil assessment it was normal to put a value on a hereditament, and that he had agreed various beach assessments in the region of £1,000 rateable value. The tribunal found that the profits basis yielded a rateable value between £600 and £700, but determined the assessment at £1,000 rateable value on the ground that the corporation would have been prepared hypothetically to suffer a moderate loss rather than to permit the hereditament to remain unlet and unmanaged and that that factor would, in the hypothetical negotiations, have had effect on the rent agreed.

Held: the finding of the tribunal that the rateable value of the hereditament was £1,000 per annum should stand for the following reasons—

(i) in assessing for rating purposes the notional rent of a hereditament such as this which not only was not let, and probably would never be let, but also was of an exceptional kind, being an amenity hereditament for attracting visitors and not a public utility for providing public services, the adoption of the profits basis was not mandatory but permissive.

Amalgamated Relays, Ltd. v. *Burnley Rating Authority* ([1950] 1 All E.R. 253) applied.

(ii) the tribunal was not bound to assess the hereditament on the profits basis merely because the parties had so agreed. A

Sheffield City Council v. *Meadow Dairy Co., Ltd.* ((1958), 2 R.R.C. 395) and dictum of DU PARCQ, L.J., in *R.* v. *Westminster Assessment Committee, Ex p. Grosvenor House* (*Park Lane*), *Ltd.* ([1940] 4 All E.R. at p. 144) applied.

(iii) the tribunal had not, accordingly, erred in law and there was evidence on which it could have found that £1,000 was the correct figure for the rateable value. B

Per CURIAM: in s. 48 (4) of the Local Government Act, 1948, the word "contention" refers to the figure aimed at and not to the various legal or factual arguments on which appellants base their case, and the tribunal is not bound by the arguments of, or the figures submitted by, one side or the other, provided that it does not travel outside the upper and lower financial limits of the figures contended for on appeal (see p. 724, letter G, p. 729, letter E, and p. 730, letter E, post). C

Appeal dismissed.

[As to use of the profits basis of valuation for rating purposes and the powers of the Lands Tribunal on appeal, see 32 HALSBURY'S LAWS (3rd Edn.) 77, para. 108, and 129, para. 173; and for cases on the subject, see 38 DIGEST (Repl.) 619, 620, *879-887*. D

For the Local Government Act, 1948, s. 48 (4) and s. 49 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 250, 251.]

Cases referred to:

Amalgamated Relays, Ltd. v. *Burnley Rating Authority*, [1950] 1 All E.R. 253; [1950] 2 K.B. 183; 114 J.P. 113; 2nd Digest Supp. E

Ellerby v. *March*, [1954] 2 All E.R. 375; [1954] 2 Q.B. 357; 118 J.P. 382; [1954] 3 W.L.R. 53; 38 Digest (Repl.) 716, *1509*.

Kingston Union v. *Metropolitan Water Board*, [1926] All E.R. Rep. 1; [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; 38 Digest (Repl.) 650, *1081*.

London County Council v. *Erith Parish* (*Churchwardens, etc.*) *& Dartford Union Assessment Committee, etc.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 38 Digest (Repl.) 481, *47*. F

Metropolitan Water Board v. *Hertford Corpn.*, *Hertford Corpn.* v. *Metropolitan Water Board*, [1953] 1 All E.R. 1047; 117 J.P. 265; [1953] 1 W.L.R. 622; 38 Digest (Repl.) 650, *1082*.

R. v. *Westminster Assessment Committee, Ex p. Grosvenor House* (*Park Lane*), *Ltd.*, [1940] 4 All E.R. 132; [1941] 1 K.B. 53; 110 L.J.K.B. 6; 165 L.T. 43; 104 J.P. 428; 38 Digest (Repl.) 768, *1837*. G

St. James' & Pall Mall Electric Light Co., Ltd. v. *Westminster Assessment Committee*, [1933] All E.R. Rep. 98; [1934] A.C. 33; 103 L.J.K.B. 9; 150 L.T. 123; 98 J.P. 20; Digest Supp.

Sheffield City Council v. *Meadow Dairy Co., Ltd.*, (1958), 2 R.R.C. 395; 51 R. & I.T. 233. H

Surrey County Valuation Committee v. *Chessington Zoo, Ltd.*, [1950] 1 All E.R. 154; [1950] 1 K.B. 640; 114 J.P. 95; 38 Digest (Repl.) 620, *887*.

Case Stated.

The appellant ratepayers were the owners of a hereditament comprising a foreshore, sea wall, esplanade, ornamental gardens and shelters and various entertainment facilities. The hereditament was assessed in the valuation list for Morecambe and Heysham Borough at £1,750 rateable value. On appeal to the Lands Tribunal (J. P. C. DONE, ESQ.), on June 17, 1959 ((1959), 5 R.R.C. 164) this assessment was reduced to £1,000 rateable value. The ratepayers appealed by way of Case Stated against that decision. They contended that the hereditament should be valued on the profits basis as a matter of law and that the tribunal exceeded its jurisdiction in valuing it on another basis, the parties having agreed that the assessment should rest on the profits basis. I

A *D. G. Widdicombe* for the ratepayers.

Sir Derek Walker-Smith, Q.C., and *J. R. Phillips* for the valuation officer.

Cur. adv. vult.

Feb. 7. The following judgments were read.

HOLROYD PEARCE, L.J.: The local valuation court confirmed an assessment B of £1,750 rateable value on the hereditament occupied by the ratepayers, Morecambe and Heysham Borough Council in the county of Lancaster. It consists of the foreshore, sea wall, esplanade, ornamental gardens and shelters and various entertainment facilities. The ratepayers appealed to the Lands Tribunal. On that appeal both parties took the view that the correct basis of assessment for the hereditament with which we are concerned should be the profits basis, and C that the percentage on tenant's capital should be fifteen per cent. Many figures and calculations were given in evidence, and these are set out in the decision. In the end, after various concessions, the valuation officer's figures would, on a strict profits basis, have produced a rateable value of £1,285. The ratepayers' figures showed a deficit and would have produced a nil valuation. After careful investigation the tribunal came to conclusions on all the various disputed items of D receipts and expenditure save the capital value of the deck chairs, and on that item it gave sufficient indication to enable one to say that on a strict profits basis the assessment would be somewhere about £600 or possibly as high as £700. Instead of adopting that figure or nil or the valuation officer's figure of £1,285, the tribunal made an assessment of £1,000. The reason for this is given in the decision.

E The decision refers to passages in the evidence of Mr. Stiles, the expert witness for the valuation officer, and continues (1):

> " In the case of *London County Council* v. *Erith Parish* (*Churchwardens, etc.*) (2) LORD HERSCHELL said (3): ' the possibility of making a pecuniary profit is not . . . the test whether the occupation is of value '. As to whether the occupation is beneficial, it can be inferred from the brochure published F by the appellants that the amenities offered by the hereditament are of prime importance to the town, a fact which is further emphasised in the following excerpt from the preamble to the Morecambe Corporation Act, 1928: ' And whereas the prosperity of the borough as proposed to be altered as a health resort is largely dependent upon the preservation of the amenities of the sea front and for that purpose it is necessary that the sea G wall and promenade described in this Act should be constructed and it is therefore expedient that the corporation should be empowered to make and maintain the same together with the other works authorised by this Act '.
>
> " It is clear from Mr. Stiles's evidence that nil or exiguous profits from this kind of undertaking are by no means rare, and that in such circumstances the consideration of accounts would appear to be superfluous. I think, H however, that when a figure has to be agreed between rating surveyors their minds would be conditioned by the degree of loss or profit (however small), and to that extent a comparison of accounts would be made, and the assessments agreed would disclose at least some relationship to the financial aspect of the undertaking."

And later the tribunal said (4):

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> " The fundamental matter of principle in this case is whether there is a point in the scale of proved profits below which the actual figures cease to be the basis of assessment because they are clearly less than the true value to the tenant. It is my view that there is, and that it has been reached in this case. Mr. Stiles's figures in valuation C [beach and foreshore] must be amended by increasing the administrative expenditure and the tenant's

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(1) (1959), 5 R.R.C. at p. 172. (2) [1893] A.C. 562. (3) [1893] A.C. at p. 591.
(4) (1959), 5 R.R.C. at p. 175.

> share, and the wages increase is too little. The result would be to bring the rateable value below £1,000, and still lower, if the wages and upkeep of gardens and shelters are included. I am quite satisfied from a study of the literature in this case that the value of the foreshore and promenade amenities to the town of Morecambe is such that the corporation would be prepared to suffer a moderate loss, rather than permit this hereditament to remain unlet and unmanaged. I am quite sure that in hypothetical negotiations between a landlord and a tenant, this fact would have its effect upon the rental value agreed."

Counsel for the ratepayers puts forward two grounds in support of the appeal. The first is that the tribunal acted beyond its powers in making an assessment above the amount which would on a profits basis be produced by the figures of the valuation officer as diminished by the tribunal's findings, when the parties had agreed that the assessment should rest on a profits basis. Having regard to that agreement, he argues, the Lands Tribunal cannot depart from the strict profits basis; and in doing so it misconceived its function. For it is not the body empowered to settle the true assessment of the hereditament; it is merely empowered to hear and determine the appeal having regard to the contentions of the parties.

There are two statutes from which the Lands Tribunal derives its jurisdiction. By s. 48 (4) of the Local Government Act, 1948:

> "... the local valuation court shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded ..."

By s. 49 (1), the county court to whom appeal then lay "... may give any directions which the local valuation court might have given". By the Lands Tribunal Act, 1949, s. 1 (3):

> "There shall be referred to and determined by the Lands Tribunal ... (e) any question on which, but for this provision, an appeal or reference to the county court would or might be made by virtue of s. 49 ... of the Local Government Act, 1948."

In my judgment the word "contention" refers to the figure aimed at and not to the various legal or factual arguments on which the appellants base their case. The tribunal cannot go outside the upper and lower financial limits of the figures contended for on the appeal (see *Ellerby* v. *March* (5)) and in the present case it did not do so. But it is not bound in arriving at the correct figure to adopt the arguments of, or the figures submitted by, one side or the other, provided that it does not travel outside the above limits and provided that there is evidence before it on which it can arrive at its conclusion. It should, however, give the parties proper opportunity to deal with any points on which it bases its decision. In *Sheffield City Council* v. *Meadow Dairy Co., Ltd.* (6) both parties agreed that the contest was on the basis of a certain valuation. One witness gave evidence on a different basis and that basis was accepted by the tribunal. This court affirmed the tribunal's decision. LORD EVERSHED, M.R., there said (7):

> "I am not myself persuaded that the putting in of these valuations and, in this case, the addition of the opening passages of [the speech of the solicitor for the rating authority] have the result of binding the parties as though there were here pleadings containing some admission of a relevant allegation on the part of the plaintiff or his equivalent."

R. v. *Westminster Assessment Committee, Ex p. Grosvenor House* (*Park Lane*), *Ltd.* (8), dealt with a hearing by an assessment committee where somewhat

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(5) [1954] 2 All E.R. 375; [1954] 2 Q.B. 357. (6) (1958), 2 R.R.C. 395.
(7) (1958), 2 R.R.C. at p. 401. (8) [1940] 4 All E.R. 132; [1941] 1 K.B. 53.

A different considerations arise, and it is therefore not directly in point; but DU PARCQ, L.J., there made certain general observations (9):

> "Even in courts of law, it is not a principle of universal application that the court must give judgment for any sum, or make any order, on which the parties are agreed. We know of no case where the public interest, or, as here, the interest of a considerable section of the public, will be affected by B the order, in which the court is bound, or even entitled, to accept an agreed figure without the slightest investigation or examination. Nor is it true, in our view, to say that any tribunal is necessarily bound to accept evidence which is uncontradicted, or unchallenged, or 'all one way'. When the particular case of an assessment committee hearing an objection is considered, it seems to us, with respect to those who have thought otherwise, C to be impossible to maintain that the figure agreed upon by the persons appearing before it, and supported by their witnesses, must be accepted without question."

And later he said (9):

> "The assessment of the rent which a hypothetical tenant will pay is not D an exact science. The hypothetical tenant is, after all, only the reasonable man in one of his aspects, and, although surveyors may know more than most people about the workings of the tenant's mind and the effect of such a catastrophe as a great war upon the estate market, they have not a monopoly of wisdom. Even a tribunal inexperienced in rating matters, hearing a statement which is almost inevitably a compound of fact, inference, E argument and conjecture, might be excused if it did not accept all the conclusions of the expert. Here, however, we are considering the duty of a tribunal of experts, who may take the view that the two experts whom they have heard are wrong. It is not disrespectful to the expert witnesses we hope, to say that the committee may possibly be right and the expert witnesses wrong. If that is granted, it seems to follow that adherence to the F doctrine enunciated by the Divisional Court might result in the committee being forced against its will to do injustice to a body of ratepayers . . . it is, we think, important that this court should make it clear that the committee, while it should hear all relevant evidence and argument in a judicial spirit, must in the end exercise its own judgment according to its own conscience."

The ratepayers have during the hearing before this court consistently conceded G that there was evidence on which the tribunal could base its assessment of £1,000. They are, indeed, precluded from arguing to the contrary as their notice of appeal does not allege absence of evidence. There was, for instance, evidence from Mr. Stiles that it was normal to put a value on a hereditament that would produce a nil assessment on a profits basis and that he had agreed various beach assessments in the region of £1,000 where the profits basis would H have produced a nil or ridiculously small amount. Moreover, the contents of the decision itself make it clear that such evidence existed, viz., expenditure which the ratepayers had incurred in advertising the amenities provided by the hereditament, and so forth. In addition, the nature of that evidence and the references to the contentions as to what should be the position if the profits basis resulted in a nil or ridiculously small figure show that there must have been I argument as to an alternative basis if the tribunal should conclude that the strict profits basis would not produce a satisfactory result. Accordingly the ratepayers' first point fails.

The second point put forward is that the tribunal was not as a matter of law entitled without special reasons, which do not here exist, to depart from the profits basis. For it has been consistently and clearly laid down that that is the correct basis, the appropriate hypothesis, for assessing the hereditament of a public utility undertaking, unless special circumstances justify a departure A from it: *Kingston Union* v. *Metropolitan Water Board* (10) and *St. James' & Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Committee* (11), *Metropolitan Water Board* v. *Hertford Corpn.* (12). It has been emphasised that the profits basis is a working hypothesis only, but nevertheless it has been consistently adhered to and there is no reported case in this century of its having been abandoned in assessing a public utility undertaking. B

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(9) [1940] 4 All E.R. at p. 144; [1941] 1 K.B. at p. 70.

LORD BUCKMASTER in the *Kingston* case said (13):

> "It does not follow that it has ever been laid down that such method is exclusive and must be of universal application. No such principle has, in my opinion, resulted from the decisions, but what does result is that a company undertaking the business of supplying water should prima facie be assessed upon this well-known plan, and it would lead to confusion C and endless multiplication of difficulty if this were not done, but where there is a company which, either by reason of its special and peculiar statutory restrictions or by reason of any other fact, cannot be regarded in the same light as that of an ordinary water company, it is open to consider whether other methods of valuation may not properly be adopted."

D

The category of public utility undertakings to which the above cases apply is a well-known class. LORD ATKIN in the *St. James' & Pall Mall* case (14) gives as examples mines, docks and harbours, sewage and drainage works, railways, gas and electric lighting works. The Rating and Valuation Act, 1925, s. 22 (4), refers, as a class, to (15)

> ". . . premises valued as part of—(a) a railway, dock, canal, gas, water or E electricity undertaking, or (b) any public utility undertaking not falling within the preceding paragraph . . ."

Finally the War Damage (Public Utility Undertakings, etc.) Act, 1949, Sch. 1, lists eight such undertakings, viz., railway, canal, harbour and dock, gas, electricity, water, sewerage and lighthouse.

F

The hereditament in the present case is occupied by the "entertainments undertaking", so described in the Morecambe Corporation Act, 1924, s. 151 and s. 153. The entertainments undertaking, however, though an activity of the ratepayers, is not a public utility undertaking as it was understood in the above cases. It is not directed to supplying public needs. It is an amenity undertaking, intended to create attractions in Morecambe in order to draw thither visitors who will spend their money in the borough and increase its pros- G perity. It is quite clear that the entertainments undertaking is not within, nor has it all those characteristics which are to be found in, that consistent and well-recognised class of public utility undertakings.

Counsel for the valuation officer rightly, I think, groups the decided cases into two main classes. First there are those cases which deal with the public utility undertakings to which the *Kingston Union* (10) and *St. James' & Pall* H *Mall* cases (11) apply. In assessing them the profits basis is mandatory and must be applied unless there are special circumstances which justify a departure from it. Secondly, there is a class of cases dealing with exceptional undertakings which are not public utility undertakings but which share some, though not all, of their characteristics and, being all (or substantially all) in one parish, do not on the ground of diffusion attract the principle of the *Kingston Union* I case (10). In these cases the profits basis may be applied in its strict form. Its application, however, is permissive and not mandatory. It may be applied in a

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(10) [1926] All E.R. Rep. 1; [1926] A.C. 331.

(11) [1933] All E.R. Rep. 98; [1934] A.C. 33. (12) [1953] 1 All E.R. 1047.

(13) [1926] All E.R. Rep. at p. 13; [1926] A.C. at p. 352.

(14) [1933] All E.R. Rep. at p. 100; [1934] A.C. at p. 41.

(15) Section 22 (4) was added by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5 (3); 35 HALSBURY'S STATUTES (2nd Edn.) 388.

A modified form as an assistance to the more direct consideration of the hypothetical rent under s. 22 (1) of the Rating and Valuation Act, 1925. In this class the question as to which method should be used is one for the decision of the tribunal on the particular facts, provided that it leads to the satisfaction of s. 22 (1).

In *Amalgamated Relays, Ltd.* v. *Burnley Rating Authority* (16), which dealt B with wireless relay services, LORD GODDARD, C.J., said (17):

> " I think a certain confusion has crept into this case in the same way as it did in *Surrey County Valuation Committee* v. *Chessington Zoo, Ltd.* (18), by using the expression ' the ' profits basis. As I pointed out in the *Chessington* case (18), where exceptional hereditaments are being dealt with —that is to say, hereditaments not of the ordinary class of houses, factories, C shops or warehouses which can always be compared with others—rating surveyors have to find some formula by which a rent can be calculated for a hereditament which is not, in fact, let at a rent and probably never would be let at a rent. Among the formulae that have been devised from time to time is one applicable to public utility undertakings—it is an elaborate formula into which I shall not go in detail—which is based D to a great extent on profits. That formula has come to be known as the profits basis, but it is not a formula which takes into account only profits. It has always been the law that in any case relating to a hereditament which is not of an ordinary class, the court can take profits into consideration. In the *Chessington* case (18), the rating authority took the view that profits formed the only basis on which they could fix a rent, and so E it was said that the assessment was ascertained on ' the ' profits basis. If they had said ' a ' profits basis, it would have been better, and it is clear in the present case that the sort of formula that was approved in *Kingston Union* v. *Metropolitan Water Board* (19) had not been adopted.
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> " The learned recorder has said: ' Here is a profit-earning system. What is it likely that a tenant would pay if this system was let to him F at a rent? ' In considering what a tenant would pay one has also to consider what a landlord would take, because in fixing the rent one has to have regard to what is often called ' the higgling of the market,' and that depends on the landlord's willingness to accept a certain sum as well as on the tenant's willingness to pay it."

G Subsequently LORD GODDARD, C.J., said (20):

> " In the present case, in my view, it was legitimate to take the ratepayers' profits into account, and the recorder cannot be said to have gone wrong in so doing. If he found that that was the only, or the best, method to enable him to ascertain what the rent ought to be, I cannot say that he ought to have adopted some other. There are many reasons, some of H which he sets out in his judgment, why he thinks the contractor's method is not the better. That seems to me entirely a question of fact, and I can see no ground for saying he has gone wrong in law."

I respectfully agree with those observations.

No case has been cited to us concerning an undertaking that is not in the recognised class of public utility undertakings in respect of which it has been I held that the profits basis must necessarily be applied; and in certain of such cases a modified profits basis has been used. The present case is an exceptional hereditament and of a type in which the use of a profits basis is permissive, if it produces a result which satisfies the requirements of s. 22 (1) of the Rating and Valuation Act, 1925. But to insist in this class of case on adherence to the profits basis, in disregard of the realities of letting and rent, is to enforce an empirical hypothesis, used as a means, in preference to the end which Parliament has prescribed by s. 22 (1).

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(16) [1950] 1 All E.R. 253; [1950] 2 K.B. 183.
(17) [1950] 1 All E.R. at p. 254; [1950] 2 K.B. at p. 189.
(18) [1950] 1 All E.R. 154; [1950] 1 K.B. 640.
(19) [1926] All E.R. Rep. 1; [1926] A.C. 331.
(20) [1950] 1 All E.R. at p. 256; [1950] 2 K.B. at p. 191.

It was much pressed in argument by counsel for the ratepayers that there is no indication in the written decision of the tribunal what type of calculation led the tribunal to conclude that £1,000 was the correct figure in the circumstances, as opposed to some quite different figure. I should be more impressed by this if the notice of appeal had alleged that there was no evidence to support the tribunal's findings. Since in the present case the profits basis was not mandatory and the tribunal had evidence before it on which it could find that £1,000 was the correct figure, there is no error in law, and the appeal must be dismissed.

HARMAN, L.J.: This appeal raises once again the question of the value for rating purposes of a hereditament of an exceptional kind, i.e., one to which there are no comparable hereditaments and where there is no letting in fact. Nevertheless, the law directs an estimate to be made of the rent at which the hereditament might reasonably be expected to let from year to year, and this was the inquiry on which the Lands Tribunal embarked. The hereditament is described in the valuation list as " Beach and premises situate at Morecambe in the county of Lancaster ", and embraces in fact what one may call the entertainment amenities provided by the ratepayers along the sea front. There was a number of constituent parts to this undertaking as the Case Stated showed. The hereditament was entered in the valuation list at £1,750, this being the local valuation officer's estimate confirmed by the local valuation court. We do not know the basis on which this assessment was made. It was agreed that this was the maximum sum at which the Lands Tribunal could properly arrive.

On the appeal to the tribunal particulars of rival valuations were put in as the rules provide and they showed a large discrepancy, the ratepayers asking for a nil assessment. Both valuers relied on what has come to be known as the profits basis, i.e., they took the incomings and deducted expenses and some return on the outlay, this being agreed in the present case at fifteen per cent. At the outset of the case the valuation officer's figure was supported by the surveyor called on his behalf, but in the course of a four days' hearing a great many figures were considered and altered as the evidence proceeded. In the end the valuation officer's valuation was reduced to £1,285 while the ratepayers still claimed that there was a loss and that the assessment should be nil.

The Case states that both parties agreed that the assessment should rest on a profits basis, and that is justified by the fact that all the evidence given was directed to that issue, but there seems no doubt that the valuation officer's surveyor recoiled from the idea of a nil or what he called a ridiculously small valuation, and he said that, where the result of the profits basis would point to nil or something very small, he would, in accordance with his usual practice, repudiate that basis and ask for a figure which he regarded as reasonable. He did not explain how he would arrive at such figure. At the conclusion of the hearing certain issues on figures remained, and on these the member of the tribunal concerned (himself a surveyor) reached conclusions cutting down the valuation officer's estimate of profits eventually to a figure substantially less than £1,000. It has not been possible to say with exactitude what the ultimate figure was, but counsel agreed that it was somewhere between £600 and £700. When the tribunal came to give its decision it used these words (21):

> " The fundamental matter of principle in this case is whether there is a point in the scale of proved profits below which the actual figures cease to be the basis of assessment because they are clearly less than the true value to the tenant. It is my view that there is, and that it has been reached in this case. Mr. Stiles's figures in Valuation C [beach and foreshore] must be

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(21) (1959), 5 R.R.C. at p. 175.

> amended by increasing the administrative expenditure and the tenant's share, and the wages increase is too little. The result would be to bring the rateable value below £1,000, and still lower, if the wages and upkeep of gardens and shelters are included. I am quite satisfied from a study of the literature in this case that the value of the foreshore and promenade amenities to the town of Morecambe is such that the [ratepayers] would be prepared to suffer a moderate loss, rather than permit this hereditament to remain unlet and unmanaged. I am quite sure that in hypothetical negotiations between a landlord and a tenant, this fact would have its effect upon the rental value agreed."

The literature to which he referred consisted apparently of various advertisements and propagandist documents issued by the ratepayers crying up the value and attraction of the amenities provided, and in addition perhaps the ratepayers' private Acts of 1924 and 1928, emphasising the value to the town of the amenities of the sea front. Accordingly, at this point the tribunal threw over the whole of the calculations on which four days had been spent because, as remarked earlier in its decision (22):

> "It is clear from Mr. Stiles's evidence [this was the valuation officer's expert] that nil or exiguous profits from this kind of undertaking are by no means rare, and that in such circumstances the consideration of accounts would appear to be superfluous."

The tribunal eventually decided on a figure of £1,000. Against this assessment the ratepayers appeal.

The first point taken is that this is an assessment made independently by the tribunal and that this is no part of its functions, being bound by the arguments of the parties. If I had been satisfied that there was no evidence to support the tribunal's figure, or if it had been above the £1,700 odd which was the valuation officer's assessment, I should have acceded to this argument, but it was not suggested at the Bar, still less proved, that there was no evidence on which such a valuation could rest, and for the reasons already given by HOLROYD PEARCE, L.J., I am of opinion that this point fails.

The second argument was that the tribunal was not justified in departing from the profits basis to which both parties directed their evidence, and that, as that basis admittedly produced a result not in excess of £700, that was the highest figure which the tribunal could legitimately reach. The so-called profits basis has been used as a guide by assessing tribunals for a century now. Admittedly it is only a means to an end, the end being an estimate of the rent that the hypothetical tenant, not excluding the occupier of the hereditament himself, would pay. In the well-known case of *Kingston Union* v. *Metropolitan Water Board* (23) it was laid down that in a case such as that of a water company, whose services extend over a number of rating areas, the profits basis is in effect the only possible basis, though theoretically it might be rejected. Since that time this principle has, I think, been somewhat extended, and now may be taken to apply to public utility services even though their activities do not extend beyond a single area. This really is because there is no other way of arriving at an answer which will not be unfair to the ratepayer. Beyond the public utility area the profits basis, of course, has been applied to many undertakings, particularly those that cannot be let, and, indeed, where the motive of an undertaking is the collection of revenue or the making of a profit it is really the obvious crutch on which to lean. Where the motive is different, such as the case of a sewage works or a school, a different device may be called in aid based on costs to the undertaker. No one suggested this to be applicable here.

It was argued that the present enterprise is or is of the nature of a public utility, but I cannot accept that; this is rather an amenity designed to attract outsiders to the town and so put money in the pockets of the citizens rather than to supply necessary wants such as gas and sewerage and electricity to the latter. It is in fact the sort of enterprise that is not infrequently let out to entrepreneurs, and as such, of course, would be rated by reference to their profits. The ratepayers themselves have other objects in view than a direct profit, such as the prestige of the town, the employment thus given to its citizens and the money likely to flow into the pockets of shop and lodging-house keepers, and it seems to me that, unless there is a rule binding us to adhere to the profits basis, the statutory object might well require a figure above that based on direct profits alone.

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(22) (1959), 5 R.R.C. at p. 172.

(23) [1926] All E.R. Rep. 1; [1926] A.C. 331.

In my judgment there is no such inflexible rule as is suggested. Indeed the judges who decided the *Kingston Union* case (24) were careful to say that exceptions might be made, and it seems to me that the more the enterprise differs from a public utility the easier it is to make an exception and take the case out of the profits rule. I think I would go further and say that this is a question of fact, and, if the tribunal of fact is persuaded that the profits basis does not achieve the statutory object of ascertaining what a proper letting value would be, but rather contradicts it by producing a sum which the tribunal is satisfied does not represent a proper value, then the tribunal is entitled, and, indeed, bound to reject the rule and treat the case as an exception.

This is what has happened here. Whether this court would have reached the same conclusion as the tribunal I do not propose to guess, but the tribunal does not appear to have misdirected itself on the considerations which ought to weigh in its mind, and has arrived at a figure with which, I think, we cannot interfere, even though we do not know exactly the means by which it reached it.

SACHS, J.: I agree that the appeal should be dismissed on the grounds given by my Lords. I confess to having had some sympathy with the point taken by counsel for the ratepayers that, whilst the tribunal stated in considerable detail the figures relative to the profits basis approach which it discarded, yet no real indication was given by it of the type of calculation on which the figure of £1,000 was based. Once, however, the ratepayers failed to establish that the profits basis ought necessarily to have been applied by the tribunal, I agree, for the reasons given by Holroyd Pearce, L.J., that in this particular case it was not open to counsel for the ratepayers to go into the questions whether the method of calculation in fact adopted by the tribunal was correct, or whether in the interests of uniformity in rating matters any particular basis should have been used for that calculation.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Morecambe and Heysham (for the ratepayers); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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(24) [1926] All E.R. Rep. 1; [1926] A.C. 331.

SUSSEX CARAVAN PARKS, LTD. *v.* RICHARDSON (VALUATION OFFICER) AND ANOTHER.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), January 25, 26, 1961.]

Rates—Rateable hereditament—Caravan site—Two caravan sites in one occupation—Separation by quarry side—Valuation officer unaware of upper site when lower assessed—Proposal to assess upper site separately—Construction of entry in valuation list.

Property occupied by a caravan parking company comprised: (i) land in a quarry site at the junction of Harley Shute Road on the east and Bexhill Road on the south, occupied in March, 1957, by ten caravans; and (ii) a larger site bordered by the backs of houses in Harley Shute Road on the east with an entrance between them, by the side of the quarry, on one side of which steps led down to the quarry, by Bexhill Road on the south and by Haven Road on the west, and in March, 1957, containing an ablution block which was usable and rateable and an administrative block, and accommodating also a number of caravans. In March, 1957, after an inspection during which the steps were not noticed and the existence of the larger site remained unsuspected, the valuation officer made a proposal for the alteration of the valuation list by inserting the following assessment: "Land used as caravan park . . . Junction of Bexhill Road and Harley Shute Road", £20 rateable value. The valuation list was altered, entry being made accordingly. Having subsequently discovered the existence of the larger site, in March, 1958, he made a further proposal for the alteration of the valuation list by inserting the following assessment; "Caravan camping site, licensed club room, shop and premises . . . Combe Haven Caravan Camping Site, Haven Road", £2,600 rateable value. On appeal against a decision of the Lands Tribunal that, as the description in the first proposal could include both properties, the second proposal sought to assess a hereditament already assessed in the valuation list and was bad,

Held: the entry, made in the valuation list pursuant to the first proposal, applied, on its true construction in the light of admissible circumstances, to the quarry site only for the following reasons—

(i) the word "land" in that entry was not apt in rating matters to describe a site which had buildings or a rateable building on it, as the main site had, and the description of situation "at the junction of Bexhill Road and Harley Shute Road" was apt to describe the quarry site but inapt to describe the main site.

(ii) the foregoing factors, which influenced the construction of the entry, overrode the prima facie presumption that, as the main site and the quarry site were properties contiguous to one another and a geographical unit which could be ringed round on a map, they ought to be treated as a single hereditament.

Gilbert v. *S. Hickinbottom & Sons, Ltd.* ([1956] 2 All E.R. 101) considered.

SEMBLE: evidence of what the valuation officer or ratepayers intended an entry in the valuation list to mean is not admissible for the construction of the list (see p. 734, letter E, and p. 735, letter E, *post*).

Appeal allowed.

[As to separate assessment of properties occupied by one person, see 32 HALSBURY'S LAWS (3rd Edn.) 31, para. 38; and for cases on the subject, see 38 DIGEST (Repl.) 506-509, *202-215*.]

Cases referred to:

Gilbert v. *S. Hickinbottom & Sons, Ltd.*, [1956] 2 All E.R. 101; [1956] 2 Q.B. 40; 120 J.P. 288; [1956] 2 W.L.R. 952; 38 Digest (Repl.) 507, *207*.

Watcham v. *A.-G. of East Africa Protectorate*, [1919] A.C. 533; 87 L.J.P.C. 150; 120 L.T. 258; 17 Digest (Repl.) 48, *563*. A

Case Stated.

The respondent ratepayers were the occupiers of premises in respect of which the appellant valuation officer had made a proposal on Mar. 27, 1958, for the alteration of the valuation list for Hastings County Borough by inserting therein an assessment of " Caravan camping site, licensed club room, shop and premises . . . Combe Haven Caravan Camping Site, Haven Road ", St. Leonards-on-Sea, at £2,600 rateable value. On Dec. 1, 1958, the proposed alteration was approved on appeal by a local valuation court of Eastbourne, Hastings and East Sussex (Eastern Part) Local Valuation Panel, but on May 3, 1960, the ratepayers' appeal against that decision was allowed by the Lands Tribunal (H. P. Hobbs, Esq.), which directed that the assessment should be deleted from the valuation list. The valuation officer appealed by way of Case Stated against that decision to the Court of Appeal, seeking the insertion of an assessment of £2,250 rateable value in respect of the hereditament in the valuation list. He contended that the tribunal was wrong in law in holding or finding that an earlier proposal made by the valuation officer on Mar. 22, 1957, did not relate only to an area referred to in its decision as " the quarry site " but comprised also the area therein referred to as " the main site ", or that there was no sufficient evidence on which the tribunal could so hold or find; that it was wrong in law in holding that the valuation officer's proposal made on Mar. 27, 1958, was bad on the ground that it related to a hereditament already assessed in the valuation list; and that on the facts set out in the decision the tribunal ought to have held or found that the proposal made by the valuation officer on Mar. 22, 1957, related only to the quarry site and that the proposal made by him on Mar. 27, 1958, related only to the main site. B C D E

Sir Derek Walker-Smith, Q.C., and *A. S. Orr* for the valuation officer.
P. R. E. Browne, Q.C., and *G. N. Eyre* for the ratepayers.

HOLROYD PEARCE, L.J.: This appeal concerns about thirty acres of land occupied by Sussex Caravan Parks, Ltd., the ratepayers, as a caravan parking site at St. Leonards-on-Sea. At its south-east corner is a quarry which adjoins the junction of Bexhill Road and Harley Shute Road. Steps lead up from the quarry to the rest of the land, which is on a higher level. That land runs back a long way, being bounded on the west side by Haven Road, and on the east side by the back gardens of the houses in Harley Shute Road. Towards the northern end, nearly half a mile from the quarry, there is an entrance between the houses in Harley Shute Road, and near that entrance there were at the material time two buildings that had been built on the land for the purpose of administration and ablution. The ablution block was usable and rateable at the material date, Mar. 22, 1957. The administrative building was erected, but not finished internally. Originally the land had been agricultural land, and was not rated. F G H

In March, 1957, the valuation officer's representative went to look at the quarry, and saw ten caravans parked closely together there. He did not notice the steps leading up to the main site further north, and was unaware that any caravans were parked round the buildings nearly half a mile north of the quarry. The valuation officer made a proposal dated Mar. 22, 1957—which I will call the first proposal—for the alteration of the valuation list by the inclusion of an entry: I

> " N.262. Description: Land used as caravan park. Name and situation: Junction of Bexhill Road and Harley Shute Road. Rateable value: £20."

No objection was made, and the list was altered accordingly. The valuation officer later became aware of the existence of the main site, which is very valuable.

A In March, 1958, therefore, he made a proposal—which I will call the second proposal—for the alteration of the valuation list by the inclusion of an entry:

> "N.512. Description: Caravan camping site, licensed club room, shop and premises. Name and situation: Combe Haven Caravan Camping Site, Haven Road. Rateable value: £2,600."

B On Apr. 18 the agents of the ratepayers lodged a proposed alteration to £1 rateable value on the grounds of incorrect designation, and consequent excessive rating. But they hurriedly withdrew that three days later, and gave notice of objection to the valuation officer's proposal on three grounds, of which now the only relevant one is that

> "there is an existing assessment dealing with the caravan park on which C rates have already been paid to Sept. 30, 1958."

The local valuation court accepted the proposal, and confirmed the rating valuation of £2,600. The Lands Tribunal, on appeal, held that the first proposal related to the whole site, and that, therefore, the second proposal was bad in that it related to a hereditament already in the valuation list. The valuation officer appeals on the ground that the tribunal was wrong in law in so holding, D and that there was no evidence on which it could so find.

The tribunal inspected the site, and made the following findings on the evidence:

> "The description 'land used as a caravan park' can apply equally to the quarry site alone or to the whole site including the quarry and the address 'corner junction of Bexhill Road and Harley Shute Road' can also apply E equally to the quarry or to the entire site. The description and situation given in the second proposal do not of themselves give any indication that the quarry site is excluded, but if it can be established that the first proposal does relate only to the quarry, then I consider the words in the second proposal not only do not warrant the proposition that the quarry land is included in that proposal, but rather that it is excluded therefrom.
>
> F "In my view the validity of the second proposal must depend upon whether by its terms the assessment of £20 rateable value related to the quarry only or to the entire site. The description and situation applying equally do not give any assistance, and the decision must rest upon the facts of occupation, and from the evidence I find that (i) caravans were parked in the quarry site; (ii) caravans were parked round the adminis- G trative building; (iii) the steps to Bexhill Road were usable; (iv) the administrative building was erected but not finished internally; and (v) the adjoining ablution block was usable.
>
> "From these findings I think it must follow that the appellants were in occupation of the whole site for the purpose of the parking of caravans and that they are entitled to say that the 1957 proposal related to the H whole site and that the 1958 proposal is bad in that it relates to a hereditament already in the valuation list and I do not think that the action of the appellants in lodging the proposal of Apr. 18, 1958—a Friday—and the withdrawing it on the following Monday can invalidate their entitlement."

It is argued by counsel on behalf of the valuation officer that that decision is I wrong on two grounds. First, he urges that the tribunal erred in holding that the description of "land used as a caravan park" together with the name and situation, "junction of Bexhill Road and Harley Shute Road" can apply equally to the quarry alone and to the whole site. Alternatively, he argues that, if there is any ambiguity, it is to be resolved according to the understanding of the parties; and on the facts the proper inference is that both the parties clearly intended and understood the first proposal to relate only to the quarry site.

His first argument runs as follows. The description "land used as caravan park" in the first proposal is an apt description of the quarry site which had no buildings. It is not an apt description of the main site which had buildings, one A of which was at that time admittedly rateable. He refers to the Valuation Lists Rules, 1955 (S.I. 1955 No. 1680) and to the Rating and Valuation Act, 1925, s. 22 (1) (a), in order to show that there is in rating a clear distinction between land alone and land with buildings on it. Although one cannot go so far as to say that a reference to land with buildings as land simpliciter in a proposal is wrong or bad, yet the presumption, he argues, is that when one refers to land B one is referring to a hereditament on which there are no buildings.

Moreover, here the first proposal refers to land used as a caravan park and gives the situation as " at the junction of Bexhill Road and Harley Shute Road ". That situation can be aptly attributed to the quarry site. It is not apt for, and cannot properly be applied to, the main site. It is true that steps lead up from the quarry onto the main site, and, if one were merely considering pedestrians, C there is access from the quarry site to the main site. But the land is being rated qua caravan park. To describe the main site as a caravan park at the junction of Bexhill Road and Harley Shute Road is simply incorrect. No caravan can possibly get to the main site from the junction of Bexhill Road and Harley Shute Road. Therefore, on those two points of construction, this proposal should be held to apply to the quarry and not to the main site. D

If that argument be not accepted, counsel for the valuation officer relies on various matters as showing that the ratepayers knew that the first proposal related only to the quarry site. On the view that I take of the matter the point does not arise. But I find it difficult to believe that evidence of what the ratepayers may have thought, or what the valuation officer may have thought, is proper to be used as a method of construction of the public rating valuation list. E It is a public document accessible to all ratepayers. It must bear meanings which are intelligible and objective. It cannot be construed by private thoughts locked in the minds of the valuation officer and the ratepayers.

Counsel for the ratepayers contends that the first proposal did in fact relate to the whole site, and that the Lands Tribunal rightly so decided. He referred to *Gilbert* v. *S. Hickinbottom & Sons, Ltd.* (1) in support of the proposition that as a F general rule or prima facie, when two or more properties are within the same curtilage or contiguous to one another, they are to be treated for rating purposes as if they formed parts of a single hereditament. To use the words of PARKER, L.J. (2) in that case, there is a prima facie presumption that, if they are a geographical unit which can be ringed round on a map, then that is an important consideration which would tend to lead to their being valued as one hereditament. G I accept that such a presumption exists; but it is a prima facie presumption and no more.

Therefore, counsel for the ratepayers argues, the quarry site and the main site, joined as they are by steps, and contiguous to one another (albeit at a different level) should be presumed to be one hereditament. The tribunal correctly construed the proposal as a whole, and then looked at the site in the light of the H existing facts. On that, he argues, it came to a correct conclusion; but even if it did not, in his contention this would be an error of fact not an error of law, and, since there was evidence on which the tribunal could find, as it did, this court cannot alter that decision.

In my judgment, on a true construction in the existing circumstances found by the tribunal, the first proposal relates to the quarry, and does not relate to the I site as a whole. The omission of any reference to buildings when, in fact, the main site had on it rateable buildings, prima facie indicates that the main site is not included. The description of the situation as being " at the junction of Bexhill Road and Harley Shute Road " coupled with the description of the premises as " land used as a caravan park " reinforces this presumption. These matters are sufficient to outweigh any prima facie presumption that these two sites, being so close together, would be rated as one hereditament. It is qua caravan park that it is given an address, and that address is one from which the quarry site can, but the main site cannot, be used.

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(1) [1956] 2 All E.R. 101; [1956] 2 Q.B. 40.
(2) [1956] 2 All E.R. at p. 107; [1956] 2 Q.B. at p. 54.

Nor do I think that it is right to say that this is only an error of fact. The construction of the combined effect of the description and name and situation is a matter of law even when applied (as it must be) to the land itself by an investigation of its geographical position, and of the facts existing at the time of the proposal. Moreover, even if it were a question of fact, I would hold that there is on the facts only one reasonable answer to the question, and that this court, therefore, would be entitled to intervene. I would, therefore, allow the appeal.

HARMAN, L.J.: I agree. At the date of what HOLROYD PEARCE, L.J., has called the first proposal in March, 1957, the ratepayers held—either by lease, or on an agreement for a lease—a comparatively large area of ground at Hastings at a rent of £1,000 a year. They also held under a precarious licence from the same lessors another piece of ground contiguous to the leased area, but on a lower level, being land that had been used for quarrying. On both these parcels of ground—that in the lease and that in the licence—a certain number (not a very large number at that time) of caravans were parked. Neither parcel was rated, but, when a planning application came to the notice of the local authority, the valuation officer took steps to make what is called an alteration in the valuation list. " Alteration " includes a new addition. The addition which he made in the proposal was in these words: " Land used as caravan park "—that is his description of the land—" Name and situation: Junction of Bexhill Road and Harley Shute Road."

The question for us is what is the true construction of that document. In order to construe it, of course, one must know the surrounding circumstances. When it is said that extrinsic evidence is not allowed in construing documents, that does not mean that one must not know every fact known to the author of the document at the time he made it. One may not inquire, except in exceptional circumstances, into his intention. But the outside circumstances must be known. For instance, the words " land used as a caravan park " mean any one of a thousand sites, I suppose, in this country. " Junction of Bexhill Road and Harley Shute Road " can only be understood either by looking at the map, or going round and looking at the site.

Looking at the site and standing at the junction of Bexhill Road and Harley Shute Road, one sees in front of one the quarry which I have mentioned. If one looks carefully enough, one also sees to the left some steps rising to the ground above the quarry. The valuation officer must be supposed to have stood at the junction which he describes as being the situation of the hereditament; and when he looked from that junction he did see land used as a caravan park, because there were then ten caravans standing in the quarry. There is no evidence that he could see any other caravan park from where he was, or any other parked caravans; and it seems to me to be clear enough to any reader of that proposal that the framer of it must be taken from the words used to have intended the quarry site.

It is quite true that the occupiers of that caravan park owned some land further to the north, and contiguous in a sense in that there is no intervening hereditament, part of which also (or maybe the whole of it) was used as a caravan park. But in my judgment that is not the same caravan park, because, except by going outside the hereditament altogether on to the public road, a caravan cannot get from one to the other. The ratepayers occupied at the time two parks, one in the quarry and one above by the buildings then in course of construction. These were separated by a considerable distance and by the physical nature of the ground. It does not seem to me that, when the surrounding circumstances are known, the words in the first proposal are open to any other view than that

what the valuation officer meant was a proposal to cover the quarry caravan park, A
and nothing more.

It is contended that that is not the true construction of the words, but that, by reason of the fact that there was some contiguous land which could be treated as part of the same geographical area, he must be assumed to mean the whole of the land occupied by the ratepayers; and the fact that there was some title to the one and a precarious title only to the other does not matter. B

The question in a rating case is what were the facts. In fact the ratepayers were in occupation of both sites. But, so far as they were used as caravan parks, there were two of them, and not one. In my judgment the Lands Tribunal was not justified in construing these words in a different way. I have great difficulty myself in following exactly what it meant. It is true, of course, that the first part of the description " land used as a caravan park " may mean, as I say, one C
of many thousands of bits of land. But when the whole document is read, and when it is seen the land is to be looked at from the junction of two roads, and is therefore narrowly bounded by the quarry site, there can be only one meaning.

I do not therefore agree that the description applied equally to what has been called the large site and the small site. Even if I did take that view, I do not gather from the tribunal's finding that, because the ratepayers were in occupation D
of both sites, we are therefore entitled to say that the 1957 proposal related to the whole area. On my view, however, that does not arise.

If that be right, it seems to me that the second description in the second proposal in 1958—the quarry having been rated already for a year—also was quite unambiguous and related to the site not being the quarry site; that therefore the two proposals are both good, and the rate could properly be levied in respect of E
each one. I do not say anything more on the point about the so-called ambiguity tentatively argued before us, because I do not think that it arises. Either there is a sufficient description or there is not, and points about ambiguity, whatever they may come to, do not arise. I only wish by way of caveat to say that *Watcham* v. *A.-G. of East Africa Protectorate* (3), to which counsel for the valuation officer called our attention, has been long under suspicion of the gravest kind from F
real property lawyers.

DAVIES, L.J.: I agree.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Menneer, Idle & Brackett,* Hastings & St. Leonards (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(3) [1919] A.C. 533.

AUSTRALIAN HARDWOODS PTY. LTD. *v.* COMMISSIONER FOR RAILWAYS.

[PRIVY COUNCIL (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Guest), January 18, 19, 23, February 6, 1961.]

Privy Council—Australia—New South Wales—Specific performance—Agreement for the operation of a sawmill—Option of purchase in agreement—Option exercised after breaches of agreement and after notice determining agreement—Whether specific performance of term of agreement to request transfer of occupation permit and sawmill licence would be granted.

The appellant was a company engaged in the timber business. The respondent held an occupation permit and a sawmill licence issued by the Forestry Commission, by virtue of which he was entitled to occupy land and operate a sawmill in New South Wales. By an agreement in writing dated May 3, 1956, which was to run for ten years from July 13, 1952, it was arranged that the appellant should take over the operation of the sawmill as from July 13, 1952, hold the buildings and plant comprising the mill on lease or hire at a rent, receive a supply of millable timber from the Forestry Commission through the intermediation of the respondent and mill the logs so supplied and sell the resulting sleepers and sawn timber to the respondent who was to buy them at a price and on terms fixed under the agreement. It was a specific condition of the agreement that, subject to certain exceptions, the appellant was not to sell any sleepers or sawn timber produced in the mill to anyone except the respondent. By cl. 6 of the agreement, if there was a breach of any clause or condition of the agreement by one side the other side could give three months' notice of determination. By cl. 9 (a), the appellant was given the option of purchase on giving three months' notice to the respondent, the purchase money to be paid in cash on the exercise of the option (cl. 9 (b)). By cl. 9 (c), the respondent undertook, contingent on the purchase, to request the Forestry Commission to transfer to the appellant the occupation permit and the sawmill licence and to continue to the appellant the supply of milling timber which it had been the respondent's responsibility to obtain for the mill. By cl. 9 (d), neither the exercise of the option nor the transfer of the permit and licence, if that followed, was to interfere with the supply of sleepers and sawn timber from the mill for the respondent's needs. On June 11, 1957, the appellant wrote to the respondent giving three months' notice of its intention to exercise the option to purchase, and by letter dated Sept. 11, 1957, this was confirmed by the appellant. On Sept. 16, 1957, the appellant wrote to the respondent that, without prejudice to its claim to have validly exercised the option, it gave a further three months' notice of its intention to exercise the option to purchase, but, up to that date, the appellant had neither paid nor tendered any money in cash in compliance with cl. 9 (b). On Oct. 11, 1957, the appellant called on the respondent in writing to request the Forestry Commission to transfer the permit and licence to it. On Nov. 25, 1957, the respondent served on the appellant a written notice determining the agreement at the conclusion of three months from the date of notice under cl. 6 on the ground of breaches committed by the appellant, and, at the trial, it was conceded by the appellant that the agreement had been effectively determined by this notice. On Dec. 16, 1957, moneys for the purchase were provided by the appellant under the terms of an agreement made in the course of arbitration proceedings. On Dec. 23, 1957, the appellant again called on the respondent to request the Forestry Commission to transfer the permit and licence. On Dec. 24, 1957, the appellant commenced a suit in equity claiming, among other relief, a declaration that it had validly exercised the option to purchase, specific performance of the contract for sale and purchase thereby made and of the provisions of cl. 9 (c) A that the respondent request the Forestry Commission to transfer the permit and licence to the appellant.

Held: assuming that the appellant had effected a purchase under the option, the earliest date at which any payment could be said to have been made was Dec. 16, 1957, and since by that date an effective notice determining the agreement had been served by the respondent, the appellant had no B right to compel the respondent to perform cl. 9 (c), because—

(i) as a matter of the law of contract, it was impossible to regard cl. 9 (c) as a mere consequential appendage of the exercise of the option under cl. 9 (a) and (b) and, therefore, as something to be performed irrespective of the observance and enforcement of the rest of the obligations under the agreement, and, accordingly, the notice of Nov. 25, 1957, for the appellant's C breaches effectively determined any rights that the appellant might otherwise have had under cl. 9 (c), (see p. 742, letter B, post) and

(ii) as a matter of equity, the appellant could not maintain a claim for specific performance of cl. 9 (c) since it was at the time in breach of its own obligations and since it could not show that it was willing and ready to carry out its obligations under the contract as its breaches had led to the D notice of Nov. 25, 1957, to determine the contract (see p. 742, letters G and H, post).

Appeal dismissed.

[As to the equitable nature of relief by specific performance, see 31 HALSBURY'S LAWS (2nd Edn.) 329, para. 360; and for cases on the subject, see 42 DIGEST 426-428, *1-20*.] E

Cases referred to:

Measures Brothers, Ltd. v. *Measures*, [1910] 1 Ch. 336; *affd.* C.A., [1910] 2 Ch. 248; 79 L.J.Ch. 707; 102 L.T. 794; 12 Digest (Repl.) 481, *3588*.

Williamson (J. C.), Ltd. v. *Lukey*, (1931), 45 C.L.R. 282.

Wolverhampton & Walsall Ry. Co. v. *London & North Western Ry. Co.*, (1873), L.R. 16 Eq. 433; 43 L.J.Ch. 131; 42 Digest 429, *22*. F

Appeal.

Appeal by Australian Hardwoods Pty. Ltd., from a decree of the Full Court of the Supreme Court of New South Wales (EVATT, C.J., HERRON and SUGERMAN, JJ.), dated June 1, 1960, affirming in part a decree of the Supreme Court of New South Wales in its equitable jurisdiction (MYERS, J.), dated Dec. 7, 1959, dismissing the appellant's suit for specific performance and a counterclaim by the respondent, G the Commissioner for Railways, for a declaration and injunction. During the pendency of the suit, the appellant changed its name from J. Jamieson & Sons Pty. Ltd. The facts are set out in the judgment of the Board.

Douglas Staff, Q.C., and *Phillip Powell* (both of the New South Wales Bar) for the appellant.

N. A. Jenkyn, Q.C., and *Hermann Jenkins* (both of the New South Wales H Bar) for the respondent.

LORD RADCLIFFE: This appeal arises out of an action instituted by the appellant, Australian Hardwoods Pty. Ltd., in the Supreme Court of New South Wales in its equitable jurisdiction claiming various reliefs by way of specific performance, declarations, mandatory orders and injunctions. The rights in I aid of which these reliefs were sought were all claimed as arising out of a written agreement made on May 3, 1956, between the appellant and the respondent; and it is solely on the legal effect of certain provisions of that agreement, in particular the ninth clause, that the issues argued before their Lordships will be found to depend. Hitherto, the appellant has been unsuccessful in obtaining any of the reliefs which it claims. Its suit was dismissed by the trial judge (MYERS, J.), who also dismissed a counterclaim put in by the respondent. When appeal was taken to the Full Court (EVATT, C.J., HERRON and SUGERMAN, JJ.), the appellant failed again, but the respondent succeeded in obtaining an order on his counterclaim, which, in effect, gave to him the right to possession of certain land about three acres in extent, the site of a sawmill which is the subject of the whole dispute. The appellant now seeks the reversal of the Full Court's order, and some part of the relief which it sought from the trial judge.

The argument before their Lordships was confined essentially to two questions: (i) whether the appellant had ever purchased the buildings, machinery and plant comprising the sawmill under an option granted to it by the agreement of May 3, 1956, and (ii) if it had purchased this property, whether it was entitled to claim from the court an order directing the respondent to send forward to the Forestry Commission certain requests in favour of the appellant which were specified in the text of the agreement. Before dealing with these questions, it is necessary to make some more detailed reference to the contents and circumstances of the agreement which gives rise to them.

The appellant is a company engaged in the timber business; the respondent's name indicates his status and activities. At the date of the agreement, the respondent held an occupation permit and a sawmill licence, both issued by the Forestry Commission under the powers of the Forestry Act, 1916-1935, and by virtue of them he was entitled to occupy land and operate a sawmill in Bril Bril State Forest in the State of New South Wales. The general tenor of the agreement, which contained numerous stipulations and provisions, was to arrange for the appellant (styled "the contractor") (i) to take over the operation of the sawmill as from July 13, 1952; (ii) to hold the buildings and plant comprising the mill on lease or hire at a rent; (iii) to receive a supply of millable timber from the Forestry Commission through the intermediation of the respondent; and (iv) to mill the logs so supplied and sell the resulting sleepers and sawn timber to the respondent, who was to buy them at a price and on terms fixed under the agreement. It was a specific condition of the agreement that, subject to certain exceptions, the appellant was not to sell any sleepers or sawn timber produced in the mill to anyone except the respondent. In general, then, the appellant secured a customer and the respondent secured a supply.

The agreement was to run for a period of ten years from July 13, 1952. There was, however, a clause (cl. 6) which provided for determination on three months' notice given by either side at any time if there had been a breach on the other side of "any clause or provision of this agreement". The full text of cl. 6 was as follows:

> "If the owner or the contractor shall commit a breach of any clause or provision of this agreement the owner or the contractor as the case may be shall be entitled (without prejudice to any other right to which such breach may give rise) to terminate the contract by giving three (3) months' notice in writing posted to the contractor or the owner at its or his address as hereinbefore set out and in the event of the owner exercising his right to terminate the contract under this clause the contractor shall be precluded from referring to arbitration in pursuance of cl. 10 hereof the question of the entitlement or otherwise of the owner to exercise such right of termination provided however that upon notice of termination being given to the contractor by the owner the contractor shall not during the period of three (3) months hereinbefore referred to have the right of exercising the option in pursuance of cl. 9 hereof to purchase all or any of the items set out in or subsequently added to the schedule to this agreement."

The crux of the dispute between the parties is cl. 9, which contained both the option of purchase and an undertaking by the respondent, contingent on the purchase, to ask the Forestry Commission to transfer to the appellant the occupation permit and sawmill licence and to continue to it the supply of milling timber which it had hitherto been the respondent's responsibility to obtain for the mill. The rest of cl. 9 contained provisions which made it plain that neither the exercise of the purchase option nor the transfer of the permit and licence, if that followed, was to interfere with the supply of sleepers and sawn timber from the mill for the needs of the respondent. Indeed, if the transfer did come about, the supply arrangements were to be extended for another ten years, ending on July 13, 1972. The full text of the clause was as follows:

> " 9. (a) The contractor shall have a separate and distinct option to purchase each and every item set out in or subsequently added to the schedule to this agreement and any such option may be exercised upon the contractor giving three (3) months' notice in writing by prepaid registered post to the owner at 19, York Street, Sydney each such notice to specify the item or items which the contractor proposes to purchase. The purchase price in each and every case shall be the residual value at the time of such purchase calculated in accordance with the figures set out in or subsequently added to the schedule to this agreement in accordance with sub-cl. (b) of cl. 1 hereof.
>
> " (b) The purchase money shall be paid to the owner in cash upon the exercise of such option.
>
> " (c) When the contractor in pursuance of sub-cll. (a) and (b) of this clause has purchased all the buildings and plant (with the exception of road motor vehicles and tractors) specified in or subsequently added to the schedule to this agreement the owner shall if required in writing by the contractor during the currency of this agreement (i) request the Forestry Commission to transfer to the contractor the said permit and the said licence and (ii) request the Forestry Commission to maintain to the contractor during the currency of this agreement a supply of timber to the extent previously provided for in sub-cl. (d) of cl. 1 hereof.
>
> " (d) The exercise from time to time of any option by the contractor prior to the determination of the agreement shall not affect the contractual rights of the parties hereto during the said period of ten years in so far as relates to the sale and purchase of sleepers and sawn timber.
>
> " (e) In the event of the said permit and the said licence being transferred to the contractor in pursuance of sub-cl. (c) of this clause the contractor shall for a period of ten (10) years after July 13, 1962, continue to sell and the owner shall continue to purchase the whole of the sleepers and sawn timber referred to in sub-cl. (c) of cl. 2 hereof in accordance with the terms and conditions of this agreement in so far as they are applicable."

One or two preliminary observations will serve to show the course which their Lordships have thought it right to take in dealing with this appeal. First, cl. 9 (a) and (b) are so worded that it is a matter of considerable difficulty to determine what is to constitute the " exercise " of the option in the sense of some act or event which is to fix the right of the appellant to take over the purchase items and the right of the respondent to have cash in exchange for them. It might be the giving of the option notice, or, possibly, the expiration of the time limited by the notice; on the other hand, it might be that, though a notice of the required length has to be given, no rights are created unless and until the purchase price is tendered at the date when the prescribed time has run out. The latter is the view that commended itself to the Full Court, and, basing themselves on it, they concluded that the appellant had never succeeded in exercising its option at all, because notice to terminate the agreement had been given before any payment was made. Both views were fully argued on the appeal; but it was conceded by the appellant's counsel that, while it was important to his case to establish that there had taken place a purchase of all the buildings and plant within the meaning of cl. 9 (c), he could not claim any relief from the equitable jurisdiction which related merely to asserting the validity of the appellant's exercise of the option. Since the appellant had been in possession of all the buildings and plant of the sawmill at all relevant dates, there was nothing that the respondent could be called on to do, even if there had been a valid exercise. It would have involved merely a transfer from lease and possession into ownership and possession. Nor would a bare declaration of right be an appropriate form of relief when the transaction, the validity of which was in issue, would amount if valid to no more than a sale of goods.

Having regard to these considerations and to the fact that other proceedings are, it seems, on foot or pending in other branches of the Supreme Court's jurisdiction, which proceedings relate to this same matter, their Lordships think that it would be preferable not to come to any conclusion on the point whether or when the option of purchase was exercised. Instead, they will address themselves to the question which is more directly appropriate to the equitable jurisdiction, whether, assuming that the appellant did purchase the buildings and plant under the option, it can claim to be entitled to any equitable relief such as would compel the respondent to comply with cl. 9 (c) and forward his requests to the Forestry Commission. It was this aspect of the matter to which the trial judge directed his attention in dismissing the appellant's suit, and their Lordships are bound to say that, on the facts that appeared at the trial, it is difficult to see what other course he could have taken.

Assuming that the appellant did effect a purchase, it is necessary to ascertain what is the earliest date at which that could have taken place. It first gave notice with regard to the purchase option by a letter dated June 11, 1957. The notice was described in the letter as " three months' notice of . . . intention to exercise the option to purchase each and every item . . ." By letter dated Sept. 11, 1957, it referred to the previous letter, and stated " we hereby confirm the exercise of the option accordingly ". On Sept. 16, another letter was sent which contained the words

> " Without prejudice to our claim that we have validly exercised this option . . . we now give you a further three months' notice pursuant to cl. 9 . . . of our intention to exercise the option to purchase . . ."

Whatever the legal effect of these letters, there is no doubt that, up to that date, the appellant had neither paid nor tendered any money in cash in respect of the items to be purchased. It had not, therefore, complied with the conditions of cl. 9 (b). The earliest date at which any payment can be said to have been made was Dec. 16, 1957, the moneys being provided under the terms of an agreement made by the parties' respective counsel on Dec. 12, in the course of arbitration proceedings. The terms of that agreement are not otherwise material. Before Dec. 16, however, events had occurred which brought about a fundamental alteration in the position of the parties and of their respective rights and liabilities under the agreement of 1956; for, on Nov. 25, 1957, the respondent had served on the appellant a written notice determining that agreement at the conclusion of three months from the date of notice. The notice of determination was given under the power provided by cl. 6 of the agreement on the ground of breaches committed by the appellant, and, when the suit came to trial, it was conceded by the appellant's counsel that the agreement had been effectively determined by this notice so as to expire on Feb. 25, 1958, and that the appellant had committed a number of breaches of obligation under the agreement which were listed in the respondent's defence and counterclaim.

The position in which the appellant stood at the trial with regard to the claim to have cl. 9 (c) enforced in its favour can thus be stated as follows. It had on two occasions called on the respondent in writing to make the desired request to the Forestry Commission, on Oct. 11, 1957, and on Dec. 23, 1957. By the first occasion no money had been paid, even if there had been in some sense an exercise of the option, so the respondent's obligation to implement cl. 9 (c) could not have fallen due; on the second occasion, though money had been paid, an effective notice to determine the whole agreement had been served by the respondent and the appellant was admittedly in breach of several of its obligations thereunder. Long before the trial took place, the agreement was at an end, and no one could recall it into existence. In those circumstances, could the appellant have any right to call on the court to compel the respondent to perform cl. 9 (c) in its favour?

In their Lordships' opinion, it does not make any difference to the result whether the question is approached by inquiring if the contractual obligation imposed by cl. 9 (c) subsisted at all in the light of what had happened by Dec. 23, 1957, or by inquiring if, assuming some obligation still subsisting, its nature and the circumstances were such as to justify a claim for specific performance. In either case, the appellant's claim is unmaintainable. To take the contractual point first, it is impossible to regard cl. 9 (c) as a mere consequential appendage of the exercise of the option under sub-cll. (a) and (b) and, therefore, as something to be performed irrespective of the observance and enforcement of the rest of the obligations under the agreement. This point is insisted on in the judgment of the Full Court, and their Lordships agree with it. They say

> "The [respondent's] obligations under cl. 9 (c) (i) and (ii) were in aid of the continued supply of sleepers and timber until 1972 . . . It appears to us to be evident that the intentions of the parties was that if the agreement was lawfully determined at any time during its currency all the rights of the parties should thereupon cease. Once the [appellant's] obligation to supply and sell sleepers and timber to the [respondent] ceased any right that it otherwise had to the executory aspects of cl. 9 ceased."

It follows, therefore, that, if the appellant had fallen into default through breaches of the agreement and by so doing had brought down on itself the notice of termination, the respondent was by that fact discharged from compliance with a clause such as cl. 9 (c) which was essentially part of a working scheme that had by then become abortive.

The appellant's position is, to say the least, none the stronger if it is judged as an applicant for specific performance and its claim for this special relief is tested by the equitable principles that apply to such a claim. It might be a difficult task to enumerate all the separate aspects in which the claim is liable to be defeated on grounds of equity. It is sufficient for the decision of this case to identify two of them. A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations. *Measures Brothers, Ltd.* v. *Measures* (1) is a familiar instance of this principle. The appellant in this case has not been able to deny, or at any rate has not denied, that it was in default in several respects at the time when the respondent served on it the notice of termination. Secondly, where the agreement is one which involves continuing or future acts to be performed by the plaintiff, he must fail unless he can show that he is ready and willing on his part to carry out those obligations, which are in fact part of the consideration for the undertaking of the defendant that the plaintiff seeks to have enforced. Here, the appellant could never show that it was ready and willing to perform its share of the agreement of 1956; for its breaches had brought on it the notice of determination which precluded it for good from doing anything more in furtherance of that agreement. It was sought in argument to withdraw the appellant's case from what was said to be the full vigour of these equitable considerations by saying that the specific relief asked for in respect of cl. 9 (c) was not specific performance "proper", on the ground that that phrase ought to be confined to the specific performance of agreements which were not intended in their nature to be the final instrument regulating the mutual relations of the parties. Now it is true that, on one occasion, LORD

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(1) [1910] 1 Ch. 336; *affd.* C.A., [1910] 2 Ch. 248.

Selborne, L.C. (in *Wolverhampton & Walsall Ry. Co.* v. *London & North Western Ry. Co.* (2)), did advert to such a distinction, stating that

> "The common expression, 'specific performance', as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed."

The same distinction has been adverted to in a case in the High Court of Australia—*J. C. Williamson, Ltd.* v. *Lukey* (3). Their Lordships are of opinion, however, that this distinction between executory and executed agreements (to adopt Lord Selborne's nomenclature for this occasion) in connexion with the jurisdiction to grant specific performance, does not suggest any line of argument that can be of assistance to this appellant. The distinction certainly cannot be taken as a warrant for the idea that the jurisdiction to give specific relief by ordering the performance of particular acts is confined to the enforcement of agreements that are executory in this sense; nor can it mean that, when a court is invited to order specific performance of an agreement which is not executory, or some part of that agreement, it should not pay attention to considerations as to the conduct and position of the plaintiff which are similar to those it attends to in the "proper" cases. Lord Selborne, in the passage referred to, made only the broad distinction between the class of executory agreements, such as agreements for the sale of land and marriage articles, and the principles applicable to specific performance of them on the one hand and on the other a very different class of agreement, which he described (2) as "ordinary agreements for work and labour . . . hiring, and service, and things of that sort". Such a division leaves uncategorised a great many agreements of various kinds which are not inherently unsuitable for specific performance in the sense that contracts for work and labour, hiring and service are normally regarded as being by their very nature so unsuitable. As to this intermediate class, it does not appear to their Lordships that there is any obvious reason why, even if their terms do not call for the execution of a further instrument regulating the rights of the parties, the equitable right to specific relief in respect of them should be tried by principles which are in any way different from those applicable to executory agreements "proper". The most that the appellant's argument could amount to was that, since it was not asking for specific performance "proper" in seeking the enforcement of cl. 9 (c), the defaults attributable to it need not necessarily be fatal to its right to relief. The only answer that that can receive is that, unless the court is to ignore equitable principles altogether in considering the right to specific relief in the present case, the relief sought cannot be granted.

It follows that the appeal against the dismissal of the appellant's suit cannot succeed.

At the trial of the suit, the respondent obtained no relief on its counterclaim. The learned judge did not consider that there was a case made out for any intervention by a court of equity. On appeal, however, the Full Court reversed the decree dismissing the counterclaim and made an order against the appellant to deliver up possession of the land described in the respondent's occupation permit. In their view, the facts did show a case for aiding the respondent by specific order and injunction. The surrender of such possession is the inevitable consequence of the termination of the agreement and the failure of the appellant to obtain a transfer of the permit to itself. If the appellant cannot succeed on its appeal, the order made on the counterclaim must stand. There seems to be no dispute about this and no argument to the contrary was submitted to their Lordships.

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(2) (1873), L.R. 16 Eq. at p. 439.

(3) (1931), 45 C.L.R. 282.

For the reasons set out, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

Solicitors: *Farrer & Co.* (for the appellant); *Light & Fulton* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re SNEYD (*deceased*). ROBERTSON-MACDONALD AND ANOTHER *v.* SNEYD AND OTHERS.

[CHANCERY DIVISION (Pennycuick, J.), February 9, 10, 13, 1961.]

Town and Country Planning—Compensation—Depreciation of land values—Interest on compensation—Interest computed by reference to the period July 1, 1948 *to June* 30, 1955—*Received in* 1956-1959 *by trustees in respect of sales of settled land during lives of two successive tenants for life and after death of second tenant for life—Whether interest apportionable over period by reference to which it was calculated and payable to personal representatives of tenants for life—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 65 (3)—*Town and Country Planning Act*, 1953 (1 *&* 2 *Eliz.* 2 *c.* 16), *s.* 2 (1)—*Town and Country Planning Act*, 1954 (2 *&* 3 *Eliz.* 2 *c.* 72), *s.* 14 (1)—*Apportionment Act*, 1870 (33 *&* 34 *Vict. c.* 35), *s.* 2.

On July 1, 1948, the appointed day for the purposes of those provisions (among others) of the Town and Country Planning Act, 1947, that related to compensation for depreciation of land values, settled estates were held upon trusts under which Colonel S. was tenant for life and after his death Major S. would be tenant for life during his life, with remainders over. Claims for payment by way of compensation for depreciation of land values were established. Colonel S. died on Dec. 25, 1949. Major S. died on Aug. 12, 1950. During the life of Colonel S. certain properties comprised in the settled estates were sold, and in 1951 and 1952 there were further sales. The right to compensation for depreciation of land values was, in general, abolished by the Town and Country Planning Act, 1953, but these sales gave rights to payments by reference to established claims, such payments consisting of principal and interest in accordance with the Town and Country Planning Act, 1954, s. 1 and s. 14.* These payments, none of which was made before 1956, amounted to £44,067 in respect of principal and £6,208 0s. 6d. in respect of interest. The payment in respect of interest was computed at a certain rate in respect of the period (fixed by s. 14 (1) of the Act of 1954) from the appointed day, July 1, 1948, to June 30, 1955. On the question whether any part of the £6,208 0s. 6d. interest was apportionable to the estate of Colonel S. or to the estate of Major S., or whether the whole sum should be treated as having accrued after the death of Major S., it being conceded that the £6,208 0s. 6d. was income, not capital,

Held: the interest should be treated as income which accrued after the death of Major S., and was not apportionable over the period July 1, 1948, to June 30, 1955, because s. 65 (3)† of the Town and Country Planning Act, 1947, on its true construction, provided for the payment of an amount to be ascertained by computing interest at a certain rate over a certain period, but the word " accrue " in s. 65 (3) did not connote a notional accrual of interest from day to day until the principal was satisfied, nor did the Apportionment Act, 1870, s. 2 apply to an interest payment under s. 65 (3).

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* The relevant terms of s. 1 and s. 14 of the Town and Country Planning Act, 1954, are printed at p. 748, letters C to I, post.

† The terms of s. 65 (3) of the Town and Country Planning Act, 1947, are printed at p. 745, footnote*, post.

[For the Town and Country Planning Act, 1947, s. 58, s. 64, s. 65 (1), (3), s. 119 (1) see 25 HALSBURY'S STATUTES (2nd Edn.) 560, 570, 571, 572, 635.

For the Town and Country Planning Act, 1953, s. 2, see 33 HALSBURY'S STATUTES (2nd Edn.) 858.

For the Town and Country Planning Act, 1954, s. 1, s. 14, see 34 HALSBURY'S STATUTES (2nd Edn.) 913, 933.

For the Apportionment Act, 1870, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 867.]

Cases referred to:

Hasluck, Re, Sully v. *Duffin*, [1957] 3 All E.R. 371; [1957] 1 W.L.R. 1135; 3rd Digest Supp.

Jones v. *Ogle*, (1872), 8 Ch. App. 192; 42 L.J.Ch. 334; 28 L.T. 245; 20 Digest 282, *412*.

Adjourned Summons.

This was an application by originating summons dated June 3, 1960, by the plaintiffs, Alan Robertson-MacDonald and Michael Francis Gordon Hibbert who were the trustees of the will of Ralph Sneyd, deceased, dated May 30, 1865, and of the will of his brother, Walter Sneyd, deceased, dated June 14, 1886, for the determination of the question whether interest received by them as trustees on the compensation paid under Part 1 of the Town and Country Planning Act, 1954, with reference to sales of settled land during the lifetime of Ralph Sneyd the younger (Colonel Sneyd), a deceased son of Walter Sneyd, was apportionable over the period from July 1, 1948, to June 30, 1955 (by reference whereto the interest was calculated under s. 14 of the Act) and due proportions thereof were payable to the first defendant as personal representative of Ralph Sneyd the younger [i.e., Colonel Sneyd] a life tenant under each of the above-mentioned wills, and to the second defendant as personal representative of Henry Ralph Mowbray Howard Sneyd [Major Sneyd], a life tenant under the above-mentioned will of Walter Sneyd; or whether the interest should be treated as income accrued after the death of Henry Ralph Mowbray Howard Sneyd, or whether it should be treated in some, and what, other manner. A like question was asked, with regard to interest on compensation paid with reference to sales of settled land after the death of Henry Ralph Mowbray Howard Sneyd. The defendants were Dorothy Charlotte Sneyd, sole surviving executrix of Colonel Sneyd; Janet Emma Jameson Howard Sneyd, sole executrix of Major Sneyd, and Thomas Howard Gavin Howard Sneyd, an infant who was tenant in tail in possession under the will of Walter Sneyd.

Colonel Sneyd succeeded as tenant for life to the estates settled by both the above-mentioned wills. He died on Dec. 25, 1949. Major Sneyd then succeeded to the settled estates as tenant for life. He died on Aug. 12, 1950. Pursuant to Part 6 of the Town and Country Planning Act, 1947, claims were made and were duly established for payments for depreciation of value of certain parts of the settled estates. The right to such payments, so it was deposed in evidence, vested by virtue of s. 64 of the Act of 1947 in Colonel Sneyd as the person in whom the legal estate in the settled land was vested on the appointed day, July 1, 1948.† In the year 1949 and in the years 1951 and 1952 parts of the land to which the established claims related were sold (or in some cases compulsorily acquired) at prices which gave rise to claims under s. 5 of the Town and Country Planning Act, 1954. At various dates between Feb. 1, 1956, and Jan. 19, 1959, payments were received, in consequence of the established claims and the legislation, which amounted in the aggregate to £44,067 in respect of principal and £6,208 0s. 6d. in respect of interest (less tax) from July 1, 1948, to June 30, 1955, as provided by s. 14 of the Act of 1954. Four of these sales, to which the payments related, took place during the life of Colonel Sneyd and all remaining sales took place after the death of Major Sneyd. The compensation attributable to the sales during the life of Colonel Sneyd was in the aggregate £3,645 in respect of principal and £513 9s. 11d. in respect of interest. It was deposed that if the aggregate sum of £6,208 0s. 6d. interest were apportionable over the period from July 1, 1948, to June 30, 1955, the apportionment would be as follows: July 1, 1948 to the death of Colonel Sneyd—£1,319 6s. 10d.; from the death of Colonel Sneyd to the death of Major Sneyd—£558 16s. 9d.; and from the death of Major Sneyd to June 30, 1955—£4,329 16s. 11d.

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* Section 65 (3) provided as follows:—" Interest on the amount of any payment falling to be made in accordance with a scheme made under this Part of this Act shall accrue, at such rate as may from time to time be determined by the Treasury, from the appointed day until the payment is satisfied in accordance with the provisions of this section, and shall be paid in cash by the Central Land Board at the time when the payment is so satisfied." As regards the repeal of s. 65 (3), see s. 2 (1) of the Town and Country Planning Act, 1953, and p. 747, letter I, post.

† July 1, 1948, was appointed by the Town and Country Planning Act, 1947 (Appointed Day) Order, 1948 (S.I. 1948 No. 213).

E. G. Wright for the plaintiffs.

P. J. Millett for the first and second defendants.

J. P. Brookes (with him *W. P. A. Graetz*) for the third defendant.

PENNYCUICK, J.: The relevant facts can be extremely shortly stated. Under the trusts of the will dated May 30, 1865, of Ralph Sneyd, his settled estates were, so far as now material, held on trusts to pay the income to one Colonel Sneyd during his life and after his death to one Major Sneyd during his life with remainders over. Colonel Sneyd died on Dec. 25, 1949. Major Sneyd died less than a year afterwards on Aug. 12, 1950. During the life of Colonel Sneyd certain sales of property comprised in his settled estates took place, and those sales gave rise to payments of compensation under the provisions of the Town and Country Planning Act, 1954, consisting of principal and interest. Certain further sales took place after the death of Major Sneyd. Those sales gave rise to compensation under the Act consisting of principal and interest. The principal in respect of compensation so far as the sales during the life of Colonel Sneyd were concerned was £3,645 with interest amounting to £513 9s. 11d. The compensation in respect of sales after the death of Major Sneyd amounted to £40,422 together with interest amounting to £5,694 10s. 7d. The question is as to the destination of those two amounts of interest, namely, £513 9s. 11d. and £5,694 10s. 7d.

It now becomes necessary to read a number of passages in the three Acts. The Town and Country Planning Act, 1947, contains, so far as material, the following. Section 58:

> " (1) Subject to the provisions of this Part of this Act, payments shall be made in accordance with a scheme to be made by the Treasury under this section, in respect of interests in land which are depreciated in value by virtue of the provisions of this Act.
>
> " (2) The aggregate amount of the payments to be made by virtue of this section and of any corresponding provisions which may be enacted in relation to Scotland shall be the sum of three hundred million pounds, and that amount shall be apportioned, as between land in England and Wales and land in Scotland, in such manner as the Treasury may by order determine after they are sufficiently informed as to the development values of land in those countries respectively as ascertained for the purposes of this Part of this Act and of any such corresponding provisions as aforesaid.
>
> " (3) As soon as may be after they are sufficiently informed as to the development values of interests in land in respect of which claims are made for payments under this Part of this Act, the Treasury shall make a scheme providing for the distribution, as between those interests or such of them as

> A may be prescribed by the scheme, of the sum apportioned under the last
> foregoing subsection to land in England and Wales."

Section 64 provides:

> "(1) Subject to the provisions of any scheme made under this Part of this
> Act with respect to the disposal of payments made thereunder, the right to
> B receive any such payment in respect of an interest in land shall vest in the
> person who is on the appointed day the owner of that interest.
>
> "(3) Subject to the following provisions of this section the reference in this
> section to the owner of an interest in land shall be construed as a reference
> to the person in whom the legal estate in respect of the interest is vested or,
> if the interest is a tenancy under an agreement for a lease, to the person
> C entitled to have vested in him the legal term agreed to be created."

Section 65 provided (1):

> "(1) All payments falling to be made in accordance with a scheme made
> under s. 58 of this Act shall be satisfied by the issue of government stock,
> that is to say stock the principal of which and the interest on which shall
> be charged on the Consolidated Fund; and all payments falling to be made
> D in accordance with a scheme made under s. 59 of this Act shall be made in
> cash by the Central Land Board.
>
> "(2) Any such stock shall be issued on such date as may be fixed by the
> Treasury, being a date not later than five years after the appointed day:
> Provided that if the amount of any payment required by this section to be
> satisfied by the issue of stock has not been finally determined on the date so
> E fixed, the stock to be issued in satisfaction of the payment shall be issued
> on such date not being later than three months after the amount thereof has
> been so determined as the Treasury may direct.
>
> "(3) Interest on the amount of any payment falling to be made in accord-
> ance with a scheme made under this Part of this Act shall accrue, at such
> rate as may from time to time be determined by the Treasury, from the
> F appointed day until the payment is satisfied in accordance with the pro-
> visions of this section, and shall be paid in cash by the Central Land Board
> at the time when the payment is so satisfied."

By s. 119 (1) it is provided that the expression "appointed day" means "such day as the Minister may by order appoint."

G The Town and Country Planning Act, 1953, has this preamble:

> "An Act to abolish development charges under the Town and Country Planning Act, 1947 . . . subject to certain savings and special provisions; to provide . . . that the payments required by s. 58 . . . of [that Act] . . . shall not be made and to make certain provision as to claims for and rights to receive such payments . . ."

H I need not read the rest of the preamble. Section 2 (1) reads as follows:

> "The payments directed to be made by s. 58 of the Town and Country
> Planning Act, 1947, and s. 55 of the Town and Country Planning (Scotland)
> Act, 1947, shall not be made, and those sections and, so far as they relate to
> payments under schemes under those sections, s. 65, s. 66 and s. 68 of the
> I first mentioned Act and s. 62, s. 63 and s. 65 of the second mentioned Act
> are hereby repealed: Provided that—(a) claims for such payments duly
> made to the Central Land Board under the said Acts shall be satisfied in
> such manner, in such cases, to such extent, at such times and with such
> interest as may hereafter be determined by an Act of Parliament passed for
> that purpose; and (b) pending the coming into operation of such an Act,
> s. 60 to s. 64 of the first mentioned Act and s. 57 to s. 61 of the second

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(1) For the repeal of s. 65, see letter I, supra.

> mentioned Act (which relate to the establishment of such claims as aforesaid and the transmission of the rights to which they relate), and any regulations made or instruments executed before the passing of this Act under or for the purposes of any of those sections, shall have effect as if—(i) the preceding provisions of this section had not been passed; but (ii) provision had instead been made by this section for postponing the date for the satisfaction of the payments until such date as Parliament might thereafter determine . . ."

That provision was implemented by the Town and Country Planning Act, 1954. The preamble to that Act is:

> "An Act to make provision for compensation and other payments by reference to claims for payments under s. 58 of the Town and Country Planning Act, 1947 . . .",

and a number of other matters. Section 1 provides:

> "(1) The provisions of this Part of this Act shall have effect for requiring payments to be made by the Central Land Board, by reference to claims established under Part 6 of the Town and Country Planning Act, 1947 (in this Act referred to as 'the principal Act'), in cases where the land, or part of the land, in respect of which such a claim was established, or the interest in land to which such a claim related, or the benefit, or part of the benefit, of such a claim, has before the commencement of this Act been the subject of an act or event such as is specified in any of those provisions.
>
> "(2) The claims referred to in the preceding subsection are claims for payments under the scheme which, but for the provisions of s. 2 of the Town and Country Planning Act, 1953 (in this Act referred to as 'the Act of 1953'), would have fallen to be made under s. 58 of the principal Act (which provided for payments in respect of depreciation of land values in accordance with a scheme to be made under that section).
>
> "(5) References in this Act to the benefit of an established claim—(a) in relation to any time before the passing of the Act of 1953, whether before or after the making of the claim, or before or after the establishment thereof, shall be construed as references to the prospective right, under and subject to the provisions of the scheme referred to in sub-s. (2) of this section, to receive a payment in respect of the interest in land to which the claim related; and (b) in relation to any time after the passing of the Act of 1953 (whether before or after the commencement of this Act), shall be construed as references to such prospective right to the satisfaction of the claim as subsisted immediately before the commencement of this Act by virtue of s. 2 of that Act; and references to part of the benefit of an established claim shall be construed accordingly."

Then s. 14 (1) says:

> "Subject to the provisions of this section, where a person is entitled to a payment in accordance with the preceding provisions of this Part of this Act, the Central Land Board shall pay to that person the principal amount of the payment together with interest thereon at the rate of three and one-half per cent. per annum from July 1, 1948, to the date of payment: Provided that if the payment is made after June 30, 1955, the interest shall be calculated to that day instead of the date of payment."

It is unnecessary to read in detail the provisions of the Act of 1954. The effect of the Acts of 1953 and 1954 was to abolish the development charges under the Act of 1947 and to provide compensation in certain limited cases where the owner of land had suffered loss as the result of the provisions of the Act of 1947: one of such cases being where, as here, there had been sales of land during the intervening period between the Act of 1947 and the Act of 1954.

It was under those sections of the Acts of 1953 and 1954 that the amounts of principal and interest were paid to the trustees of the Sneyd estates.

The question which now arises is stated in the originating summons as follows:

> "Whether interest received by the plaintiffs as such trustees as aforesaid on the compensation paid under Part 1 of the Town and Country Planning Act, 1954, with reference to sales of settled land during the lifetime of [Colonel Sneyd] (a) is apportionable over the period from July 1, 1948, to June 30, 1955 (by reference whereto such interest is calculated under s. 14 of the said Act) and due proportions thereof are payable to the first and second defendants respectively as personal representatives of the said deceased life tenants or (b) is to be treated as income accrued after the death of [Major Sneyd] or (c) is to be treated or applied in some and what other manner."

Then there is a like question as regards the interest on compensation paid with reference to the sales after the death of Major Sneyd.

It is contended by counsel on behalf of the first two defendants, who are respectively the personal representatives of Colonel Sneyd and Major Sneyd, that the Act of 1947, by s. 65 (3), purports to provide for interest accruing; that that provision must be treated as meaning accruer in the strict sense of the term; and that in that context the provisions of the Acts of 1953 and 1954 merely restore the previous prospective right of the owners under the Act of 1947 and effect no change in the beneficial interests, so that the provision for accruer is equally effective to be applied in the Acts of 1953 and 1954. Counsel for the remainderman, who is the infant defendant in tail, contends that s. 65 (3) of the Act of 1947 does not itself provide for accruer in the strict sense, but whether it does or not, it is impossible to read into the Acts of 1953 and 1954 by implication any provision as to accruer.

It seems to me that this question depends on the proper construction to be given to s. 65 (3) of the Act of 1947. Before referring again to the words of that subsection, certain matters should be borne in mind. First, s. 65 is concerned with the position between the state, on the one hand, and the owners of the interest in land on the appointed day, on the other hand, and is not concerned with beneficial interests in what must be the comparatively rare cases where the interests are held by trustees. When I say comparatively rare, I mean that they must be a relatively small proportion of all the cases of the interests affected by the Act. Next it must be borne in mind that under s. 65 (3) there can be no question of accruer in the strict sense of the word. Under this section and the other provisions of the Act of 1947 no principal debt comes into existence until the provisions for the ascertainment of development value under the Act have been carried through and the principal sum becomes ready for payment. There is no principal sum in existence before the day of payment, on which interest could accrue from day to day as it does on a fixed debt. It is true that the interest represents compensation to the owners of the interest for being kept out of their money, but the amount of the principal sum owing to them remains unascertained until that day comes. Thirdly, it is plain that the provisions of the Apportionment Act, 1870, cannot apply to interest payable under s. 65. Section 2 of the Apportionment Act, 1870, provides

> "... All rents, annuities, dividends, and other periodical payments in the nature of income ... shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

It seems quite clear that interest payable under s. 65 (3) is not to be regarded as an "other periodical payment in the nature of income" within the meaning of that section, and on that point I have been referred to the decision in *Jones* v. *Ogle* (2). A

I turn now to the words used in s. 65 (3) of the Act of 1947

> " Interest on the amount of any payment falling to be made in accordance with a scheme made under this Part of this Act shall accrue, at such rate as may from time to time be determined by the Treasury, from the appointed day until the payment is satisfied in accordance with the provisions of this B section, and shall be paid in cash by the Central Land Board at the time when the payment is so satisfied."

The subsection provides for two matters: first, that the interest shall accrue, and, secondly, that the interest shall be paid in cash. It seems to me on the natural construction of the words of that subsection that the word " accrue ", which cannot bear its strict meaning, ought to be treated as meaning no more than " shall C be payable "; that is to say, the section provides for two actual matters, first, it creates an indebtedness by the state to the owners in a sum to be ascertained by reference to interest at a certain rate over a certain period, on the principal amount of the compensation; and, secondly, it provides for the discharge of that indebtedness by payment in cash. It is not a natural construction of the subsection to treat the second part as relating to an actual matter, that is to say, D the payment of cash, and the first part as prescribing retrospectively for a notional accruer of interest in the strict sense of the word " accruer ". So it seems to me that the effect of s. 65 is no more than this: to provide that when the day of payment comes, the owner shall be entitled to the principal compensation to be paid by way of satisfaction by the issue of stock, and to interest E which is to be calculated at a certain rate for a certain period on the amount of that principal compensation. There is nothing in sub-s. (3) on its proper construction which could be treated as requiring accrual notionally from day to day over the past period until the date of satisfaction of the principal. If this is so no further difficulty arises under the Acts of 1953 and 1954, because it is quite clear that the Act of 1954 contains no express reference to accruer, and F such reference could not be included in the Act of 1954 except by implication from the terms of the Act of 1947. I would add that if, contrary to my view, the Act of 1947 did provide for an accruer in the strict sense, it seems to me that there would be the very greatest difficulty in a construction of the Act of 1954 which had the effect of altering the prospective rights of owners by the removal of the provisions for accruer which had previously existed. But that G question does not arise.

I conclude, therefore, that the question raised by the summons should be answered by deciding, in accordance with para. (b), that the interest in question should be treated as income accrued after the death of Major Sneyd.

I ought to add that it has been common ground between counsel that the interest is in the nature of income and not in the nature of capital, and for that H I have been referred (by way of contrast only) to the decision of WYNN-PARRY, J., in *Re Hasluck, Sully* v. *Duffin* (3), which is under a different section of one of the Acts.

Declaration accordingly.

Solicitors: *Cunliffe & Mossman*, agents for *Knight & Sons*, Newcastle-under-Lyme, (for the plaintiffs); *Hunters* (for the first, second and third defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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(2) (1872), 8 Ch. App. 192.

(3) [1957] 3 All E.R. 371.

W. v. W.

[Probate, Divorce and Admiralty Division (Phillimore, J.), November 30, 1960.]

Divorce—Maintenance of wife—Enforcement of order against husband—Garnishee proceedings—Jurisdiction of Divorce Court—R.S.C., Ord. 45.

The Divorce Court has jurisdiction to make a garnishee order, and the practice to be followed is that set forth in R.S.C., Ord. 45 (see p. 762, letter B, post).

Reasoning in *Re Woolgar, Woolgar* v. *Hopkins* ([1942] 1 All E.R. 583) not followed.

Re Hedderwick, Morten v. *Brinsley* ([1933] All E.R. Rep. 73) and *Re Bidie, Bidie* v. *General Accident Fire & Life Assurance Corpn., Ltd.* ([1948] 2 All E.R. 995) considered.

[**Editorial Note.** Possibly the principal propositions on which this decision rests are (i) that the effect of s. 5 and s. 16 of the Supreme Court of Judicature Act, 1873, was to confer on the judge of the court for divorce and matrimonial causes all powers theretofore enjoyed by superior courts of common law at Westminster, including power to make garnishee orders (see p. 758, letter C, post); and (ii) that r. 64 of the Matrimonial Causes Rules, 1957, which provides for enforcement of orders, is not exclusive (see p. 761, letter I, to p. 762, letter A, post).

As to garnishee orders in the Divorce Division, see 12 Halsbury's Laws (3rd Edn.) 475, para. 1062; 16 Halsbury's Laws (3rd Edn.) 79, para. 119, note (c); and for cases on the subject, see 27 Digest (Repl.) 681, *6497-6502*.]

Cases referred to:

Bailey v. *Bailey*, (1884), 13 Q.B.D. 855; 53 L.J.Q.B. 583; 27 Digest (Repl.) 682, *6515*.

Bidie, Re, Bidie v. *General Accident Fire & Life Assurance Corpn., Ltd.*, [1948] 1 All E.R. 885; [1948] Ch. 697; *affd.* C.A., [1948] 2 All E.R. 995; [1949] Ch. 121; 27 Digest (Repl.) 719, *6886*.

Crispin v. *Cumano*, (1869), L.R. 1 P. & D. 622; 38 L.J.P. & M. 28; 20 L.T. 150; 21 Digest 599, *1847*.

Edmunds v. *Edmunds*, [1904] P. 362; 73 L.J.P. 97; 91 L.T. 568; 27 Digest (Repl.) 681, *6499*.

Hedderwick, Re, Morten v. *Brinsley*, [1933] All E.R. Rep. 73; [1933] Ch. 669; 102 L.J.Ch. 193; 149 L.T. 188; 27 Digest (Repl.) 674, *6421*.

Jinks v. *Jinks*, [1936] 3 All E.R. 1051; 27 Digest (Repl.) 682, *6510*.

Linton v. *Linton*, (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; sub nom. *Linton, Re, Ex p. Linton*, 52 L.T. 782; 49 J.P. 597; 27 Digest (Repl.) 675, *6436*.

Stillwell, Re, Brodrick v. *Stillwell*, [1916] 1 Ch. 365; 85 L.J.Ch. 314; 114 L.T. 604; 27 Digest (Repl.) 674, *6419*.

Whittaker v. *Whittaker*, (1881), 7 P.D. 15; 51 L.J.P. 80; 47 L.T. 131; 27 Digest (Repl.) 681, *6497*.

Woolgar, Re, Woolgar v. *Hopkins*, [1942] 1 All E.R. 583; [1942] Ch. 318; 111 L.J.Ch. 209; 167 L.T. 60; 27 Digest (Repl.) 674, *6422*.

Worboys v. *Worboys*, [1953] 1 All E.R. 857; [1953] P. 192; [1953] 2 W.L.R. 901; 3rd Digest Supp.

Summons adjourned into open court for judgment.

In this case the wife applied to make absolute a garnishee order nisi made by Mr. Registrar Compton Miller on Sept. 28, 1960. The facts appear in the judgment.

R. J. S. Harvey for the wife, the judgment creditor.

Joseph Jackson for the husband, the judgment debtor.

Cur. adv. vult.

Nov. 30. **PHILLIMORE, J.,** read the following judgment: On Nov. 20, 1959, Stevenson, J., made an interim order for maintenance in favour of the wife who was the successful petitioner in this suit. In addition to a sum for the support of the child of the marriage his order required the husband to pay £800 a year less tax, this sum to be payable monthly for the support of the wife. On July 8, 1960, the husband was committed to Brixton prison for failure to comply with this order, the arrears as at May 16, amounting to over £241. He was discharged after twenty-one days on July 29, the arrears remaining unpaid.

The wife learnt that Barclays Bank, Ltd. were indebted to the husband and so instituted garnishee proceedings. An application was made to Mr. Registrar Compton Miller on Sept. 28, 1960, supported by an affidavit sworn by the wife on Sept. 27. In her affidavit she swore that £223 8s. 9d. was owing in respect of arrears of maintenance for the period to Mar. 29, 1960, and that Barclays Bank, Ltd. were indebted to the husband in the sum of £250. On the hearing of this application made ex parte the registrar made an order nisi and fixed the hearing of the summons for Oct. 10. On this date counsel for the husband stated that he appeared under protest and desired to submit that the court had no jurisdiction to hear the summons or make an order. The learned registrar adjourned the matter for hearing by a judge and it came before me on Nov. 2. At this hearing a solicitor representing the garnishee informed me that his clients, Barclays Bank, Ltd., were indebted to the husband, the judgment debtor, in a sum sufficient to meet the amount claimed in the summons, and counsel for the husband conceded that, subject to the points of law which he desired to raise, the order nisi must be made absolute. He then proceeded to make three submissions: (i) That there is no jurisdiction in the Divorce Division to make a garnishee order. (ii) That on the assumption that there is such jurisdiction no order absolute can be made on this summons since the affidavit of the wife, the judgment creditor, sworn on Sept. 27, 1960, had not been served on the husband, the judgment debtor. (iii) That inasmuch as the judgment debtor had already been committed to prison for the arrears in question the court ought not to allow them to be made the subject of a garnishee order.

In support of his first submission counsel for the husband made it plain that he is contending that although this court has made garnishee orders for many years—in fact, as will appear, for nearly eighty years—it has never had any jurisdiction to do so and that all these orders have been bad. The jurisdiction, he says, has always been the subject of doubt amongst lawyers. This assertion discloses a discrepancy between the two principal text-books on divorce. In support of it counsel referred me to Rayden on the Practice and Law in the Divorce Division (1st Edn.), published in 1910. At p. 148 the learned editor deals with the practice of the court at that time, nearly fifty years ago, in making garnishee orders and there appears at note (c):

> ". . . these orders seem to be made under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 61-67; as, although the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49) 'repeals' this, by s. 5 (6) it saves the jurisdiction (1) thereby conferred . . ."

Counsel for the husband emphasised the word "seem" and pointed out that this note has survived all subsequent editions and appears at p. 428 of the 7th Edn. which he himself edited in 1958. It now appears in the 8th Edn. at p. 488, published since I heard the summons and, as he pointed out, has also found its way into the article on Divorce by Karminski, J., and counsel himself which is included in 12 Halsbury's Laws (3rd Edn.), p. 475, note (b).

In the rival work first published as Browne on Divorce in 1864 it is necessary to go to the 4th Edn. edited by Mr. Powers in 1879 to find a similar expression of doubt. In a note at p. 561 the learned editor, after reciting the orders applicable to execution under the Judicature Acts, including R.S.C., Ord. 45 which is the order dealing with garnishee proceedings, goes on:

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(1) Section 5 (6) was presumably a misprint for s. 5 (b).

> " but as those rules are not applicable to the Divorce Court and as the Matrimonial Causes Act, 1857, s. 52, refers to the manner of enforcing decisions of the High Court of Chancery in practice at the time, it seems the former rules of Chancery are the ones to be adopted in the Divorce Court."

Since, as I shall show, the Divorce Court was at any rate by 1882 making garnishee orders and there was certainly no power in the Chancery Division to make such orders in 1857 it is not perhaps surprising that this note should have disappeared from the next edition published in 1889. In the 14th Edn. of this work, now entitled Latey on Divorce, the learned editors state in terms at p. 985: " Garnishee orders are made in the Divorce Division and are governed by R.S.C., Ord. 45."

In this state of editorial disagreement and legislative rivalry counsel for the husband prays in aid an independent witness, Master Wheatcroft in his article on Execution in 16 Halsbury's Laws (3rd Edn.). In dealing with garnishee proceedings at p. 79 the author adds note (c) in which he questions whether the practice in the Divorce Division can be based on R.S.C., Ord. 45, in the light of the wording of the rules themselves and of two decisions which he cites, namely, *Re Woolgar, Woolgar* v. *Hopkins* (2) and *Re Bidie, Bidie* v. *General Accident Fire & Life Assurance Corpn., Ltd.* (3) with both of which I must deal. This note and the cases to which the learned master refers in fact form the basis of counsel for the husband's resourceful argument. I say resourceful because it does scant justice to the statutory provisions which form the practice of the Divorce Division. It is the sort of argument which counsel presents when he is required to do something for a debtor who is determined not to pay his debts.

Counsel's main submission was as follows: The practice of the Supreme Court in regard to garnishee proceedings is contained in R.S.C., Ord. 45, under the heading " Attachment of Debts ". The Matrimonial Causes Rules, 1957, contain no mention of garnishee proceedings although they do refer to other methods of enforcing the orders of the court. Thus r. 63 deals with attachment and committal of the person and r. 64, which has the side title " Enforcement of orders ", deals with the procedure to be followed on the issue of a writ of fieri facias or sequestration. Accordingly it is argued that, since the Matrimonial Causes Rules, 1957, whilst providing for the enforcement of orders, make no express provision for garnishee proceedings, the provisions of R.S.C., Ord. 45 cannot be imported unless some warranty can be found in the Matrimonial Causes Rules, 1957, for so doing. Counsel then turns to r. 82 of the Matrimonial Causes Rules, 1957, which provides (4):

> " Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply."

Counsel for the husband does not seek to argue that R.S.C., Ord. 68 affords any difficulty in this case. Order 68, r. 1, provides:

> " Subject to the provisions of this order, nothing in these rules (5), save as expressly provided, shall affect the procedure or practice in any of the following causes or matters . . . (d) Proceedings for divorce or other matrimonial causes."

Counsel says that a garnishee summons is not " a proceeding for divorce or other matrimonial cause ", and, accordingly, that R.S.C., Ord. 68 affords no difficulty. His argument is simply this—By virtue of r. 82 the Rules of the Supreme Court can be applied only " Subject to the provisions of these rules and of any enactment ". Since these rules expressly provide for the enforcement of orders by r. 63 and r. 64, the methods provided by these rules, that is, committal, attachment, fieri facias or sequestration, are the *only* methods by which the orders of the court can be enforced unless sanction for some other method can be found in some enactment. Thus, in the absence of any reference in the Matrimonial Causes Rules to procedure by judgment summons it was necessary, he claims, to make S.R. & O. 1932 No. 503 (6) to enable the court to apply this method of enforcing its orders.

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(2) [1942] 1 All E.R. 583; [1942] Ch. 318.
(3) [1948] 2 All E.R. 995; [1949] Ch. 121.
(4) 10 Halsbury's Statutory Instruments (1st Re-issue) 262.
(5) I.e., Rules in Crown, revenue and matrimonial cases.

In support of this submission counsel relies on the decision of Simonds, J., in *Re Woolgar, Woolgar* v. *Hopkins* (7). In that case a widow sought to recover arrears of alimony due to her under an order of the Divorce Division by taking out a summons in the Chancery Division for the administration of her deceased husband's estate. At that time the question whether money due under an order for maintenance made by the Divorce Division could be treated as a debt so as to found an action in the Chancery Division was the subject of conflicting authority. In *Re Stillwell, Brodrick* v. *Stillwell* (8) Sargant, J., decided that it could be so treated, but in *Re Hedderwick, Morten* v. *Brinsley* (9) Luxmoore, J., refused to follow that decision. In the latter case, having considered two decisions of the Court of Appeal, *Bailey* v. *Bailey* (10) and *Linton* v. *Linton* (11), Luxmoore, J., held that an order by the Divorce Court for payment of alimony did not create a legal debt at common law and that the only method available to a wife of enforcing such an order was by way of judgment summons under s. 5 of the Debtors Act, 1869. He also held that inasmuch as alimony is a judicial assessment of the husband's obligation to maintain his wife and as such is inalienable and unassignable, cannot be affected by agreement between the parties or by the bankruptcy of the husband, and remains subject always to variation and revision by the court, it does not partake of the nature of a legally enforceable debt.

In *Re Woolgar* (7) Simonds, J., preferred to follow the decision of Luxmoore, J., in *Re Hedderwick* (9). He was, however, faced with a subsidiary point as a result of an alteration in the Matrimonial Causes Rules. The rules issued in 1937 contained r. 81 worded as the present r. 82 save that the word " statute " has been replaced by the word " enactment ". Counsel for the wife argued that the effect of this rule as amended was to import the Rules of the Supreme Court into matters relating to matrimonial causes and in particular to import R.S.C., Ord. 42, r. 24. That rule provides:

> " Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect."

Simonds, J., dealt with this point as follows (12):

> " The next question is whether any difference has been made by the alteration in the Matrimonial Causes Rules, 1937. The suggestion is that r. 81, which is a new rule, has made a difference, and that, to use a neutral word, a liability not hitherto provable in the administration of an estate is now provable . . . And it is said that the result of r. 81 is to introduce the provisions of R.S.C., Ord. 42, r. 24 . . . It is said that here there is an order for alimony made by the Divorce Court, and that that order can be enforced as if it were a judgment to the same effect. A judgment, of course, can be

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(6) The Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932, whereby the jurisdiction and powers under the Debtors Act, 1869, s. 5 [2 Halsbury's Statutes (2nd Edn.) 294] so far as they related to default in payment in pursuance of any order or judgment in a matrimonial cause, were assigned to the Probate Division.

(7) [1942] 1 All E.R. 583; [1942] Ch. 318.

(8) [1916] 1 Ch. 365.

(9) [1933] All E.R. Rep. 73; [1933] Ch. 669.

(10) (1884), 13 Q.B.D. 855.

(11) (1885), 15 Q.B.D. 239.

(12) [1942] 1 All E.R. at p. 584; [1942] Ch. at p. 320.

A enforced by way of proof in the administration of the estate. Therefore, it is said, under this rule, the order of the Divorce Court can be enforced in this way. However, r. 81 begins with these words: 'Subject to the provisions of these rules . . .' I turn, therefore, to r. 62, which . . . prescribes the way (and, as I think, the only way) in which an order of the Divorce Court may be enforced . . . That rule would be wholly unnecessary B if the result of r. 81 was to substitute, as a means of enforcing the orders of the Divorce Court, the provisions of R.S.C., Ord. 42, r. 24. Accordingly, I must come to the conclusion that r. 81 has not made any difference in this respect, and that the decision of LUXMOORE, J., in *Re Hedderwick* (13), must still be regarded as an authority."

The application for administration was therefore dismissed.

C Counsel for the husband argues that I should follow this decision. Rule 62 referred to by SIMONDS, J., is now r. 64, (14) and, to borrow the words of the learned judge, prescribes the way, and the only way (I emphasise this phrase), in which an order of the Divorce Court may be enforced. Just as SIMONDS, J., held that r. 81 did not import the provisions of R.S.C., Ord. 42, r. 24, so I should hold that it does not import R.S.C., Ord. 45. Moreover, this decision on the effect of D the rules was, it is said, approved by the Court of Appeal in *Re Bidie, Bidie* v. *General Accident Fire & Life Assurance Corpn., Ltd.* (15). That case was tried by JENKINS, J. It was a claim by a widow to recover against the estate of her dead husband arrears of maintenance under an order of the justices made pursuant to the Summary Jurisdiction (Married Women) Act, 1895. The learned judge held that the wife could not recover, her only remedy being that pro- E vided by the Act itself, which remedy did not survive the husband's death. He further held that for this purpose there is no distinction between alimony payable under an order of the Divorce Court and maintenance payable under the order of a court of summary jurisdiction and followed the decisions of LUXMOORE, J., in *Re Hedderwick* (13) and of SIMONDS, J., in *Re Woolgar* (16). It is not surprising that the argument under the Matrimonial Causes Rules advanced F in *Re Woolgar* (16) was not apparently advanced in *Re Bidie* (17) since, of course, those rules could have no application in the case of an order under the Summary Jurisdiction (Married Women) Act, 1895.

In the Court of Appeal, however, junior counsel for the widow in following referred to r. 62 of the Matrimonial Causes Rules presumably to suggest that since an order for arrears of maintenance can be enforced by writ of fieri facias G it must partake of the nature of a debt. In his brief judgment on this point LORD GREENE, M.R., said (18):

> "There is only one point which requires mentioning and that is the reference to the Matrimonial Causes Rules, r. 62. It was suggested by counsel for the plaintiff [the widow] that *Re Hedderwick* (13) and *Re Woolgar* H (16) were wrongly decided in view of that rule. It is worth noticing that in neither case was any suggestion made that r. 62 affected the matter at all. In *Re Hedderwick* (13) counsel did not, apparently, think it worth referring to, and in *Re Woolgar* (16) it was referred to, not as governing the case, but on the assumption that it did not govern the case and that its effect had been altered by a later rule, r. 81. I might also say that those rules do I not apply to the present case, which has nothing to do with the Matrimonial Causes Rules."

As the Master of the Rolls pointed out, the Matrimonial Causes Rules had nothing to do with the point before the court. I do not think that his remarks, which were clearly obiter, can be regarded as approving the observations of Simonds, J., in dealing with the point under the Matrimonial Causes Rules in *Re Woolgar* (19).

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(13) [1933] All E.R. Rep. 73; [1933] Ch. 669.
(14) 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 250.
(15) [1948] 2 All E.R. 995; [1949] Ch. 121.
(16) [1942] 1 All E.R. 583; [1942] Ch. 318.
(17) [1948] 1 All E.R. 885; [1948] Ch. 697.
(18) [1948] 2 All E.R. at p. 997; [1949] Ch. at p. 125.

What, then, does the argument under the rules amount to? First, doubts have been expressed as to the jurisdiction of this Division to make garnishee orders in the absence of a clear statement as to the origin of the power to do so. However, though the power has been exercised for many years no attempt appears to have been made to dispute the jurisdiction. If it had been, I am sure that the industry of counsel for the husband would have produced it. Secondly, the judgment of Simonds, J., in *Re Woolgar* (20) is clear. If the wording of the Matrimonial Causes Rules, r. 81 (now r. 82) does not import R.S.C., Ord. 42, it is difficult on the reasoning which he adopted to see how it can import R.S.C., Ord. 45. Since r. 82 also refers to powers derived from " any enactment " counsel for the husband went on to argue that the power to make garnishee orders does not derive from any enactment.

Dealing with the reference in the note to Rayden on Divorce (8th Edn.), at p. 488, note (c), to the Common Law Procedure Act, 1854, he points out that the effect of s. 99, which interprets the terms " court " and " judge " on which the power to make garnishee orders is conferred by s. 61 to s. 67, is to confer these powers on the judges of the Superior Courts of Common Law sitting at Westminster. The Matrimonial Causes Act, 1857, made no reference to the Common Law Procedure Act, 1854, or to the power to garnishee. In dealing with the powers of the court it provided by s. 22:

> " In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

Again by s. 52:

> " All decrees and orders to be made by the court in any suit, proceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution."

This latter section bears the side note: " Enforcement of orders and decrees."

Crispin v. *Cumano* (21), decided in 1869, shows that at that date the Court of Chancery had no power to make a garnishee order, and it follows that the Divorce Court had no such power at that date. How then, it is said, was the power conferred? I am content to accept the able argument put forward by counsel for the wife in answer. His argument was as follows: The history of the remedy by way of garnishee is conveniently stated by Mr. Cababé, a barrister of the Inner Temple, in his book on Interpleader and Attachment of Debts, published in 1881, at p. 147. He says:

> " There was no way, previous to the passing of the Common Law Procedure Act, 1854, by means of which a judgment creditor could obtain payment of his debt, from parties who were indebted to the judgment debtor; yet far more than the amount of the judgment debt might be due to the judgment debtor from such parties: and they would probably be quite indifferent to whom they paid the debt, so long as they could get a good discharge for it.
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> " Such being the state of things, the Common Law Procedure Act, 1854,

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(19) [1942] 1 All E.R. at p. 584; [1942] Ch. at p. 320.

(20) [1942] 1 All E.R. 583; [1942] Ch. 318.

(21) (1869), L.R. 1 P. & D. 622.

A in s. 60 to s. 67, provided a machinery by means of which a judgment creditor might ascertain what debts were due to his judgment debtors from third parties, and then proceed to attach them, and so ultimately obtain payment of them.

"The practice was further developed by the Common Law Procedure Act, 1860, s. 29 and s. 30, and by these provisions the practice was regulated B at common law till the passing of the Judicature Act, 1875. In Chancery the power to attach debts did not exist. Now, however, under R.S.C., Ord. 45 of 1875, the practice of attachment applies to all divisions of the High Court; and the several rules of the order deal with the practice for attachment. These rules are, however, substantially the same as the provisions of the Common Law Procedure Acts, 1854 and 1860; so that the decisions under C those Acts are applicable to the present practice."

This passage in referring to all divisions is stating that the Divorce Division at this date, 1881, had got the power to make a garnishee order. It is, accordingly, interesting to find that OAKLEY, the Chief Clerk of the Divorce Registry, in his book on DIVORCE PRACTICE (3rd Edn.), published in 1889, devotes five pages (p. 171 to p. 176) to the procedure by way of garnishee. Moreover, in D 1881, SIR JAMES HANNEN, P., in *Whittaker* v. *Whittaker* (22), made the first garnishee order recorded in the reports as having been made by a judge in this division. In that case the petitioner, who had obtained a decree of dissolution and an order for costs, sought to attach a debt due to the respondent and also to appoint a receiver of the respondent's property. The report, in recording the order granting both types of relief, records the authority for the appoint- E ment of a receiver but makes no reference to any authority in regard to the garnishee order. It seems safe to assume that the making of garnishee orders was already familiar practice in the division. The case was referred to as a precedent for the making of a garnishee order in a matrimonial suit by GORELL BARNES, J., in *Edmunds* v. *Edmunds* (23). Although the headnote to that decision begins:

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> "The principles involved in garnishee proceedings arising out of decrees and orders in matrimonial suits examined and considered",

it is to be observed that it was not sought to argue there was no jurisdiction to make a garnishee order in such a suit; the only reference to jurisdiction being to the Common Law Procedure Act, 1854, which, it was said, made a chose in G action subject to attachment.

As Mr. CABABÉ indicated in the passage which I have read, the jurisdiction to make a garnishee order which was created by the Common Law Procedure Act, 1854, and extended by the Common Law Procedure Act, 1860, was originally enjoyed only by the Superior Courts of Common Law sitting at Westminster. That power was extended to other courts, including the Court for Divorce and H Matrimonial Causes, by the Supreme Court of Judicature Act, 1873, which set up a Supreme Court comprising two permanent divisions: Her Majesty's High Court of Justice and Her Majesty's Court of Appeal. Section 5 in stipulating the constitution of Her Majesty's High Court of Justice as including "the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes" provides:

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> "All the judges of the said court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction . . ."

Section 16 states the jurisdiction of the High Court of Justice as follows:

> "The High Court of Justice shall be a superior court of record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement

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(22) (1881), 7 P.D. 15.

(23) [1904] P. 362.

> of this Act, was vested in, or capable of being exercised by, all or any of the courts following; (that is to say) . . ."

and then a list of all the principal courts follows, including the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas at Westminster and the Court for Divorce and Matrimonial Causes. The section continues:

> " The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said courts, respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law, or custom, and all powers given to any such court, or to any such judges or judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdictions so transferred."

The effect of s. 5 and s. 16 was to confer on the judge of the Court for Divorce and Matrimonial Causes all the powers hitherto enjoyed by the superior courts of common law sitting at Westminster, including, of course, the power to make garnishee orders. Section 23 provided for the exercise of the jurisdiction and for the making of rules as follows:

> " The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such rules and orders of court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such rules or orders of court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective courts from which such jurisdiction shall have been transferred, or by any of such courts."

No court can abrogate a jurisdiction conferred by Parliament either by rule or by failure to make a rule, and it follows that as from Nov. 2, 1874, when the Act came into operation the Court for Divorce and Matrimonial Causes in issuing process by garnishee was either acting under some new rule or pursuant to s. 23 " as nearly as may be in the same manner " as such process was issued prior to that date by the superior courts of common law sitting at Westminster.

In 1875 Parliament passed an Act to amend the Supreme Court of Judicature Act, 1873. Section 16 of the Act of 1875 reads as follows:

> " The rules of court in Sch. 1 to this Act shall come into operation at the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. But such rules of court, and also all such other rules of court (if any) as may be made after the passing and before the commencement of this Act under the authority of the next section, may be annulled or altered by the authority by which new rules of court may be made after the commencement of this Act."

Then s. 17 went on to provide for the making of rules in future, and s. 18 provided:

> " All rules and orders of court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the chief judge in bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, except so far as they are expressly varied by Sch. 1 hereto or by rules of court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and

> in the Court of Appeal respectively until they shall respectively be altered or annulled by any rules of court made after the commencement of this Act ",

and then the exception goes on to preserve the powers of the Court for Divorce and Matrimonial Causes to make rules and regulations. It seems unlikely that the Court for Divorce and Matrimonial Causes had at this date passed any rule dealing with garnishee proceedings.

Schedule 1 contains Ord. 45, which describes the procedure to be followed in garnishee proceedings. As Mr. CABABÉ points out, it is, in effect, a codification of s. 61 to s. 67 of the Common Law Procedure Act, 1854, and s. 29 to s. 30 of the Common Law Procedure Act, 1860. In addition Ord. 62 provides for " Exceptions from the Rules " as follows: " Nothing in these rules shall affect the practice or procedure in any of the following causes or matters . . ." The last in the list of such causes cites " Proceedings for divorce or other matrimonial causes." This is the same stipulation as that now contained in R.S.C., Ord. 68, to which I referred at the beginning of this judgment when dealing with the terms of r. 82 of the Matrimonial Causes Rules.

What, then, was the position after the Act of 1875 came into force in November of that year? The Act of 1873 had granted the Court for Divorce and Matrimonial Causes jurisdiction to make garnishee orders, its jurisdiction to be exercised either by rule or in the absence of a rule by following " as nearly as may be " the former procedure of the superior courts of common law sitting at Westminster. The Act of 1875 provided a rule in the shape of Ord. 45 which was in fact a codification of the provisions of the Common Law Procedure Acts on which the common law courts had acted. At the same time Ord. 62 provided that it was not to affect the practice or procedure in a proceeding for divorce or other matrimonial cause.

Dependent on whether garnishee process in the Court for Divorce was to be termed such a " proceeding " or " cause " either that court must have used Ord. 45 or the old procedure of the common law courts which it codified. For all practical purposes it comes to the same thing, but this distinction may explain the doubt expressed in the 1st Edn. of RAYDEN [at p. 148] to which I have referred.

The Statute Law Revision Act, 1883, repealed the Common Law Procedure Acts but saved the jurisdiction derived from them, as counsel agree. In 1924 the Matrimonial Causes Rules first contained in r. 97 a rule analogous to the present r. 82. These rules provided as follows: Rule 77 and r. 78 dealt with attachments and committal in terms similar to those now contained in r. 63. Rule 79 read as follows:

> " (a) In default of payment to any person of any sum of money at the time appointed by any order of the court for the payment thereof, a writ of fieri facias, sequestration, or elegit shall be sealed and issued as of course in the registry upon an affidavit of service of the order and of non-payment ",

this covering the field now covered by r. 64. Rule 97 provided:

> " In any matter of practice or procedure which is not governed by statute or dealt with by these rules the Rules of the Supreme Court in respect of like matters shall be deemed to apply."

The question whether these rules affected the position depends in fact on whether the reasoning of SIMONDS, J., in *Re Woolgar* (24) was correct.

In 1925 the Supreme Court of Judicature (Consolidation) Act, 1925, repealed and re-enacted the provisions of the Acts of 1873 and 1875. The relevant sections are as follows. Section 4 divided the business of the High Court into three Divisions, the third consisting of the Probate, Divorce and Admiralty Division

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(24) [1942] 1 All E.R. 583; [1942] Ch. 318.

A (25), and provided by sub-s. (4) (which was added by the Administration of Justice Act, 1928, s. 6):

> "Without prejudice to the provisions of this Act relating to the distribution of business in the High Court, all jurisdiction vested in the High Court under this Act shall belong to all the Divisions alike."

B Section 18 set out the general jurisdiction of the High Court and followed closely the provisions of s. 16 of the Act of 1873. Section 18 (1) provides that the High Court shall be a superior court of record and then in sub-s. (2) vests in the High Court the jurisdiction which formerly vested in or was capable of being exercised by all or any of the following courts, and then follows a list including the High Court of Chancery and the Superior Courts of Common Law but excluding the Court for Divorce and Matrimonial Causes. Subsection (2) C provides further jurisdiction, then by sub-s. (3):

> "The jurisdiction vested in the High Court shall, subject as otherwise provided in this Act, include the jurisdiction which was formerly vested in, or capable of being exercised by, all or any one or more of the judges of the courts aforesaid respectively sitting in court or chambers or elsewhere, when acting as judges or a judge, in pursuance of any statute, law or custom, D and all powers given to any such court or to any such judges or judge by any statute, and also all ministerial powers, duties and authorities incident to any and every part of the jurisdictions so vested."

Finally s. 21 reads:

> "The High Court shall have such jurisdiction—(a) in relation to matrimonial causes and matters, as was immediately before the commencement E of the Matrimonial Causes Act, 1857, vested in or exercisable by any ecclesiastical court or person in England in respect of divorce a mensa et thoro, nullity of marriage, jactitation of marriage, or restitution of conjugal rights, and in respect of any matrimonial cause or matter except marriage licences; and (b) with respect to declarations of legitimacy and of validity of marriage, as is hereinafter in this Act provided; and all such F jurisdiction in relation to matrimonial causes and matters as, under or by virtue of any enactment which came into force after the commencement of the Act of 1873 and is not repealed by this Act, was immediately before the commencement of this Act vested in or capable of being exercised by the High Court constituted by the Act of 1873."

G The effect of these sections is, I think, to preserve and confer on the Divorce Division the jurisdiction granted to the Court for Divorce and Matrimonial Causes by the Acts of 1873 and 1875 including the power to make garnishee orders. In 1937 when the Matrimonial Causes Rules were revised r. 81 was issued in the form of the present r. 82 save only that the word "enactment" was then represented by the word "statute".

H This was, then, the state of the rules and statutes at the time when *Re Woolgar* (26) was decided. If it is right that the Divorce Division enjoyed by virtue of statute the power to make garnishee orders, as it was indubitably the practice of the Division to do, it was, of course, inaccurate to state that "the only way" in which an order of the Divorce Court could be enforced was by way of writ of fieri facias or sequestration in accordance with r. 62 of the Matri- I monial Causes Rules. It is to be observed, however, that the learned judge was not referred to the Judicature Acts or to the question whether the court had power to make a garnishee order. He was solely concerned with the effect of the Matrimonial Causes Rules and particularly with the question whether the new r. 81 enabled the Division to apply R.S.C., Ord. 42, r. 24, despite the wording of r. 62.

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(25) 5 HALSBURY'S STATUTES (2nd Edn.) 342.
(26) [1942] 1 All E.R. 583; [1942] Ch. 318.

A Unfortunately, I have to consider the effect of the rules in order to determine whether the Division in making a garnishee order applies R.S.C., Ord. 45, or whether its practice is still based on that of the superior courts of common law prior to 1873 as codified in that order. The question is a somewhat barren one since the distinction appears to involve little practical difference. Nobody can say that r. 82 is exactly pellucid, a criticism which comforts me in differing B from the reasons which commended themselves to SIMONDS, J. Rule 82 of the Matrimonial Causes Rules, 1957, reads (27):

> "Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply."

C R.S.C., Ord. 68, r. 1, it will be remembered, excludes application of the Rules of the Supreme Court in the case of "Proceedings for divorce or other matrimonial causes".

What does r. 82 mean? I think that the rule is governed by the phrase "Subject to the provisions of these rules and of any enactment" in the sense that unless either the rules themselves or some enactment provide otherwise the Rules of D the Supreme Court are to apply to any cause or matter to which the rules themselves apply. It does not seem to me that this rule attempts to deal with the jurisdiction of the court in any cause or matter to which the rules themselves do not apply. It follows that if the jurisdiction of the court to make a garnishee order is not a cause (28) or matter to which the Matrimonial Causes Rules apply it is not easy to find any rule to govern its process unless it can be said that it is E not a proceeding for divorce or other matrimonial cause. If it is not such a proceeding it would appear that R.S.C., Ord. 45, could be applied. If it is such a proceeding but it is not a cause or matter to which the Matrimonial Causes Rules apply there would seem to be no machinery stipulated for the process of the court.

In attempting to resolve these subtleties it is important to determine what is F a cause or matter "to which these rules apply" and what is the meaning of the phrase in R.S.C., Ord. 68, "proceedings for divorce or other matrimonial causes". Procedure by way of garnishee is clearly procedure to enforce an order of the court. If that order is an order requiring the payment of maintenance pursuant to some proceeding for divorce or other matrimonial cause, the order is, in my opinion, part of such proceeding or cause. The procedure for G its enforcement must surely be ancillary to and partake of the nature of the order. Thus GORELL BARNES, J., is reported (29) to have referred to the decision of SIR JAMES HANNEN, P. (30), as an instance of garnishee proceedings in a matrimonial suit. I am, therefore, of opinion, despite the concession offered by counsel for the husband, that these proceedings are covered by the provisions of R.S.C., Ord. 68. It was to nullify the effect of that order in relation to "Proceedings H for divorce or other matrimonial causes" and to enable the Divorce Division to supplement its own procedure in relation to such matters that the present r. 82 was first issued as r. 81 in 1937.

The Matrimonial Causes Rules provide for the making of orders of maintenance and alimony so that in my opinion garnishee process being ancillary to such orders must be "a matter" to which the rules apply. If this argument I be right I should have thought that at any rate since 1937 the Divorce Division in making garnishee orders was applying the provisions of R.S.C., Ord. 45. It is true that r. 64 of the Matrimonial Causes Rules (31) is entitled "Enforcement of orders " but nothing in its wording shows that the methods which it provides are to be the exclusive methods of enforcing an order. If Parliament has provided another method I do not think that r. 82 prevents the application of the Rules of the Supreme Court. I derive some assistance on this point from the decision of DAVIES, J., in *Worboys* v. *Worboys* (32) applying the Rules of the Supreme Court in regard to substituted service despite the provisions of the Matrimonial Causes Rules with regard to other forms of service.

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(27) 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 262.

(28) For definition of "matrimonial cause" see the Supreme Court of Judicature (Consolidation) Act, 1925, s. 225; 5 HALSBURY'S STATUTES (2nd Edn.) 398.

(29) In *Edmunds* v. *Edmunds*, [1904] P. at p. 370.

(30) In *Whittaker* v. *Whittaker*, (1881), 7 P.D. 15.

(31) 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 250.

In conclusion, I have no doubt that this Division is entitled to make garnishee orders and, in my opinion, the practice to be followed is that set forth in R.S.C., Ord. 45. That is in fact the practice which has been applied for the better part of eighty years as is shown by the earlier text-books to which I have referred. If I am wrong and this practice cannot be directly applied, it follows that this Division is still following the practice of the superior courts of common law sitting at Westminster which practice is incorporated in that order and is, accordingly, that to be followed. In short, this court in the exercise of its jurisdiction conferred by statute follows the terms of R.S.C., Ord. 45.

I turn to the second point raised by counsel for the husband, that the affidavit in support of the summons was not served on his client. I think that the short answer is that R.S.C., Ord. 45, does not require service of the affidavit on the judgment debtor. As to the third point —that since the debtor has already been committed for at any rate part of the amount involved the judgment creditor will not be permitted to enforce the debt by garnishee—I think that this point is disposed of by the decision in *Jinks* v. *Jinks* (33) and by the provisions of the Debtors Act, 1869, s. 5. Accordingly, I will make this order absolute.

Order accordingly.

Solicitors: *Wright & Bull* (for the wife, the judgment creditor); *Michael Fox & Co.* (for the husband, the judgment debtor).

[*Reported* by A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

COLLCO DEALINGS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Guest), February 8, 9, March 2, 1961.]

Income Tax—Exemption—Removal of exemption—A person entitled under any enactment to an exemption—Application to resident in the Republic of Ireland —Dividend stripping—Finance (No. 2) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 17), *s.* 4 (2).

Statute—Operation—Effect to be given to plain words notwithstanding international treaty.

The appellant company was registered and resident in the Republic of Ireland and not resident in the United Kingdom. It bought the whole of the ordinary issued share capital in two English companies and in 1957 received two dividends thereon. These dividends were wholly paid out of profits made by the companies before their shares were so acquired, and they were paid less United Kingdom income tax. The appellant company sought to recover the tax under the Income Tax Act, 1952, s. 349 and Sch. 18, Part 1, setting out the agreement for the avoidance of double taxation in the case of the Republic of Ireland. The Crown claimed that the exemption did not apply by virtue of s. 4 (2)* of the Finance (No. 2) Act, 1955, which removed the exemption in cases of " dividend stripping ".

Held: the appellant company was " a person entitled under any enactment to an exemption from income tax " within the meaning of s. 4 (2) of the Act of 1955 since those words unambiguously referred to any United Kingdom Act of Parliament including s. 349 of the Act of 1952, under which (and not under the agreement to avoid double taxation) the relevant exemption arose; effect must be given to those words, notwithstanding that by so doing the operation of the double taxation agreement with Eire was qualified, and, accordingly, s. 4 (2) removed the exemption contemplated by the double taxation agreement and the appellant company was not entitled to recover the tax deducted.

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(32) [1953] 1 All E.R. 857; [1953] P. 192. (33) [1936] 3 All E.R. 1051.

* Section 4 (2) is printed at p. 764, letter F, post.

Decision of the COURT OF APPEAL ([1960] 2 All E.R. 44) affirmed.

[As to legislation concerning dividend stripping, see 20 HALSBURY'S LAWS (3rd Edn.) 201, para. 356; and as to the removal of tax exemption in cases of dividend stripping, see ibid., p. 602, para. 1177.

As to relief against double taxation with the Republic of Ireland, see 20 HALSBURY'S LAWS (3rd Edn.) 461, paras. 866, et seq.

As to the duty to follow the plain meaning of statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 498, para. 636.

For the Finance (No. 2) Act, 1955, s. 4 (2), see 35 HALSBURY'S STATUTES (2nd Edn.) 294.]

Appeal.

Appeal by the taxpayer company, Collco Dealings, Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., PEARCE and HARMAN, L.JJ.), dated Mar. 10, 1960, and reported sub nom. *Inland Revenue Comrs.* v. *Collco Dealings, Ltd., Same* v. *Lucbor Dealings, Ltd.*, [1960] 2 All E.R. 44, affirming an order of VAISEY, J., dated July 24, 1959, and reported [1959] 3 All E.R. 351, allowing the Crown's appeal by way of Case Stated against a decision of the Special Commissioners of Income Tax. The facts are set out in the opinion of VISCOUNT SIMONDS.

Sir Andrew Clark, Q.C., J. G. Foster, Q.C., and *R. Buchanan-Dunlop* for the appellant company.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *E. Blanshard Stamp* and *A. S. Orr* for the Crown.

Their Lordships took time for consideration.

Mar. 2. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this is, in my opinion, a very clear case and I am so well satisfied with the judgments of VAISEY, J., and of the Master of the Rolls (LORD EVERSHED) and his colleagues in the Court of Appeal that I propose to deal with it at no great length.

The appellant company was incorporated in the Republic of Ireland on May 29, 1957, and has at all material times been resident there and not in the United Kingdom. On Oct. 31, 1957, it acquired one thousand ordinary shares of £1 each in a company called Carpets and Textiles (Wholesale), Ltd. which on the next day declared an interim dividend of £174 10s. per share subject to deduction of income tax. It accordingly received a sum of £100,337 10s., £174,500 less income tax £74,162 10s. The dividend was wholly paid out of profits accumulated before the shares were acquired by the appellant company. On the same Oct. 31, it acquired two thousand ordinary shares of £1 each in a company called Afco Agencies, Ltd., which company in its turn on the next day declared an interim dividend of £52 per share subject to deduction of tax. The appellant company accordingly received a net dividend of £59,800, £104,000 less income tax £44,200. This dividend also was wholly paid out of profits accumulated before the shares were acquired by the appellant company. These transactions, which might seem strange to those unversed in the devious ways of tax avoidance, had their natural sequel in a claim for repayment of the tax that had been deducted. It was this claim and its rejection that led to these proceedings. On what, then, was the claim based and on what its rejection?

By a series of agreements made by the British government first with the Government of the Irish Free State and afterwards with the Government of the Republic of Ireland, provision was made (inter alia) for the reciprocal exemption from income tax and supertax, later, surtax, of persons resident in Great Britain (including Northern Ireland) or in the Irish Free State (or Republic of Ireland) but not resident in both countries. Each of such agreements, of which the first was dated Apr. 14, 1926, and the last that is material for our present purpose was dated July 21, 1947, provided that it should be subject to confirmation by legislation both by the United Kingdom Parliament and by the Irish legislature, and should have effect only if and so long as that legislation was in force. Each agreement was duly confirmed by appropriate legislation in both countries. It is necessary only to refer to s. 349 of the Income Tax Act, 1952, which confirmed and gave statutory force to them, thereby giving to persons residing only in the Republic of Ireland the statutory right to exemption from United Kingdom income tax and surtax. The Act further provided, by para. 4 of Sch. 18, that any claim for exemption from tax on the ground that the claimant was resident in the Republic of Ireland and was not resident in the United Kingdom should be made to the Commissioners of Inland Revenue in such form as they might prescribe, and the commissioners should, on proof of the facts to their satisfaction, allow the claim accordingly.

On the basis of this Act, the appellant company claimed the return of the several sums of tax which had been deducted from the dividends that I have mentioned. I do not doubt that the claims must have been allowed but for the Act to which I now refer. In the meantime, however, the United Kingdom government had become aware of the practice compendiously, if not felicitously, called "dividend stripping", of which the transactions that I have already mentioned were conspicuous examples. Not only residents in Ireland but certain other corporations or bodies, to which exemption from tax had been conceded, were using the concession in a manner that could not have been contemplated when it was made. Accordingly, by the Finance (No. 2) Act, 1955, it was provided by s. 4 (2):

> "Where a person entitled under any enactment to an exemption from income tax which extends to dividends on shares becomes entitled to receive a dividend on a holding of shares of any class to which this section applies, being shares sold or issued to him or otherwise acquired by him after the said Oct. 26 and not more than six years before the date of which the dividend becomes payable, and the dividend is to any extent paid out of profits accumulated before the date on which the shares were so acquired, then, if those shares, or those shares together with [other shares therein specified] amount to ten per cent. or more of the issued shares of that class, the exemption shall, to an extent proportionate to the said extent to which the dividend is paid out of profits accumulated before the date on which the shares were acquired, not apply to the dividend:"

The shares, in respect of which the dividends in question were received by the appellant company, were "shares of a class to which the section applies".

Here, then, was the answer to the claim for return of tax and the Commissioners of Inland Revenue rejected it accordingly. The appellant company appealed from the rejection to the Commissioners for the Special Purposes of the Income Tax who allowed the appeal. But when the matter was brought before the High Court on Case Stated, their determination was reversed by Vaisey, J., whose decision was unanimously upheld by the Court of Appeal. Your Lordships are now asked to restore the determination of the Special Commissioners and declare that the appellant company are entitled to exemption from tax in respect of the dividends in question.

My Lords, the argument in favour of the appeal was not lacking in vigour or ingenuity, but, in my opinion, it was not well founded. The words of the relevant subsection are very clear. The single question is whether the appellant company is "a person entitled under any enactment to an exemption from income tax . . ." At least it claims to be so entitled in the present case; that is the foundation of these proceedings. But it is said in the first place that it is not entitled under an enactment but under an agreement (which the appellant company, to add weight to the argument, prefers to call a treaty). This contention cannot be accepted. The appellant company has no rights under any agreement. Its rights arise under the Act of Parliament which confirms the agreement and gives it the force of law. It was said that its rights then arose not "under" the enactment but "by virtue of it". This distinction appears to me too tenuous to form the basis of a serious argument; but, if I had to make a choice, I should say that the rights arose "under" rather than "by virtue of". Then it was said that the words of the subsection are wide and general. The maxim generalia specialibus non derogant was invoked. But this contention fell by the way when it was pointed out that every case in which exemption had been granted was a special case, and that this contention would lead to the subsection having no application at all.

It had been urged that the general words of the subsection should be so construed as not to have the effect of imposing or appearing to impose the will of Parliament on persons not within its jurisdiction. This argument, which had influenced the Special Commissioners, was not advanced before this House. A somewhat similar argument was, however, pressed on your Lordships and was, perhaps, more strongly than any other relied on by the appellant company. It was to the effect that to apply s. 4 (2) to the appellant company would create a breach of the 1926 and following agreements, and would be inconsistent with the comity of nations and the established rules of international law; the subsection must, accordingly, be so construed as to avoid this result. My Lords, the language that I have used is taken from a passage at p. 148 of MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.), which ends with the sentence (p. 149): "But if the statute is unambiguous, its provisions must be followed, even if they are contrary to international law". It would not, I think, be possible to state in clearer language and with less ambiguity the determination of the legislature to put an end in all and every case to a practice which was a gross misuse of a concession. What, after all, is involved? It is nothing else than that, when Parliament said "under any enactment", it meant "any enactment except . . ." But it was not found easy to state precisely the terms of the exception. The best that I could get was "except an enactment which is part of a reciprocal arrangement with a soverign foreign state". It is said that the plain words of the statute are to be disregarded, and these words arbitrarily inserted in order to observe the comity of nations and the established rules of international law. I am not sure on which of these high-sounding phrases the appellant company chiefly relies. But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear. I am well aware that there are cases—many were cited to your Lordships—in which the principle stated in MAXWELL has been applied, though less often, I think, on an appeal to comity of nations than to rules of international law. But each case must be judged in its own context, and I know of no case in which at the same time the words of a statute were unambiguously clear and it was sought to vary them on grounds which could not be justified by broad considerations of justice or expediency nor could be supposed to commend themselves to that sovereign power whose citizens relied on them.

For these reasons and for the reasons given in the courts below, with which, as I have said, I agree, I am of opinion that this appeal should be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, the question arising for decision on this appeal is whether the appellant company is or is not " a person entitled under any enactment to an exemption from income tax ", within the meaning of s. 4 (2) of the Finance (No. 2) Act, 1955. There is no doubt that, at the time when this subsection came into force, the appellant company was " entitled . . . to an exemption from income tax ", and, if it was so entitled " under any enactment ", the subsection applies to the appellant company and deprives it of exemption from tax in respect of certain very large dividends declared by two English companies and paid to the appellant company.

Counsel for the appellant company submitted first that it was entitled to exemption under an agreement made on Apr. 14, 1926, between the British government and the Government of the Irish Free State, as amended by subsequent agreements, and not under any enactment. The effect of these agreements, stated shortly, was that a person who could prove that for any year he was resident in the Republic of Ireland and was not also resident in Great Britain or Northern Ireland was to be " entitled to exemption " from British income tax for that year in respect of all property situate and all profits or gains arising in Great Britain or Northern Ireland. Similar relief from Irish income tax was given to persons resident only in the United Kingdom in respect of Irish income tax. The appellant company was able to prove that it was resident only in the Republic of Ireland, but it is clear, to my mind, that it did not become " entitled " to any exemption from British income tax under these agreements. Nothing but a British statute could confer any such exemption, and this was recognised by cl. 8 of the agreement of 1926, which was repeated in the subsequent agreements and was as follows:

> " This agreement shall be subject to confirmation by the British Parliament and by the Oireachtas of the Irish Free State and shall have effect only if and so long as legislation confirming the agreement is in force both in Great Britain and Northern Ireland and in the Irish Free State."

The 1926 agreement and the subsequent agreements which modified it were all confirmed by statutes of each country, and the British confirming statute which was operative when s. 4 (2) of the Finance (No. 2) Act, 1955, came into force was the Income Tax Act, 1952, the relevant section being s. 349. If the words " entitled under any enactment " are to be given their ordinary meaning, it is clear that, in 1955, the appellant company was entitled to an exemption from income tax " under " the statute of 1952 and not under any of the agreements already mentioned.

Counsel for the appellant company, however, submitted that s. 4 (2) of the Act of 1955 should be given a narrow construction, because otherwise it would infringe the comity of nations by unilaterally depriving Irish residents of the benefits conferred on them by the agreements and confirmed by statute. They invited your Lordships to hold either (a) that the words " person entitled " in the subsection mean a person who is entitled solely and exclusively under an enactment, and do not extend to include a person who is entitled under an agreement with a foreign state by virtue of its incorporation in the municipal law of England by an English statute, or (b) that the words " any enactment " mean " any enactment standing alone and not being part of a reciprocal arrangement with a foreign state ". In support of the second construction, they pointed out that words such as " any " or " all " or " every " have been given a narrow meaning in many cases, some of which were cited to your Lordships. My Lords, I am unable to give either of the suggested meanings to the very plain words of s. 4 (2) of the Act of 1955. I accept the statement in MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.), at p. 149—" If the statute is unambiguous, its provisions must be followed ". I can see no ambiguity in

s. 4 (2), and I do not think that its provisions give rise to any breach of international comity. Both parties to the agreements recognised that they might at any moment be brought to an end by the legislature of either country revoking the statutory confirmation thereof: see cl. 8 of the agreement of 1926, already quoted. Moreover, in the cases where wide words have been given a narrower meaning, there has always been some reason to think that the legislature could not have intended the wide words to have their full effect. I find no such reason in the present case, and I agree with the observations of VAISEY, J., that (1)

> "The plain object of s. 4 (2) of the Act of 1955 was to prevent what is colloquially called 'dividend stripping', and, if the decision of the Special Commissioners stands, residents in Ireland can do what their fellow-taxpayers in this country are prohibited from doing. If that is the law, so be it, but the consequence is not one which commends itself to me on general principles of justice and fairness."

I would dismiss the appeal.

LORD REID: My Lords, I agree with my noble and learned friends that this appeal should be dismissed, but I should prefer to rely on rather different reasons. I am not satisfied that it would be wrong in any circumstances to attach a limited meaning to the words of s. 4 (2) of the Finance (No. 2) Act, 1955. In some of the authorities cited to your Lordships, words to my mind equally unambiguous have been so limited, and, if the result of holding that these words cannot be given a limited meaning were that Parliament must be held to have created a jurisdiction wider than anything consistent with the broad principles of international law, I would at least hesitate, but there is no question of that kind in this case. The most that can be said is that, unless a limitation is implied, the subsection enacts something inconsistent with the provisions of a treaty, and even that is hardly accurate. It appears to me that there is by no means so strong a presumption against Parliament having done that.

Although the infringement of a treaty may cause loss to individuals, the only person properly entitled to complain of such infringement is the other party to the treaty. No doubt, if that other party is aggrieved, the infringement is a breach of the comity of nations and there is a presumption that Parliament did not intend to act contrary to the comity of nations. But I do not think that there is necessarily a presumption that every infringement of a treaty is a breach of the comity of nations. After a treaty has been made, circumstances may alter, and it may be reasonable to take unilateral action in the expectation that the other party to the treaty will not object. Indeed, the other party may have been consulted and have raised no objection. We do not know what happened in this case. But we do know that, on a previous occasion, unilateral action was taken by s. 52 of the Finance (No. 2) Act, 1945, and this was followed by an alteration of the treaty in 1947 which altered the scope of the original tax exemption to correspond with the provisions of the Act of 1945.

There is another reason against inferring any limitation of the scope of s. 4 (2). We were furnished with a list of statutory exemptions from income tax, and it appears that there were three main methods by which tax could be avoided in the way which s. 4 (2) is designed to prevent. It could be done with the co-operation of charities, of the trustees of certain superannuation funds or of Irish residents. Clearly, it would have been of little value to prevent two of these methods and leave the third untouched, and I cannot attribute to Parliament an intention to limit the scope of s. 4 (2) so as to produce that result. Accordingly, it appears to me that there is no substance in the appellant company's case.

LORD RADCLIFFE: My Lords, I agree that this appeal ought to be dismissed for the reasons which have been given by my noble and learned friend on the Woolsack.

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(1) [1959] 3 All E.R. at p. 355.

The only one of the appellant company's contentions that appeared to me to have any plausibility was that which sought to restrict the apparent range of s. 4 (2) of the Finance (No. 2) Act, 1955, by the argument that, if applied to persons enjoying exemption as being resident in the Republic of Ireland but not also in the United Kingdom, it would contradict the provisions of the inter-governmental agreements about double taxation between the two countries. It is, no doubt, true that statutory words apparently unlimited in scope may be given a restricted field of application if there is admissible ground for importing such a restriction; and the consideration that, if not construed in some limited sense, they would amount to a breach of international law is well recognised as such a ground. But a supposed intention not to depart from observance of the comity of nations is a much vaguer criterion by which to determine the range of a statute; and when the departure consists in no more than a provision inconsistent with an inter-governmental agreement about taxation which by its own terms is subordinated to the approval of the respective legislatures of the countries concerned and persists only so long as its terms are maintained in force as law by those legislatures, I think that there is no useful aid at all to be obtained from this principle of interpretation. The principle depends wholly on the supposition of a particular intention in the legislature, and I do not think that in the case before us there is any reason to make the supposition which is suggested.

LORD GUEST: My Lords, in order to succeed in this appeal the appellant company have to show that they do not come within the terms of s. 4 (2) of the Finance (No. 2) Act, 1955, as " a person entitled under any enactment to an exemption from income tax ". The claim made by the appellant company for exemption from income tax was made in accordance with para. 4 (1) of Part 3 of Sch. 18 to the Income Tax Act, 1952. Their claim for exemption is founded on s. 349 of the Income Tax Act, 1952. Under sub-s. (1) of that section, the agreements between the United Kingdom and the Republic of Ireland in regard to relief from double taxation are confirmed, but it is only by virtue of sub-s. (2) that the agreements have the effect of exempting persons entitled under the agreements from liability to United Kingdom income tax. The only limitation on the right to exemption is that the law of the Republic of Ireland must grant relief during the relevant year of assessment. The appellant company's argument that the exemption is not " under " s. 349, but is " in virtue " of that section to my mind discloses a distinction without a difference. As the income tax is imposed by a United Kingdom enactment, relief from its imposition could only be granted by a similar enactment. The appellant company cannot approbate and reprobate the Income Tax Acts. In order to claim exemption from United Kingdom income tax, they must appeal to a United Kingdom enactment, namely, s. 349 of the Income Tax Act, 1952. At the same time they are repudiating s. 4 (2) of the Act of 1955, which refers to the same class of persons who benefited under the Act of 1952. In my opinion, it is impossible to put the limitation sought by the appellant company on s. 4 (2). It refers to a limited class of persons readily identifiable and the appellant company come within that class. Assuming that s. 4 (2) involves a breach of a treaty with the Republic of Ireland, as to which I have some doubt, it must be given effect to, notwithstanding its effect on international agreements, if its language admits of no doubt (Maxwell on Interpretation of Statutes (10th Edn.), p. 154). The language of s. 4 (2) is unambiguous and applies, in my view, to the appellant company.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *R. M. Bull & Co.* (for the appellant company); *Solicitor of Inland Revenue.*

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

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DIMBULA VALLEY (CEYLON) TEA CO., LTD. *v.* LAURIE.

[CHANCERY DIVISION (Buckley, J.), January 19, February 2, 1961.]

Company—Shares—Preference shares—Right to participate in surplus assets—Undistributed profits not required for payment of dividend on preference B *shares—Capitalisation of reserve fund resulting from revaluation of fixed assets.*

Company—Capitalisation—Reserve fund resulting from revaluation of fixed assets—Distributable as dividend under articles of association—Whether capitalisation for exclusive benefit of ordinary shareholders encroached on rights of preference shareholders.

C The share capital of a company incorporated in 1896 was divided into ordinary shares and preference shares. Its memorandum of association provided that the preference shares should carry such rights as were defined " in the articles of association registered herewith ". Article 5 of the original articles of association provided: " The ten thousand preference shares in the original capital shall confer on the holders the following rights: (a) The D right to receive out of the profits of the company a cumulative preferential dividend at the rate of six per cent. per annum on the amount for the time being paid up thereon, such dividend to commence as from Mar. 31, 1896. (b) The right in the event of the company being wound-up to be paid out of the surplus assets of the company, the amount paid up in respect of such preference shares and all arrears (if any) of dividend thereon up to the date E of the commencement of the winding-up in priority to the other shareholders, and to participate in any further surplus assets of the company after payment of the amount paid up in respect of the other shares rateably with the other shareholders in proportion to the amount paid up on the said preference shares and the other shares respectively." Article 85 of the original articles provided: " Subject to the rights of members entitled to F shares issued upon special conditions, the profits of the company, after setting aside such sum to a reserve as the directors may decide, shall be divisible among the members in proportion to the amount paid up on the shares held by them respectively . . ." Article 90 thereof empowered the directors to place profits to reserves. The original articles contained no capitalisation provision and no article in terms authorising the declaration of dividends, G but the declaration of dividends was included among the business to be transacted at ordinary general meetings of the company. In 1946 the company adopted new articles, which included a capitalisation article*. Certain questions arose concerning participation by preference shareholders in surplus assets on winding-up, and whether under the new capitalisation article the company had power to allot shares credited as fully paid up to H ordinary shareholders by way of capitalisation of reserves resulting from revaluation of capital assets.

Held: (i) in a winding-up the preference shareholders would, pursuant to art. 5 (b), be entitled to participate rateably with the ordinary shareholders in the assets of the company remaining after payment of the debts and liabilities of the company, after payment of any arrears of preference I dividend up to the date of the beginning of the winding-up, after returning to the members the amounts paid up or credited as paid up on all the shares of the company and after providing for costs (see p. 778, letters A and H, post).

Scottish Insurance Corpn., Ltd. v. *Wilsons & Clyde Coal Co., Ltd.* ([1949] 1 All E.R. 1068) and *Re Bridgewater Navigation Co.* ([1891] 2 Ch. 317) considered.

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* The relevant part of the new capitalisation article is set out at p. 773, letter B, post.

(ii) a reserve fund resulting from revaluation of unrealised fixed assets, made in good faith by competent valuers and unlikely to be liable to short-term fluctuations might legally be capitalised, or might be distributed legally as dividend where the regulations of the company so permitted; accordingly the new capitalisation article authorised capitalisation of the capital surplus resulting from the revaluation and, as this surplus could legitimately have been distributed as dividend (viz., exclusively among the ordinary shareholders), a capitalisation exclusively for their benefit did not encroach on rights of the preference shareholders and would be valid (see p. 780, letter F, and p. 781, letter C, post).

Inland Revenue Comrs. v. *Thornton, Kelley & Co., Ltd.* ([1957] 1 All E.R. 650) applied.

Westburn Sugar Refineries, Ltd. v. *Inland Revenue Comrs.* ([1960] Taxation Reports 105) not followed.

[As to distribution of surplus after refunding paid-up capital in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 680, para. 1350; and for cases on the subject, see 10 DIGEST (Repl.) 1065-1075, *7387-7434*.

As to the source from which dividends may be paid, see 6 HALSBURY'S LAWS (3rd Edn.) 397-400, paras. 768 to 774; and for cases on the subject, see 9 DIGEST (Repl.) 627 et seq., *4191* et seq.

For the Companies Act, 1948, s. 56 (1), (2), s. 58 (1), (5), see 3 HALSBURY'S STATUTES (2nd Edn.) 508, 510.]

Cases referred to:

Birch v. *Cropper, Re Bridgewater Navigation Co., Ltd.*, (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 10 Digest (Repl.) 1065, *7391*.

Bolton v. *Natal Land & Colonization Co.*, [1892] 2 Ch. 124; 61 L.J.Ch. 281; 65 L.T. 786; 9 Digest (Repl.) 180, *1162*.

Bridgewater Navigation Co., Re, [1891] 1 Ch. 155; *varied*, C.A., [1891] 2 Ch. 317; 60 L.J.Ch. 415; 64 L.T. 576; 10 Digest (Repl.) 1067, *7403*.

Duff's Settlements Trusts, Re, National Provincial Bank, Ltd. v. *Gregson*, [1951] 2 All E.R. 534; [1951] Ch. 923; 9 Digest (Repl.) 302, *1904*.

Hill (*R. A.*) v. *Permanent Trustee Co. of New South Wales, Ltd.*, [1930] All E.R. Rep. 87; [1930] A.C. 720; 144 L.T. 65; sub nom. *Re Hill* (*Richard*), *Hill* v. *Permanent Trustee Co. of New South Wales*, 99 L.J.P.C. 191; 9 Digest (Repl.) 628, *4193*.

Inland Revenue Comrs. v. *Thornton, Kelley & Co., Ltd.*, [1957] 1 All E.R. 650; 37 Tax Cas. 98; [1957] 1 W.L.R. 482; 28 Digest (Repl.) 368, *1613*.

Scottish Insurance Corpn., Ltd. v. *Wilsons & Clyde Coal Co., Ltd.*, [1949] 1 All E.R. 1068; [1949] A.C. 462; 1949 S.C. (H.L.) 90; [1949] L.J.R. 1190; 2nd Digest Supp.

Westburn Sugar Refineries, Ltd. v. *Inland Revenue Comrs.*, (1960), 41 S.L.T. 297; [1960] Taxation Reports 105.

Westburn Sugar Refineries, Ltd., Ex p., [1951] 1 All E.R. 881; [1951] A.C. 625; 1951 S.C. (H.L.) 57; 9 Digest (Repl.) 159, *935*.

Adjourned Summons.

This was an application by originating summons dated Oct. 5, 1960, by the plaintiff Dimbula Valley (Ceylon) Tea Co., Ltd., to determine: (i) Whether on the true construction of the memorandum and articles of association of the company and in the events which had happened the allotment to the holders of the ordinary shares in the company in the year 1920 of a further 42,044 ordinary shares was in accordance with the rights of the members. (ii) If the answer to (i) were in the negative whether such allotment should now by reason of lapse of time or otherwise be regarded as having been valid. (iii) Whether the further surplus assets of the company in which the preference shares participated in a winding-up rateably with the other shareholders of the company meant (a) the assets of the company available after payment of the debts and liabilities of the

A company and the return to the members of the amounts paid up, or credited as paid up, on all shares in the company and the payment to the preference shareholders of any arrears of their dividend up to the date of the commencement of the winding-up or (b) some other, and if so what, assets. (iv) Whether the company had power pursuant to art. 140 of its present articles of association or otherwise to allot to the ordinary shareholders credited as fully paid up shares B or securities by way of capitalisation of (a) credit balance on profit and loss account and other revenue reserves (b) reserves resulting from the realisation of capital profits or (c) reserves resulting from the revaluation of capital assets or (d) share premium account. (v) Whether on a poll (a) every member holding ordinary shares had one vote for every five ordinary shares held by him and every member holding preference shares had one vote for every preference C share held by him or (b) the members were on a poll entitled to some other, and if so, what voting rights. The originating summons also asked that the defendant John William Laurie, the holder of preference shares in the plaintiff company, might be authorised to defend the summons on behalf of all the holders of preference shares in the company, and the defendant John Anthony Downes, the holder of ordinary shares, might be authorised to defend the summons on D behalf of all the holders of ordinary shares in the company. The facts appear in the judgment.

J. G. Monroe for the plaintiff.

P. J. Sykes for the first defendant, a representative preference shareholder.

T. D. D. Divine for the second defendant, a representative ordinary shareholder.

E *Cur. adv. vult.*

Feb. 2. **BUCKLEY, J.,** read the following judgment: In this case I have to determine certain questions arising on the interpretation of the memorandum and articles of association of Dimbula Valley (Ceylon) Tea Co., Ltd., a company incorporated in the year 1896 under the Companies Acts, 1862 to 1890. The F original authorised capital of the company was £200,000 divided into ten thousand preference shares, twenty thousand ordinary shares and ten thousand unclassified shares, all of £5 each. The memorandum of association provided that the preference shares should carry such rights as were defined " in the articles of association registered herewith ". Article 5 of those articles was in the following terms:

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> " The ten thousand preference shares in the original capital shall confer on the holders the following rights:—(a) The right to receive out of the profits of the company a cumulative preferential dividend at the rate of six per cent. per annum on the amount for the time being paid up thereon, such dividend to commence as from Mar. 31, 1896. (b) The right in the event of the company being wound-up to be paid out of the surplus assets H of the company, the amount paid up in respect of such preference shares and all arrears (if any) of dividend thereon up to the date of the commencement of the winding-up in priority to the other shareholders, and to participate in any further surplus assets of the company after payment of the amount paid up in respect of the other shares rateably with the other shareholders in proportion to the amount paid up on the said preference shares and the I other shares respectively."

The memorandum provided that the unclassified shares might be issued as ordinary, preference or deferred shares, or partly in one such manner and partly in another, and the articles authorised the issue of any of these shares or any new shares created on an increase of capital as preference shares ranking pari passu with the original preference shares, but so that the number of preference shares at any time issued should not exceed one-third of the issued share capital of the company.

Voting was regulated by art. 54 as follows:

> "Every member shall have one vote for every ten shares held by him. A member shall not be entitled to vote in respect of a less number of shares than ten, or an excess of shares less than ten over ten, or any multiple of ten."

Under the heading "Dividends and Reserve" the following articles were included:

> "85. Subject to the rights of members entitled to shares issued upon special conditions, the profits of the company, after setting aside such sum to a reserve as the directors may decide, shall be divisible among the members in proportion to the amount paid up on the shares held by them respectively. Provided, nevertheless, that where capital is paid up in advance of calls, upon the footing that the same shall carry interest, such capital shall not, whilst carrying interest, confer a right to participate in profits.
>
> "90. The directors may from time to time set aside such of the profits of the company as they think proper as a reserve to meet contingencies, or for equalising dividends or for repairing, improving, and maintaining any of the property of the company, and for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and may, subject to cl. 5 hereof, invest the several sums so set aside upon such investments as they may think fit, and from time to time may deal with and vary such assets and investments and dispose of all or any part thereof for the benefit of the company, and divide the reserve into such special funds as they think fit, with full power to employ the whole or any of the assets constituting the reserve in the business of the company, and that without being under any obligation to keep the same separate from the other assets."

There was no article, similar to art. 114 of Table A of 1948, in terms authorising the declaration of dividends or providing that no dividend should exceed the amount recommended by the directors, but the declaration of dividends was included amongst the business to be transacted at ordinary general meetings of the company and there were references to dividends "declared" on shares in articles dealing with the transfer and transmission of shares. There was an article authorising the payment of interim dividends by the directors. The original articles of association contained no capitalisation clause. They contained a common-form article authorising increases of capital but no provision for the subdivision of shares. They contained a variation of rights clause but no use was made of this in respect of any of the matters with which I am concerned. In May, 1910, the company by special resolution adopted an article authorising the subdivision of shares, and thereupon subdivided the ordinary shares of £5 each, which were then 22,933 in number, into 114,665 ordinary shares of £1 each, and further resolved that any further shares to be thereafter issued as ordinary shares should be divided into and issued as £1 shares. The result of this was to multiply the votes of the ordinary shareholders greatly. In March, 1911, however, this position was rectified or altered by another special resolution substituting for art. 54 a new article which gave ordinary shareholders one vote for every five ordinary shares held, and to preference shareholders one vote for every preference share held. In March, 1920, the company by special resolution adopted a new article authorising capitalisation of undivided profits, which I need not read.

On Apr. 14, 1920, the company increased its share capital to £250,000 by the creation of fifty thousand ordinary shares of £1 each. On the same day the company capitalised a sum of £42,044 in the form of ordinary shares distributed amongst the ordinary shareholders credited as fully paid. The amount so capitalised then stood to the credit of the general reserve of the company and represented accumulated revenue.

I am asked to decide whether the allotment of 42,044 shares which was effected in pursuance of that resolution was in accordance with the rights of the members of the company.

In 1946 the company adopted in place of the original articles of association a new set of articles of association which included a capitalisation article of which I need not read more than the following:

> "140. The company in general meeting may at any time and from time to time on the recommendation of the board pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend and (A) for the time being standing to the credit of any reserve fund or reserve account of the company, including premiums received on the issue of any shares or debentures of the company, or any sum arising from any operation creating an excess of assets on capital account, or (B) being undivided net profits in the hands of the company, be capitalised, and that such sum be appropriated as capital to and amongst the shareholders who would have been entitled thereto if the same had been distributed by way of dividend in the shares and proportions in which they would have been so entitled, and in such manner as the resolution may direct."

The article goes on to provide in the usual way for the sum so appropriated being applied in paying up shares or debentures to be issued to the shareholders in accordance with their rights.

I am further asked to decide the following questions set out in the originating summons:

> "(3) Whether the further surplus assets of the company in which the preference shares participate in a winding-up rateably with the other shareholders of the company mean (a) the assets of the company available after payment of the debts and liabilities of the company and the return to the members of the amounts paid up or credited as paid up on all shares in the company and the payment to the preference shareholders of any arrears of their dividend up to the date of the commencement of the winding-up or (b) some other, and if so what assets.
>
> "(4) Whether the company has power pursuant to art. 140 of its present articles of association or otherwise to allot to the ordinary shareholders credited as fully paid up shares or securities by way of capitalisation of (i) credit balance on profit and loss account and other revenue reserves, (ii) reserves resulting from the realisation of capital profits, (iii) reserves resulting from the revaluation of capital assets, or (iv) share premium account."

The reference to share premium account has been added by amendment, which I have already authorised, to the originating summons.

> "(5) Whether on a poll (a) every member holding ordinary shares has one vote for every five ordinary shares held by him and every member holding preference shares has one vote for every preference share held by him, or (b) the members are on a poll entitled to some other and if so what voting rights."

Questions 3 and 4 are hypothetical questions, in this sense, that there is, so far as I know, no present intention of the company being wound up or capitalising any of its undistributed profits, but they are questions which affect the valuing of the company's shares to some extent and which would have to be clarified before any reorganisation of the company's capital structure was undertaken, and I think that it is desirable that I should answer them.

Counsel who appears for the first defendant, a representative preference shareholder, concedes that, at any rate after so long an interval of time, he could not successfully contend that the capitalisation which was effected in 1920 ought not to be regarded as regular and valid. Indeed, he could suggest no ground on which that capitalisation could be said to have been irregular, and I shall accordingly declare that it was in accordance with the rights of the members.

As regards the powers of the company to capitalise reserves and undistributed profits in the future, however, he has contended that the company has no power to capitalise any reserve resulting from the revaluation of capital assets, although he concedes that it can properly capitalise any credit balance on profit and loss account or other revenue reserve, any reserve resulting from the realisation of capital profits or any amount standing to the credit of a share premium account. As regards a winding-up, he contends that the surplus assets in which the preference shareholders are entitled to participate are those assets of the company which remain after all the claims of creditors and the costs of the winding-up have been paid. It will be convenient to consider the rights in a winding-up first.

The rights attached to the preference shares as set out in the original articles of association were imported into the memorandum of association by reference and consequently remain unaffected by any alterations of the company's articles. So far as participation in profits and in the assets of the company on a winding-up is concerned, they are laid down in the original art. 5 which I have read. Counsel for the preference shareholder concedes that para. (a) of that article contains a comprehensive statement of the preferential shareholders' rights to participate in profits until a winding-up occurs. As to para. (b), he says that " surplus assets " here cannot mean such assets as remain after not only paying creditors and costs but also extracting distributable profits to which any class of shareholders may have become entitled before the winding-up began because of the reference to payment out of the surplus assets of arrears of the preference dividend. Moreover, if by virtue of the original art. 85 the ordinary shareholders become entitled, as they accrue, to all profits of the company not required for payment of the preference dividend, notwithstanding that such profits remain undistributed, counsel says that it is hard to see what surplus assets could be left over in a winding-up after paying creditors, costs and arrears of preference dividend, repaying paid-up capital and distributing to the ordinary shareholders the undistributed profits to which they would have so become entitled.

On the other hand, counsel on behalf of the second defendant, a representative ordinary shareholder, contends that the present case is governed by the decision in *Re Bridgewater Navigation Co.* (1), that the undistributed profits of the company not required for payment of the preference dividend become appropriated to and belong to the ordinary shareholders and that they ought accordingly to be excluded from the assets in which the preference shareholders are entitled to participate in a winding-up. According to counsel for the ordinary shareholder, the surplus assets in which the preference shareholders may participate after creditors, costs and arrears of preference dividend have been paid and paid-up capital has been repaid will not include any such undistributed profits. The reference in para. (b) of art. 5 to " further surplus assets " relates, according to him, to such matters as appreciation of capital assets realised in the winding-up or profits obtained by the liquidator carrying on the company's business for the purposes of the winding-up.

Before I consider the relevant authorities I will make the following observations. First, it is clear that at any time before liquidation the ordinary shareholders, who control the voting at general meetings, could quite legitimately extract by way of dividends on their ordinary shares the whole of the distributable but undistributed profits except to the extent that they might be required to pay accrued preference dividends. Secondly, assuming that art. 140 of the new articles of association adopted in 1946 was validly adopted, it is clear that at any time before liquidation the ordinary shareholders could, under that article, capitalise for their own exclusive benefit the whole of such undistributed profits with the like exception. Even if, therefore, the preference shareholders were entitled to participate pari passu with the ordinary shareholders in any assets of the company remaining after paying creditors, costs and arrears of preference dividend and repaying paid-up capital, their expectations in this respect could not be said to be very great. Considerations of this kind assisted the majority of the House of Lords in *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (2) to reach the conclusion on the construction of the relevant regulations in that case that the preference shareholders in the respondent company had no such right of participation.

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(1) [1891] 1 Ch. 155; *varied*, C.A., [1891] 2 Ch. 317.

Whether in the present case the preference shareholders have such a right depends on the bargain between the members constituted by the company's memorandum and articles, and depends on the true interpretation of the original art. 5 read in the context of the rest of the original articles of the company. The fact that the ordinary shareholders might be able to defeat the expectations of the preference shareholders to participate in a winding-up in undistributed profits is not necessarily inconsistent with the preference shareholders having such a right.

In para. (b) of art. 5 the expression " surplus assets " is used twice. Where it first appears it must clearly mean property of the company remaining after the external liabilities of the company have been discharged and provision has been made for the costs of the winding-up, but before any capital has been repaid to the preference shareholders or any arrears of preference dividend have been satisfied, and a priori before any capital has been repaid to the ordinary shareholders or any profits have been distributed to them. In other words, " surplus assets " here means all the assets of the company remaining after creditors have been paid and the costs of winding-up have been paid or provided for, but before any payment to members as such has been made or provided for. The article confers on the preference shareholders a right to certain preferential payments out of this fund; it then directs repayment thereout of the capital paid up on the other shares of the company, that is to say, the ordinary shares; finally it confers on the preference shareholders a right to " participate in any further surplus assets of the company " rateably with the other shareholders. In this context I think that " any further surplus assets " must mean that part of the fund of " surplus assets " referred to earlier in the paragraph which remains after making thereout the specific payments referred to in the paragraph.

In *Re Bridgewater Navigation Co.* (3) the question arose whether undistributed profits of the company were distributable in a winding-up amongst the ordinary shareholders of the company only or amongst the preference and ordinary shareholders rateably. The company as originally constituted had only one class of shareholders and its articles provided, inter alia, as follows (4):

> " 85. Subject to the last preceding article, and subject to any arrangement which may from time to time have been entered into relative to the remuneration of any manager or other officer of the company by way of commission or a percentage on the net profits of the company or any part thereof, the entire net profits of each year shall belong to the holders of the shares of the company and be divided pro rata upon the whole paid-up share capital of the company, and the directors may, with the sanction of the company in general meeting, declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon."

The preceding article authorised the directors of the company to set aside sums out of profits to reserves. Subsequently the company created a class of preference shares whose right to participate in profits was limited to a preferential dividend at the rate of five per cent. per annum.

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(2) [1949] 1 All E.R. 1068; [1949] A.C. 462.

(3) [1891] 1 Ch. 155; *varied*, C.A., [1891] 2 Ch. 317.

(4) [1891] 1 Ch. at p. 156.

In *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (5) the House of Lords had earlier decided that after adjusting the rights of the shareholders inter se the surplus assets of the company ought to be divided between the shareholders of both classes in proportion to their shares. In *Re Bridgewater Navigation Co.* both NORTH, J. (6) and the Court of Appeal (7) took the view that this decision of the House of Lords had not decided the proper destination of the undistributed profits in question before them: presumably this would properly be described as relating to the adjustment of the rights of the shareholders inter se. The decisions of NORTH, J. (6) and the Court of Appeal (7) turned mainly on the terms of art. 85 of the company's articles of association, which I have read. Having regard to the creation of the preference shares with a limited right to participate in profits NORTH, J., held (8) that that article should be read as though it said:

> "shall after payment of the dividend to the preference shareholders belong to and be divided pro rata among the ordinary shareholders of the company."

He consequently held that the ordinary shareholders were exclusively entitled to the net profits of the year current at the date of liquidation, subject to paying an apportioned preference dividend to the preference shareholders, and to a sum reserved but not required for canal improvements, but not to certain other reserves. The Court of Appeal (7) varied the order of NORTH, J. (6), holding that the last-mentioned reserves also represented undistributed profits, which had not lost that character as a result of having been reserved for purposes for which in the event they were not required. The significant circumstance in the case was, in my judgment, that art. 85 provided that the whole of the company's net profits of each year remaining after payment of the preference dividend should "belong to . . . and be divided" among the ordinary shareholders. The right of the preference shareholders to participate in the company's assets in a winding-up necessarily took effect subject to this right of the ordinary shareholders.

By the articles of association which came under consideration in *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (9), the right of the preference shareholders of the respondent company to participate in profits while the company was a going concern was limited to a cumulative preferential dividend at a stated rate, subject to which the residue of the profits was declared by art. 128 to be "divisible" amongst the ordinary shareholders. In a winding-up the preference shareholders were given a preferential right to repayment of capital paid up on their shares but the articles were silent about what should happen to any assets remaining after that preferential right was satisfied. The majority of the learned Lords held as a matter of construction that the articles dealing with the preferential rights of the preference shareholders in a winding-up contained an exhaustive statement of their rights to participate in the company's assets in a winding-up. From the fact that their right to participate in profits while the company was a going concern was limited to their preferential dividend and that their right to participate in a winding-up was restricted to repayment of the capital paid up on their shares, it would naturally follow that the profits of the company which were not required for payment of the preference dividend belonged at all times to the ordinary shareholders. VISCOUNT MAUGHAM, LORD SIMONDS and LORD NORMAND, however, all seem to have reached the conclusion that the rights of the preference shareholders in a winding-up were restricted to repayment of capital by the road of first holding that the profits, so far as not required for payment of the preference dividend, became appropriated to the ordinary shareholders, and belonged to them while the company was still a going

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(5) (1889), 14 App. Cas. 525.
(6) [1891] 1 Ch. 155.
(7) [1891] 2 Ch. 317.
(8) [1891] 1 Ch. at p. 168.
(9) [1949] 1 All E.R. 1068; [1949] A.C. 462.

A concern. In reaching this conclusion they were largely influenced by the circumstance that the articles gave the ordinary shareholders complete control of these profits until liquidation. I think that this decision may be summarised as follows: (i) the article regulating the distribution of profits did not in terms state that profits remaining after paying the preference dividends should belong in any event to the ordinary shareholders; (ii) the article dealing with rights in a B winding-up was silent about whether the preference shareholders should or should not participate in surplus assets available for distribution after repayment of all paid-up capital; (iii) it was clear that until liquidation began the ordinary shareholders could, by means of dividends and capitalisation, appropriate to themselves all the undistributed profits not required to pay preference dividends. The majority of the learned Lords considered the last-mentioned circum- C stance to afford the clue to the proper construction to be adopted as regards (i) and (ii)—see per VISCOUNT MAUGHAM (10), LORD SIMONDS (11), and LORD NORMAND (12).

As regards (i) *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (13) differed from *Re Bridgewater Navigation Co.* (14) but was similar to the present case.

D As regards (ii) *Re Bridgewater Navigation Co.* (14) was similar to *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (15) and the present case differs from them both by reason of the terms of art. 5, para. (b).

As regards (iii), the present case resembles *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (15).

E The significant distinction between the present case and *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (15) is that para. (b) of the original art. 5 in the present case makes it clear that the preference shareholders are entitled to participate to some extent in a winding-up beyond repayment of their paid-up capital and payment of arrears of their preference dividend. The question is to what extent they are so entitled.

F The distinction between this case and *Re Bridgewater Navigation Co.* (14) is that the original art. 85 in the present case said not that the profits there referred to should " belong " to the ordinary shareholders but that they should be " divisible " among (in effect) the ordinary shareholders. In such a passage " divisible " might, as a matter of interpretation, mean " that which is to be divided " or " that which is capable of being divided ". In *Scottish Insurance* G *Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (15) the former of these alternatives was adopted for reasons which I have already indicated. Counsel for the second defendant, the ordinary shareholder, says that similar reasons apply here because there was nothing in the original articles to prevent the ordinary shareholders at any time before liquidation from taking for themselves all the undistributed profits not required to satisfy the preference dividend. This is true, H but I must also keep in mind the terms of art. 5, para. (b). As I have endeavoured to show in *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (15) the appropriation to the ordinary shareholders of profits not required to pay preference dividends and the exclusion of the preference shareholders from participation in any surplus assets were complementary provisions. In the present case a parallel position does not exist because of the reference in art. 5, I para. (b), to participation by the preference shareholders in surplus assets. The circumstance that the ordinary shareholders have complete dominion over profits while the company is a going concern is not necessarily inconsistent with another class of shareholders having a right to participate in profits which the ordinary shareholders choose to leave undistributed until after the commencement of a winding-up.

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(10) [1949] 1 All E.R. at p. 1071; [1949] A.C. at p. 479.
(11) [1949] 1 All E.R. at p. 1078; [1949] A.C. at p. 488.
(12) [1949] 1 All E.R. at p. 1082; [1949] A.C. at p. 494.
(13) [1949] 1 All E.R. 1068; [1949] A.C. 462.
(14) [1891] 2 Ch. 317.
(15) [1949] 1 All E.R. 1068; [1949] A.C. 462.

Having regard to the analysis which I have made of the language of para. (b) of art. 5 I feel compelled to the view that in the present case the preference shareholders would be entitled to participate in a winding-up rateably with the other shareholders in all the assets of the company which remain after paying creditors, costs and arrears of the preference dividend and after repaying all paid-up capital. I do not think that either *Re Bridgewater Navigation Co.* (16) or *Scottish Insurance Corpn., Ltd.* v. *Wilsons & Clyde Coal Co., Ltd.* (17) requires or enables me to reach another view. Indeed, I think that part of Lord Simonds' reasoning in the latter case strongly supports my view, for he says (18):

> "There is another somewhat general consideration which also, I think, deserves attention. If the contrary view of arts. 159 and 160 is the right one and the preference stockholders are entitled to a share in surplus assets, the question will still arise what those surplus assets are. For the profits, though undrawn, belong, subject to the payment of the preference dividend, to the ordinary stockholders, and, in so far as surplus assets are attributable to undrawn profits, the preference stockholders have no right to them. This appears to follow from the decision of the Court of Appeal in *Re Bridgewater Navigation Co.* (16), in which the judgment of the House of Lords in *Birch* v. *Cropper* (19) is worked out. This again is not decisive of the construction of particular articles, but I am unwilling to suppose that the parties intended a bargain which would involve an investigation of an artificial and elaborate character into the nature and origin of surplus assets."

In a case like the present, in which it is clear that the preference shareholders are to participate to some extent in surplus assets, an investigation of the kind envisaged by Lord Simonds would be involved if the surplus assets had to be divided into two categories, namely, undistributed profits belonging to the ordinary shareholders and other surplus assets.

Consequently, I reach the conclusion that in the present case the right of the ordinary shareholders to the exclusive enjoyment of accumulated profits which are not required to pay the preference dividend depends on appropriate resolutions being passed before liquidation begins, and that in default of such resolutions such accumulated profits will form part of the fund of assets distributable under art. 5, para. (b).

I have reached this conclusion without reference to the company's new articles of association, but I should point out that under art. 130 of those articles no dividend can be declared in excess of the recommendation of the directors. The ordinary shareholders consequently no longer enjoy the dominion over profits which they enjoyed under the original articles and on which counsel for the ordinary shareholder relies.

Accordingly I will declare, in answer to question 3 of the originating summons, that, according to the true construction of the memorandum and articles of association of the company, the preference shareholders will be entitled in a winding-up to participate rateably with the other shareholders of the company in the assets of the company available after payment of the debts and liabilities of the company and the return to the members of the amounts paid up or credited as paid up on all shares in the company and the payment to the preference shareholders of any arrears of their dividend up to the date of the commencement of the winding-up, and after providing for costs.

I come now to the question of the effect of the capitalisation article, art. 140 in the company's new articles of association. The first submission of counsel for the preference shareholder with regard to this, was that if this article in any respect varied, or purported to vary, the rights of the preference shareholders, it is to that extent not binding on them. This must be right, because the rights of the preference shareholders are by reference written into the memorandum of association and so are only capable of variation by a scheme of arrangement sanctioned by the court under the Companies Acts, except that possibly the rights so written into the memorandum ought to be taken as capable of being varied in accordance with the modification of rights clause contained in the original articles of association, but this clause, as I have stated, has never been operated. Accordingly the question raised by the originating summons in respect of art. 140 involves first the consideration whether under the terms of that article amounts standing to the credit of all, or some, and if so which, of the accounts referred to in question 4 of the summons can be capitalised, and secondly the consideration whether the power to capitalise so construed conflicts with any right of the preference shareholders.

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(16) [1891] 2 Ch. 317.

(17) [1949] 1 All E.R. 1068; [1949] A.C. 462.

(18) [1949] A.C. at p. 488; [1949] 1 All E.R. at p. 1078.

(19) (1889), 14 App. Cas. 525.

Counsel for the preference shareholder concedes that capitalisation is authorised by the article under all of the heads mentioned in the question except reserves resulting from the revaluation of capital assets.

He relies, in this connexion, on *Westburn Sugar Refineries, Ltd.* v. *Inland Revenue Comrs.* (20). In that case a revaluation in 1948 of the company's buildings, plant and machinery disclosed an excess of £155,910 over book values. This excess was carried to capital reserve. In the following year the company capitalised £152,250 of the amount on capital reserve. In 1950 the company, having carried out certain other transactions, reduced its capital by repaying part of its paid-up capital. This reduction was confirmed, the application for confirmation being carried as far as the House of Lords (21). In those proceedings the propriety of the 1949 capitalisation was not in issue, but it does not seem to have struck anybody that there might have been anything wrong about it. Later the question whether the capitalisation attracted profits tax as being a capitalisation of a " distributable sum " within the Finance Act, 1951, s. 31 (5), came before the Court of Session. The Lord President, Lord Clyde (who, incidentally, had been one of the counsel engaged in the proceedings before the House of Lords in 1951), after holding that the capitalisation having been of an increment in the value of fixed assets the subject-matter could not have been utilised in making a distribution within the meaning of the section, went on to say, as a separate ground for his decision, that it would have been illegal for the company to have distributed the amount in question. After referring to a passage in Palmer's Company Law (20th Edn.), p. 645, which for myself I read as saying that by law an unrealised profit resulting merely from revaluation of fixed assets can be treated as a profit for dividend purposes but that this is not normally to be regarded as a wise commercial practice, but which the Lord President (Lord Clyde) seems to have interpreted otherwise, he said (22):

> " I am of opinion that these observations are sound, and that particularly in the case of an appreciation, which is neither realised nor immediately realisable, it would be illegal to distribute the surplus."

Then Lord Sorn said (23):

> " In my view capital profits are not distributable until they are realised."

Founding himself on these observations counsel for the preference shareholder contends that a reserve fund resulting from a revaluation of fixed assets cannot legitimately be distributed by way of dividend. Consequently, he says, it cannot legitimately be capitalised. It is to be observed that art. 140 provides that the capitalised sum is to be

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(20) [1960] Taxation Reports 105. (21) [1951] 1 All E.R. 881; [1951] A.C. 625.
(22) [1960] Taxation Reports at p. 107. (23) [1960] Taxation Reports at p. 109.

> "... appropriated as capital to and amongst the shareholders who would have been entitled thereto if the same had been distributed by way of dividend in the shares and proportions in which they would have been so entitled ..."

These words are common form in articles of this kind, and I think that it is correct to say that a capitalisation of this sort is in essence the declaration of a dividend combined with the application of that dividend on behalf of the shareholders entitled to participate in it in paying up shares to be allotted and issued to them in satisfaction of their rights of participation: see *R. A. Hill* v. *Permanent Trustee Co. of New South Wales, Ltd.* (24). As a general rule only that which could be distributed in dividends can be capitalised. Where the rights of various classes of shares to participate in profits differ from their rights of participating in a winding-up, any other view or arrangement would lead to anomalous results. The exception to this general rule is that a sum standing to the credit of a share premium account or of a capital redemption reserve fund may not be distributed, except as provided by the Companies Act, 1948, s. 56 (1) or s. 58 (1), but may be capitalised under s. 56 (2) or s. 58 (5). The Court of Appeal has held that if a share premium account is distributed with the sanction of the court, the distribution must be treated as though it were not a distribution of profit but a repayment of paid-up capital: *Re Duff's Settlements Trusts, National Provincial Bank, Ltd.* v. *Gregson* (25). A share premium account and a capital redemption reserve fund are, however, statutory creatures and these statutory provisions governing their distribution are of a special and artificial character. This exception from the general rule which I have formulated accordingly does not, in my judgment, in any way discredit the rule.

If, therefore, the Scottish court was right in holding that a reserve fund constituted as a result of a revaluation of unrealised fixed assets could not legally be distributed, it would seem to me to follow that it likewise could not legally be capitalised. It has, I think, long been the generally accepted view of the law in this country (though not established by judicial authority) that, if the surplus on capital account results from a valuation made in good faith by competent valuers and is not likely to be liable to short-term fluctuations, it may properly be capitalised: see *Inland Revenue Comrs.* v. *Thornton, Kelley & Co., Ltd.* (26). Indeed, as I have pointed out, this was actually done by Westburn Sugar Refineries, Ltd. For myself, I can see no reason why, if the valuation is not open to criticism, this should not be so, or even why, in any case in which the regulations of the company permit the distribution by way of dividend of profit on capital account, a surplus so ascertained should not be distributed in that manner. After all, every profit and loss account of a trading concern which opens and closes with a stock figure necessarily embodies an element of estimate. The difference between ascertaining trading profits by, amongst other things, estimating the value of the stock in hand at the beginning and end of the accounting period and ascertaining capital profits by comparing an estimated value of the assets with their book value appears to me to be a difference of degree but not of principle. Moreover, if a company has fluid assets available for payment of a dividend, I can see nothing wrong in its using those assets for payment of a dividend and at the same time as a matter of account treating that dividend as paid out of a capital surplus resulting from an appreciation in value of unrealised fixed assets. The proper balance of the company's balance sheet would not be disturbed by such a course of action. The company would be left with assets of sufficient value to meet the commitments shown on the liabilities side of its balance sheet, including paid-up share capital. A company is not required by law to keep any part of its assets in any particular form. I do not say that in many cases such a course of action would be a wise commercial practice, but for myself I see no ground for saying that it is illegal. The Lord President (Lord Clyde) and Lord Sorn both referred to dicta in various English cases, but with the exception of *Bolton* v. *Natal Land & Colonization Co.* (27) in which the decision has no bearing on the question that I am considering, these cases all related to realised capital appreciation, not to surpluses founded on estimates of values. I should naturally wish to pay the greatest respect to the decision of the Court of Session in *Westburn Sugar Refineries, Ltd.* v. *Inland Revenue Comrs.* (28) notwithstanding that it is not binding on me, but for the reasons indicated above I feel constrained to differ from it.

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(24) [1930] All E.R. Rep. 87; [1930] A.C. 720.

(25) [1951] 2 All E.R. 534; [1951] Ch. 923.

(26) [1957] 1 All E.R. 650.

For these reasons I reach the conclusion that, unless it conflicts with the rights of the preference shareholders, art. 140 authorises capitalisation of a reserve resulting from the revaluation of capital assets.

As, for the same reasons, I have also reached the conclusion that the company could legitimately distribute a capital surplus of this nature by way of dividend, that is to say, exclusively amongst the ordinary shareholders at any time when the preference dividend has been paid in full, a capitalisation exclusively for the benefit of the ordinary shares in similar circumstances could not, in my opinion, encroach on the rights of the preference shareholders.

Accordingly I shall declare that the company has power pursuant to art. 140 of its present articles of association to capitalise under all the heads set out in question 4 of the originating summons.

There remains only the question relating to voting rights. Neither counsel before me really sought to argue that question 5 of the originating summons ought not to be answered in the sense of para. (a). The increase of the ordinary shareholders' voting rights resulting from the subdivision of their shares did not alter the rights attached to the preference shares, although it decreased their effectiveness. The increase of the preference shareholders' voting rights effected in 1911 did not deprive the preference shareholders of any existing right: it conferred additional rights on them. Consequently, in my judgment, it did not vary or abrogate any right conferred on the preference shareholders by the memorandum of association: it reinforced such rights. Similarly the increase in the ordinary shareholders' voting rights which was effected at the same time did not deprive them of any rights but conferred additional rights.

In these circumstances I will make a declaration in the terms of para. (a) of question 5.

I will also make the representation orders asked for.

Declarations accordingly.

Solicitors: *Stephenson, Harwood & Tatham* (for all parties).

[*Reported by* Jenifer Sandell, *Barrister-at-Law.*]

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(27) [1892] 2 Ch. 124.

(28) [1960] Taxation Reports 105.

BARCLAYS BANK, LTD. AND ANOTHER *v.* ASCOTT.

[QUEEN'S BENCH DIVISION (Barry, J.), February 3, 1961.]

Landlord and Tenant—Notice to quit—Business premises—Notice stating landlord would not oppose application to court for new tenancy provided rent and performance of covenants guaranteed by person approved by landlord—Notice on prescribed form containing notes which set out the grounds on which the landlord was entitled to oppose an application to court under the Landlord and Tenant Act, 1954*—Notice did not state ground of opposition—Validity of notice—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 25 (6).

By s. 25 (6) of the Landlord and Tenant Act, 1954, a notice served under s. 25 terminating a business tenancy " shall not have effect unless it states whether the landlord would oppose an application to the court . . . for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in s. 30 of this Act he would do so ". The landlords of business premises to which the Act of 1954 applied, served on the tenant of the premises notice to terminate her tenancy under s. 25 of the Act. The notice was on the form prescribed for this purpose by the Landlord and Tenant (Notices) Regulations, 1957. It stated that the landlords " would not oppose an application to the court . . . for the grant of a new tenancy provided [the tenant's brother] or some other person approved by [the landlords] is a guarantor for payment of the rent and performance and observance of the covenants " under a new tenancy. Failure to provide a guarantor was not a ground mentioned in s. 30 of the Act for opposing an application to the court for a new tenancy. At the bottom of the notice the tenant's attention was drawn to the notes printed on the back of the notice explaining the effect of the relevant part of the Act of 1954 and in particular, note 4 set out the grounds mentioned in s. 30 on which a landlord could oppose an application to the court and explained that the court could not grant a new tenancy where the landlord stated in his notice that he would oppose an application on one of those grounds and established that ground. In an action by the landlords for possession of the premises,

Held: the notice was invalid because, applying the ordinary rules regarding construction of documents, the notice meant that the landlords would oppose an application to the court for a new tenancy if no suitable guarantor was found, but did not mean merely that the landlords would not oppose such an application though endeavouring to insist in so far as they could on the provision of a guarantor; accordingly, as the notice did not also specify any ground of opposition mentioned in s. 30 of the Landlord and Tenant Act, 1954, and did not give the tenant sufficient information to enable her to deal with the situation arising from the notice, it was ineffective (see p. 786, letter G, and p. 787, letter G, post).

Ratio decidendi of HODSON, L.J., in *Bolton's* (*House Furnishers*) *Ltd.* v. *Oppenheim* ([1959] 3 All E.R. 90) explained.

[As to a landlord's notice to terminate a business tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 889, para. 1711.

For the Landlord and Tenant Act, 1954, s. 25 (6), see 34 HALSBURY'S STATUTES (2nd Edn.) 411.

For the Landlord and Tenant (Notices) Regulations, 1957, see 12 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 159.]

Case referred to:

Bolton's (*House Furnishers*), *Ltd.* v. *Oppenheim*, [1959] 3 All E.R. 90; [1959] 1 W.L.R. 913; 3rd Digest Supp.

Action.

By specially indorsed writ dated Dec. 22, 1958, the plaintiffs, Barclays Bank, Ltd., and Michael Lyons, claimed possession of premises known as 16 Western Road, Mitcham, Surrey, and mesne profits from Oct. 20, 1958, until the date of possession. By an oral agreement made in 1942 the premises, which then were subject to the Rent Restrictions Acts, were let to the defendant, Miss Esther Ascott, on a weekly tenancy. The defendant used part of the premises as a shop for her business of a general and second-hand dealer. By virtue of the Rent Act, 1957, the premises were decontrolled and they then became subject to Part 2 of the Landlord and Tenant Act, 1954. The plaintiffs, wishing to get vacant possession of the premises, entered into negotiations in the latter part of 1957 with the defendant's brother, Mr. George Ascott. As a result of the negotiations the plaintiffs indicated their willingness to grant a new tenancy of the premises including the shop to the defendant jointly with her sister-in-law, Mrs. M. E. Ascott, provided that Mr. George Ascott acted as guarantor of the rent. With a letter dated Feb. 1, 1958, the plaintiffs' surveyors sent Mr. George Ascott a draft of the proposed new tenancy for consideration by all the parties; the letter stated that the grant of the new tenancy was conditional on discharge of the arrears of rent due from the defendant under her existing tenancy. A copy of the draft agreement was sent to Mrs. M. E. Ascott. Correspondence then followed between Mr. George Ascott and the plaintiffs regarding the state of repair of the premises but no satisfactory arrangement was arrived at on this matter, and the draft agreement sent to Mr. Ascott on Feb. 1 was never approved by the parties. It was clear from the correspondence that no objection had been raised by any of the parties to the inclusion in the agreement of Mr. George Ascott as guarantor, but no binding arrangement to that effect had been made. On Apr. 14, 1958, the plaintiffs served a notice under s. 25 of the Landlord and Tenant Act, 1954, on the defendant terminating her business tenancy of the premises. The notice which was on form 7 prescribed by the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957 No. 1157), read as follows:

> "To Miss Esther Ascott of 16 Western Road, Mitcham, Surrey, tenant of premises known as 16 Western Road, Mitcham, Surrey. 1. We Barclays Bank Limited whose registered office is situate at 54 Lombard Street in the City of London and Michael Lyons of 58 Uxbridge Road, Shepherds Bush in the County of London trustees of the will of Henry Lyons deceased landlord (Note 7) of the above-mentioned premises, hereby give you notice terminating your tenancy on the 20th day of October, 1958 (Note 1). 2. You are required within two months after receiving this notice to notify us in writing whether or not you will be willing to give up possession of the premises on that date (Note 2). 3. We would not oppose an application to the court (Note 3) under Part 2 of the Act for the grant of a new tenancy (Note 6) provided Mr. George Ascott of 37 Nightingale Road, Carshalton, Surrey, or some other person approved by us, is a guarantor for payment of the rent and performance and observance of the covenants or agreements to be performed and observed by you in relation to such new tenancy, as already agreed to by you. 4. This notice is given under the provisions of s. 25 of the Landlord and Tenant Act, 1954. Your attention is called to the Notes overleaf . . ."

The notes on the back of the notice explained the effect of Part 2 of the Landlord and Tenant Act, 1954, and in particular, note 4 read,

> "The court has no power to make an order for the grant of a new tenancy if the landlord, having stated in his notice that he will oppose an application to the court on one of the grounds specified in the Act establishes that ground to the satisfaction of the court . . ."

The grounds specified in the Act (s. 30) were then set out in the note. Note 6 read—

> "If the landlord states in this notice that he will not oppose an application to the court for the grant of a new tenancy, it will be open to the tenant and the landlord to negotiate on the terms of the tenancy . . ."

The defendant did not notify the plaintiffs within two months of receiving the notice that she would not be willing to give up possession on the date specified in the notice.

The defendant contended that the notice was invalid since it did not unambiguously state, as required by s. 25 (6) of the Landlord and Tenant Act, 1954, whether the plaintiffs would oppose an application to the court for a new tenancy, and if they would oppose an application, it did not state on which of the grounds set out in s. 30 of the Act they would do so. The relevant provisions of the Act of 1954 and of the Landlord and Tenant (Notices) Regulations, 1957, are set out in the judgment of BARRY, J. (see p. 785, post).

A. E. Holdsworth for the plaintiffs, the landlords.
D. J. Hyamson for the defendant, the tenant.

BARRY, J., having stated the facts, continued: Before turning to the construction of the notice, I should perhaps refer to the statutory provisions governing this tenancy, and particularly to the provisions of Part 2 of the Landlord and Tenant Act, 1954. Under s. 24 (1) of that Act Parliament has provided that:

> "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act,"

and the section continues in terms which are not relevant to the present purposes. Section 25 relates to the termination of the tenancy by the landlord and provides:

> "(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination') . . .
>
> "(2) Subject to the provisions of the next following subsection, a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein.
>
> "(5) A notice under this section shall not have effect unless it requires the tenant, within two months after the giving of the notice, to notify the landlord in writing whether or not, at the date of termination, the tenant will be willing to give up possession of the property comprised in the tenancy.
>
> "(6) A notice under this section shall not have effect unless it states whether the landlord would oppose an application to the court under this Part of this Act for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in s. 30 of this Act he would do so."

Pausing there, the only question which arises in regard to this notice is to whether it states, as required by s. 25 (6), whether the landlord would oppose an application to the court under this Part of the Act, and, if so, also states on which of the grounds mentioned in s. 30 of this Act he would do so. It is common ground that the notice served on Apr. 14, 1958, complies with the requirements of s. 25 in all other respects.

Section 29 relates to the orders which could be made by the court for the grant of a new tenancy and reads as follows:

A > "(1) Subject to the provisions of this Act, on an application under s. 24 (1) of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided.
>
> "(2) Where such an application is made in consequence of a notice given by the landlord under s. 25 of this Act, it shall not be entertained unless B the tenant has duly notified the landlord that he will not be willing at the date of termination to give up possession of the property comprised in the tenancy.
>
> "(3) No application under s. 24 (1) of this Act shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under s. 25 of this Act or, as the case may be, after C the making of the tenant's request for a new tenancy."

It is common ground that the tenant has not brought herself within the terms of that section, and no question of an application to the court for the granting of a new tenancy can therefore arise.

Section 30 of the Act relates to the position which arises if a landlord objects D to the application for a new tenancy. Subsection (1) reads:

> "The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act or, as the case may be, under s. 26 (6) thereof, that is to say . . ."

Then a number of grounds is set out, some of which relate to the past conduct E and suitability of the tenant and some to the future intentions of the landlord with regard to the premises, such as his intention to demolish or reconstruct the premises. I need not go into those grounds because the landlords do not purport to rely on them. The landlords' case is that they have in fact indicated to the tenant in their notice, that they would not oppose an application for a new tenancy. I need not read any other sections of the Act, but it may be F noted that ss. 31, 32, 33, 34 and 35 relate to the matters which should be considered by the court in an application for the grant of a new tenancy by the existing tenant. As I have already indicated, s. 25 (1) of the Act of 1954 requires that the notice to terminate given to the tenant should be in the "prescribed form".

Certain statutory regulations have been made, and the latest are, I think, G the Landlord and Tenant (Notices) Regulations, 1957 (1). It is right that I should refer very shortly to one or two of those regulations. Regulation 4 provides:

> "The forms in the Appendix to these regulations, or forms substantially to the like effect, shall be used for the following purposes, that is to say:— H . . . (vii) A notice under the provisions of s. 25 of the Act [of 1954], being a notice terminating a tenancy to which Part 2 of the Act applies, shall, unless it contains a copy of a certificate given under the provisions of ss. 57, 58 or 60 of the Act, be in Form 7."

Those sections have no application to the present case, and therefore the regulations provide that the notice under s. 25 (1) shall be given in accordance with I Form 7, or in a form substantially to the like effect. Form 7 is a short form, and in so far as its standard portions are concerned, it has of course clearly been used by the landlords, or their surveyors in the present case. On the back of Form 7 there are a number of "Notes", and it is to those I shall refer shortly when considering the notice served in the present case. [HIS LORDSHIP then read the notice (2) and continued:] It seems to me that this case is typical of the pitfalls which beset the path of those dealing with notices, and even more particularly those who deal with the various statutory notices required under the recent landlord and tenant legislation. These pitfalls occur even to those who act, as I am satisfied the landlords acted in this case, with the very best intentions and with the sole desire to be as helpful to their tenant as they could. I have the very greatest sympathy with the landlords in the present case. However, I cannot decide points of this sort on grounds of sympathy. I must look at this notice and decide, as best I can, whether it does in fact comply with the requirements of the Act.

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(1) S.I. 1957 No. 1157.

(2) See p. 783, letter F, ante.

A number of very useful authorities have been cited to me (3), but, as I see it, none of them is directly in point, and I do not think that any useful purpose would be served if I were to refer to them in detail. It appears to me that the real gist of these decisions was summarised by HODSON, L.J., in *Bolton's* (*House Furnishers*), *Ltd.* v. *Oppenheim* (4). As I understand HODSON, L.J.'s judgment, the question which the court really has to consider is whether the notice given by the landlord has given such information to the tenant as will enable the tenant to deal, in a proper way, with the situation (whatever it may be) referred to in the notice. It is clear, I think, from the authorities which have been cited to me that this notice should be construed liberally, and provided that it does give the real substance of the information required, then the mere omission of certain details, or the failure to embody in the notice the full provisions of the section of the Act referred to, will not in fact invalidate the notice. However, no authority has been cited to me which indicates, or which would even tend to indicate, that a notice should be construed otherwise than in accordance with the ordinary rules of construction, or that the court would be entitled to give to it a meaning which it does not in fact bear under the ordinary rules of grammar or construction.

I turn now to the relevant paragraph, para. 3, of this notice, which reads:

> "We would not oppose an application to the court under Part 2 of the Act for the grant of a new tenancy . . . provided Mr. George Ascott of 37 Nightingale Road, Carshalton, Surrey, or some other person approved by us, is a guarantor for payment of the rent and performance and observance of the covenants or agreements to be performed and observed by you in relation to such new tenancy, as already agreed to by you."

It seems to me that, applying any sensible rule of construction, the only possible meaning which can be given to that paragraph is that the landlords would not oppose an application to the court for the grant of a new tenancy provided that the guarantor is found. I can see no escape from the submission of counsel for the tenant that the inevitable corollary of those words is that if the guarantor is not found, the landlords will in fact oppose an application to the court, and their intimation that they would not oppose the application is, I think, clearly conditional on the agreement of the recipient of the notice to obtain either Mr. George Ascott or some other approved person as a guarantor "for payment of the rent and performance and observance of the covenants or agreements to be performed and observed by you in relation to such new tenancy as already agreed to by you".

Does that notice give to the tenant the information that she ought to have when she is called on to face the situation which is brought into being by the service of the notice? I do not think that the tenant has been given such information. She is told that in effect non-opposition of the application is conditional on the provision of the guarantor as already agreed, and, if that term is not acceptable to the tenant, that the landlords will thereafter oppose the application.

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(3) The following cases were cited to the court:—*Ahearn* v. *Bellman*, (1878), 4 Exch. 201; *Bury* v. *Thompson*, [1895] 1 Q.B. 231, 696; *Wheeler* v. *Wirral Estates, Ltd.*, [1935] 1 K.B. at p. 299; *Biles* v. *Caesar*, [1957] 1 All E.R. 151; *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.*, [1958] 1 All E.R. at p. 616; *Morgan* v. *Jones*, [1960] 3 All E.R. 583.

(4) [1959] 3 All E.R. 90.

There is force, I think, in the submission made to me by counsel for the landlords that if the tenant took the trouble to study the Act or even to peruse with care the notes printed on the back of the notice, she would have had an opportunity of appreciating that by a notice of that kind the landlords were in effect putting themselves in the position of agreeing to or not opposing an application to the court, irrespective of any qualification as to the provision of Mr. George Ascott, or some other person, as a guarantor of the performance of any new tenancy which might be agreed. They would put themselves in that position because they would have failed to have indicated in the notice, as they were bound to do if they intended to oppose the application, the one of the grounds specified in s. 30 of the Landlord and Tenant Act, 1954, on which their opposition was based. Not having done so, their opposition would inevitably be ineffective. But how far does that help the tenant? If the tenant had read these notes with care, she would naturally come to the conclusion that the non-opposition of the landlords was entirely dependent on her agreement to the provision of a guarantor, and she would enter into any subsequent negotiations for a new tenancy with her hands tied, in that it would be impossible for her to raise any objection to the landlords' requirements in connexion with a guarantor in so far as those requirements have been expressed in the notice.

That, I think, is the clear meaning of the notice, and I do not think any tenant would be bound to enter into subsequent negotiations with his or her hands tied in that way. A tenant who refused to have his or her hands tied in that way would, on this notice, be faced with the position that the landlords' notice of non-opposition was no longer applicable and that in effect the landlords would be opposing the application for a new tenancy, because the tenant was not prepared to provide Mr. George Ascott, or some other approved person, as a guarantor.

If the tenant read further through the notes, she would probably appreciate that in those circumstances the landlords would be in a very difficult position because they would have failed to state the ground of their opposition, but I do not think that any duty rests on the tenant to attempt to rectify that position or the landlords' notice, any more than it would rest on a tenant to ask the landlords the ground on which their opposition was based, if in fact the landlords failed to take the trouble, at the outset, to fill up the form in the proper way specifying one of the grounds referred to in s. 30 of the Landlord and Tenant Act, 1954.

I am quite satisfied here that the landlords acted with the best possible intentions, and that what they really meant to say was: "We are not going to oppose an application for a new tenancy, but we give you warning we are going to insist, in so far as we can and for as long as we can, that you provide Mr. George Ascott as guarantor." They might well have so worded the notice that an intimation to that effect would not have invalidated it as a notice under the Landlord and Tenant Act, 1954, but in my judgment they failed to do so. They have said their non-opposition depended on the provision of Mr. George Ascott as a guarantor, and I think that the only sensible meaning of para. 3 of the notice is that if Mr. George Ascott, or another approved person, is not provided, then the landlords will oppose an application to the court. That, to my mind, is an insufficient notice, and, with much regret, I have come to the conclusion that this action must fail.

Judgment for the tenant.

Solicitors: *Saville & Mannooch* (for the plaintiffs, the landlords); *George & George* (for the defendant, the tenant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

Re M. (an infant).

[COURT OF APPEAL (Lord Evershed, M.R., Upjohn and Pearson, L.JJ.), February 6, 7, 9, 1961.]

Child—Care—Local authority—Child boarded out with foster parents—Parental rights assumed by authority—Request by local authority to return child—Child made ward of court on application of foster parents—Jurisdiction of court to review decisions of local authority—Children Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 43), *s.* 1 (1) (*a*), *s.* 2 (1), *s.* 13 (1) (*a*)—*Law Reform* (*Miscellaneous Provisions*) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 100), *s.* 9.

Statute—Crown—Whether bound by statute—Parens patriae jurisdiction as to infants—Children Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 43).

(i) In relation to children within the realm and within the comprehension of the Children Act, 1948, the prerogative right of the Queen as parens patriae is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948; in particular the power to make an infant a ward of court by invoking the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, is unaffected (see p. 795, letter C, post).

(ii) But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority and, may, therefore, order that the child cease to be a ward of court (see p. 795, letter D, post).

(iii) There remains the right (and duty) of the judge in whom the prerogative power is vested to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties (see p. 795, letter F, post).

On Apr. 13, 1956, a local authority received an illegitimate child into their care under s. 1 (1) of the Children Act, 1948, on the ground that he had been abandoned by his mother, and on the same day, under s. 13 (1) (a) of the Act, they boarded out the child with foster parents, with whom he had been living for nearly two years. On Apr. 1, 1957 the foster father died, but the child continued to be boarded out with the foster mother. In October, 1957, the local authority passed a resolution under s. 2 (1) of the Act, vesting all the rights and powers of the child's mother in itself. In June, 1960, the local authority formed the view that boarding out the child with the foster mother was not in the child's best interests, and required the foster mother to return him. Despite an undertaking which she had signed (in the form set out in the schedule to the Boarding-Out of Children Regulations, 1955, to allow the child to be removed when required by the local authority), the foster mother refused to return him. In August, 1960, the local authority was given leave by the court to issue a summons for an order of habeas corpus, but on Oct. 14, 1960, on an application being made by the foster mother under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, the child became a ward of court, and the application for habeas corpus was adjourned generally. The local authority then applied for an order, under s. 9 (3) of the Act of 1949, that the child should cease to be a ward of court.

Held: the child should cease to be a ward of court because (a) the Children Act, 1948, had in the circumstances of this case placed the decision as to the best interests of the child in the exclusive jurisdiction of the local authority, and in the absence of any impeachment of the propriety of what had been done by the local authority the prerogative jurisdiction of the court must be treated as pro tanto restricted (see p. 794, letter B, post); and (b) on the facts there was no object in maintaining the infant as a ward of court (see p. 795, letter G, post).

Re A.B. (*an infant*) ([1954] 2 All E.R. 287) approved.
Decision of CROSS, J. (ante, p. 201) affirmed.

[As to the care of a child by a local authority, see 21 HALSBURY'S LAWS (3rd Edn.) 275, para. 590, and as to assumption of parental rights by a local authority, see ibid. 277, 278, paras. 592, 593; and for cases on the subject, see 28 DIGEST (Repl.) 726, 727, *2326*, *2327*.

For the Children Act, 1948, s. 1, s. 2 (1) and s. 13, see 12 HALSBURY'S STATUTES (2nd Edn.) 1105, 1107 and 1114.

For the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, see 28 HALSBURY'S STATUTES (2nd Edn.) 777.]

Cases referred to:

A.B. (*an infant*), *Re*, [1954] 2 All E.R. 287; [1954] 2 Q.B. 385; 118 J.P. 318; [1954] 3 W.L.R. 1; 28 Digest (Repl.) 726, *2326*.

A.-G. v. *De Keyser's Royal Hotel, Ltd.*, [1920] All E.R. Rep. 80; [1920] A.C. 508.

C. (*an infant*), *Re*, [1958] 2 All E.R. 656; [1959] Ch. 363; [1958] 3 W.L.R. 309; 3rd Digest Supp.; 89 L.J.Ch. 417; 122 L.T. 691; 17 Digest (Repl.) 437, *91*.

Carltona, Ltd. v. *Works Comrs.*, [1943] 2 All E.R. 560; 17 Digest (Repl.) 441, *119*.

Point of Ayr Collieries, Ltd. v. *Lloyd-George*, [1943] 2 All E.R. 546; 17 Digest (Repl.) 480, *278*.

Wheaton v. *Maple & Co.*, [1893] 3 Ch. 48; 62 L.J.Ch. 963; 69 L.T. 208; 19 Digest 55, *317*.

Appeal.

This was an appeal by a foster mother from an order of CROSS, J., dated Nov. 30, 1960, and reported ante, p. 201. On an application by the local authority in wardship proceedings CROSS, J., ordered that the child should cease to be a ward of court because, where a local authority had received a child into its care under s. 1 (1) of the Children Act, 1948, and was acting within the authority's powers under the Act, the court had no right to review the decision of the authority on what was for the benefit of the child.

J. D. May for the appellant, the foster mother.

F. P. Neill for the respondent, the local authority.

Cur. adv. vult.

Feb. 9. The following judgments were delivered.

LORD EVERSHED, M.R.: This appeal raises an important question, viz., whether on the facts of the case the terms of the Children Act, 1948 are by necessary implication such as to restrict the ancient prerogative of the Crown as parens patriae as regards infants (now exercisable by way of ward of court procedure in the Chancery Division, the procedure invoked by the present summons) and so to justify the conclusion of CROSS, J., in declaring that the infant ceased to be a ward.

The facts of the case are as follows. The infant, an illegitimate boy, was born on July 10, 1952. About two years later the boy's mother rang the bell on the appellant's door and asked for information about lodgings for herself and the child. The appellant, who had never seen the mother before, out of the kindness of her heart offered, until the lodgings were found, herself to look after the child—as she supposed, for a few days. But though there was some further information about the mother, for practical purposes she then disappeared altogether from the scene. In April, 1956, that is some year and a half or more afterwards, the appellant informed the Birmingham Corporation authorities of the presence with her of this child, and on Apr. 13, 1956, the child was, by virtue of the powers under the Act of 1948, formally taken into the care of the

A corporation and formally boarded out with the appellant. The appellant signed, in accordance with the appropriate regulations, an undertaking to return the child on demand to the corporation. The appellant was then married: her husband was living, and there were several children of the marriage. In April, 1957, the appellant's husband died. On Oct. 25, 1957, the corporation took a further step by virtue of s. 2 of the Act of 1948, that is to say, they appropriately B resolved to assume in regard to the child parental rights; but his boarding out with the appellant continued as before. So we come to June, 1960, in which month the corporation requested, in accordance with the terms of the undertaking, that the foster mother should return the child to the corporation. No reasons were given to the foster mother by the corporation. In August, 1960, the foster mother not having complied with that demand, application was made C by the corporation to BUCKLEY, J., sitting as vacation judge for leave to issue a habeas corpus summons and that leave was given, the hearing of the summons being later adjourned until Oct. 19. Five days before that date, on Oct. 14, the foster mother took out a summons in the Chancery Division of the High Court entitled in the Law Reform (Miscellaneous Provisions) Act, 1949, asking for an order that the infant be made a ward of court and for directions as to the custody, care and control of the infant. D

The relevant terms of s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949 are as follows:

> " (1) Subject to the provisions of this section, no infant shall be made a ward of court except by virtue of an order to that effect made by the court.
>
> " (2) Where application is made for such an order in respect of an infant, E the infant shall become a ward of court on the making of the application, but shall cease to be a ward of court at the expiration of [the time therein stated, a period inapplicable to the present case].
>
> " (3) The court may, either upon an application in that behalf or without such an application, order that any infant who is for the time being a ward of court shall cease to be a ward of court."

F I for my part reject the argument of counsel for the corporation that the section which I have read, being merely procedural, should be limited to apply only to some infants, a class which counsel for the corporation did not attempt to define, but which he said must be such as to exclude in any event infants in respect of whom the local authority has exercised its powers under the Children Act, 1948. It seems to me that s. 9 of the Act of 1949 is quite general and clear G in its terms, with the consequence that on the issue of a summons as provided by the section, a child becomes a ward and so remains unless and until either (a) the court sets aside the proceedings altogether—as it would in the case of an infant for whom his parent successfully claims diplomatic privilege (see *Re C. (an infant)* (1))—or (b) at the expiration of the period indicated in sub-s. (2) which is not relevant for present purposes, or when the court makes an order, as was H done in this case, that the infant ceases to be a ward.

The jurisdiction of the Chancery Division in regard to infants is ancient and has proved itself most salutary. It is a jurisdiction not from its nature and origin to be lightly cut down. On the other hand, there is no doubt that in recent years and in light of modern conditions, including the unhappy fact of there being between twenty thousand and thirty thousand divorces in every year, the many I statutes passed by Parliament for the benefit of children are a recognition of the obligation of the State to take positive measures, and in many cases precisely formulated measures, for the care and upbringing of young children whose circumstances today may be unhappy, but who will be the citizens of tomorrow. We have been referred to a number of such statutes, but, having already alluded to the Act of 1949, I shall now confine myself to the Act of 1948, with which we are particularly concerned.

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(1) [1958] 2 All E.R. 656; [1959] Ch. 363.

A The main part of counsel for the appellant's argument was simple. It was that the ancient prerogative will not be held by the courts to be ousted or restricted by any statute unless the statute in question does so expressly or by clear implication of its terms. That general proposition I accept, for it is well established (see, e.g., the language of LINDLEY, L.J., in *Wheaton* v. *Maple & Co.* (2)). On the other hand, the necessary clear inference may be drawn when a statute deals B with a matter subject to the exercise of the royal prerogative and provides in precise terms a new means of securing the same result. In that connexion I refer to the passage in the speech of LORD SUMNER to which our attention was directed in argument. It was the speech in *A.-G.* v. *De Keyser's Royal Hotel, Ltd.*, when LORD SUMNER said (3):

> "The appellant further contended that all that was done could be done, C and was done, independently of any statute by virtue of the royal prerogative alone. I do not think that the precise extent of the prerogative need now be dealt with. The legislature, by appropriate enactment can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject-matter, D even though they enact a modus operandi for securing the desired result, which is not the same as that of the prerogative. If a statute merely recorded existing inherent powers, nothing would be gained by the enactment, for nothing would be added to the existing law. There is no object in dealing by statute with the same subject-matter as is already dealt with by the prerogative, unless it be either to limit or at least to vary its exercise, or to E provide an additional mode of attaining the same object."

What then is the effect of the relevant language of the Children Act, 1948? In all the circumstances of this case and its importance, I shall be excused for making some substantial citations from it. Section 1, being the first section of Part 1 of the Act with the cross-heading "Duty of local authorities to assume care of children", provides—

> F "(1) Where it appears to a local authority with respect to a child in their area . . . (a) that he has neither parent nor guardian or has been and remains abandoned by his parents or guardian . . . and (c) in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child, it shall be the duty of the local authority to receive the child into their care under this section.
>
> G "(2) Where a local authority have received a child into their care under this section, it shall . . . be their duty to keep the child in their care so long as the welfare of the child appears to them to require it . . ."

Section 2 (1) is, so far as relevant, thus:

> "Subject to the provisions of this Part of this Act, a local authority may H resolve with respect to any child in their care under the foregoing section in whose case it appears to them . . . (b) that a parent or guardian of his [thereinafter referred to as the person on whose account the resolution was passed] has abandoned him . . . that all the rights and powers which the . . . person on whose account the resolution was passed, [would have had,] shall vest in the local authority."

I Section 3 (1) provides that while a resolution passed by virtue of s. 2 (1) (b) of the Act is in force with respect to a child, all rights and powers which the parent would have in respect of the child shall be vested in the local authority in accordance with the resolution.

I will pass over the remainder of Part 1 and come to the twelve sections of Part 2 beginning with s. 11, the cross heading for that Part of the Act being "Treatment of children in care of local authorities". Section 12 (1) reads:

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(2) [1893] 3 Ch. at p. 64.
(3) [1920] A.C. at p. 561; [1920] All E.R. Rep. at p. 103.

> " Where a child is in the care of a local authority, it shall be the duty of that authority to exercise their powers with respect to him so as to further his best interests."

Section 13 (1) provides:

> " Subject to the provisions of this section, a local authority shall discharge their duty to provide accommodation and maintenance for a child in their care—(a) by boarding him out on such terms as to payment by the authority and otherwise as the authority may, subject to the provisions of this Act and regulations thereunder, determine . . ."

Section 14 (1) states that:

> " The Secretary of State, [the Home Secretary,] may by regulations make provision for the welfare of children boarded out by local authorities under para. (a) of sub-s. (1) of the last foregoing section."

I pass to s. 39 in Part 6 in order to note that by that section the local authority is bound to establish a children's committee for the purposes of exercising their functions under certain enactments including the Act with which we are now concerned. Section 42 (1) provides that local authorities are to exercise their functions under the enactments to which I have just alluded under the general guidance of the Secretary of State, and finally, s. 60 (1), in Part 7, states that the transitional provisions set out in Sch. 2 shall have effect for the purposes of the Act. Schedule 2 by para. 4 provides that any rules (4) in force immediately before the commencement of the Act are to have effect and to continue in force as there stated. I have made those last references because, although it may not generally be competent to expand the language of an Act by reference to rules purporting to be made under it, it is to be noted that in this case the existing rules of 1946 (5) were, by s. 60 (1) of and para. 4 (1) (2) of Sch. 2 to the Children Act, 1948, to be treated as regulations made under the Act. Finally, I observe that the rules of 1946 which were in force and which are referred to in the schedule, being the Children and Young Persons (Boarding Out) Rules, 1946 (6), include in r. 8 (1) this:

> "A foster parent shall, on receiving a foster child to be boarded out with him, be required by the local authority to sign in duplicate an agreement in the form set out in the schedule to these rules . . ."

In that schedule one finds an agreement with an undertaking to return the child, which is in accordance with what was done in this case. Those regulations of 1946 were replaced by the Boarding-Out of Children Regulations, 1955 (7), but reg. 20 of the regulations of 1955 is a restatement of reg. 8 in the regulations of 1946.

What then is the effect of this statute to which I have made such references as occur to me to be necessary? I think that the effect may be stated in two propositions. First, the enactment is such that in a case like the present there is in the Act a clear and comprehensive scheme laid down (what LORD SUMNER called a modus operandi (8)) involving positive duties imposed by Parliament on the local authority and a precise formulation of the way in which the consequent powers are to be exercised, and, secondly, that as regards these duties and powers the discretion is conferred on the authority by the words—" appears to them "—which have occured in the citations that I have made. The meaning of that phrase was expounded by LORD GODDARD, C.J., in *Re A.B.* (*an infant*) (9), to which I shall return, as meaning "appears to the satisfaction of the local authority", and that is a formula which, as LORD GODDARD, C.J., pointed out, must be taken to confer an absolute discretion on the person or authority concerned provided it is exercised bona fide. LORD GODDARD, C.J., in that respect followed the decisions of this court in *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* (10) and the later case of *Carltona, Ltd.* v. *Works Comrs.* (11). Counsel for the appellant has said that the relevant committee of this or any other local authority is, after all, as he put it, only a conglomeration of persons who may perhaps act by a majority. It may be added also that since human beings are fallible there may be cases in which a local authority acting by its committee may be moved by improper motives, for example, of personal hostility to some person concerned so that the resolution or decisions they arrived at can be impeached as not being bona fide exercises of their power. It may also be that a particular visitor might act from some similar motives not properly to be justified. In the present case, however, no such suggestions have been made and there is no attack whatever on the propriety of anything that the local authority has done or of the motives behind those actions. In the result all that has been suggested and can be suggested is that the decisions reached by the local authority or their officers on what appeared to them to be the best interests of the child are, or could, or might be held, on review by the court, to be wrong.

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(4) Viz., rules under s. 84 (2) of the Children and Young Persons Act, 1933.

(5) The Children and Young Persons (Boarding-Out) Rules, 1946 (S. R. & O. 1946 No. 2083).

(6) S.R. & O. 1946 No. 2083; see 11 HALSBURY'S STATUTORY INSTRUMENTS 222.

(7) S.I. 1955 No. 1377.

(8) See p. 791, letter D, ante.

(9) [1954] 2 All E.R. 287; [1954] 2 Q.B. 385.

On those premises, that is to say in the absence of any challenge as to the propriety of what the local authority or its officers have done as distinct from their wisdom, I feel compelled, by the clear indication of the language to which I have alluded in the statute, to conclude that this matter of judging the present best interests of the child in the circumstances of this case has been placed by Parliament in the exclusive jurisdiction of the local authority. Counsel for the appellant conceded that on the premises, as I have stated them, the onus would be heavy on him to persuade the Chancery courts to override or disregard the conclusions of the local authority. That argument and that concession appear to me to involve counsel in something of a dilemma. For the purposes of deciding the immediate questions which now have been raised, either the prerogative jurisdiction survives and exists or it does not; and if it does survive and exist, then the decision as to what now is in the best interests of the child must rest not with the local authority, but with the court. There seems to me to be no escape from that result. I think it also necessary to observe here the position of the foster parent. The fact that she originally was kind enough to undertake to look after this child voluntarily is in the present circumstances in my view no longer relevant. I am not, of course, to be taken as suggesting anything whatever adverse to her conduct in regard to the child. But her position is in truth equivalent to that of a nurse to whom the child has been temporarily committed by the local authority acting in loco parentis and on the terms of the undertaking given in accordance with the statutory regulations—a state of affairs, as I think, within the express contemplation and precise formulation of the provisions of the statute.

Let me repeat that I wish in this case to adhere strictly to the facts before us. This is not a case in which application to make the child a ward of court has been made by some person altogether outside the scope of the scheme of the Act or in regard to something outside its contemplation, e.g., the question of the marriage of the infant or having to do with its property. I must not be taken, therefore, to be laying down any general proposition intended to apply to other or imagined sets of circumstances which may or may not be held to be within the scope and intendment of the Act of 1948. These cases will be dealt with when the need to deal with them arises. For it is notorious that, as was stated by a distinguished American judge (12) in regard to legislation, circumstances do from time to time occur which might be said to be "not anticipated by most gifted A legislative imagination." Nor am I saying that in other cases it might not be proper, as it would be competent, for the court to decide that a child should remain a ward of court even though the court did not then seek to interfere in any way with what the local authority had decided should be done. I confine myself to saying that the state of affairs which is before us is one which is within the strict contemplation and comprehensive provisions of the Act of 1948, as I interpret it, B and in the absence of any impeachment of the propriety of what has been done by the local authority or their representatives, the result in this case seems to me to be that the old prerogative jurisdiction must be treated as pro tanto restricted and the proper order to make is that which CROSS, J., made, viz., to declare that the infant should cease to be a ward of court.

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(10) [1943] 2 All E.R. 546.

(11) [1943] 2 All E.R. 560.

(12) FELIX FRANKFURTER, J., in SOME REFLECTIONS ON THE READING OF STATUTES (Sixth Annual Cardozo Lecture 1947), p. 7.

I have referred earlier to *Re A.B.* (*an infant*) (13), and it is proper that I should C make some further references to it. That was also a case in which a child had been committed to a foster mother on the terms of an agreement and undertaking entirely comparable to those in the present case, save that the agreement and undertaking were in accordance with the rules of 1946 instead of the present regulations of 1955. In that case the local authority who had assumed care of the child had required delivery of the child to the corporation in order that the D corporation might send the child to another home. The foster mother declined to deliver the child up, and the proceedings were not by way of ward of court proceedings but by way of habeas corpus proceedings before the Divisional Court of the Queen's Bench Division. It was the decision of the court that in the circumstances of that case the statute had comprehensively covered the case and that therefore any discretion in the court had been displaced by E the discretion of the local authority. I read two passages from the judgment of LORD GODDARD, C.J. Having referred earlier to the argument put forward that the court should exercise the prerogative right which in this case is invoked in the Chancery court and that there was nothing to restrict or oust that jurisdiction, LORD GODDARD, C.J. said (14):

> "The Act of 1948 not only enables, but directs the local authority to act F without an order of the court. In the present case, having acted in accordance with the statute, the local authority proceeded to take the steps which Parliament by the combined effect of the Act and the statutory rules and orders has directed them to take, that is, to board the child out with foster parents on the foster parents giving an undertaking to return the child if so required. I cannot see, under those circumstances, how this court can G step in and say that as between the local authority and the foster parents, and contrary to the wishes of the local authority, we can order the child to remain with the foster parents. To do so would be to usurp the duties which are laid on the local authority by the Act of Parliament, and we should be substituting our own view as to what was right for the child as against the view of the local authority. It would be quite contrary to the whole tenor H of Part 1 and Part 2 of the Act of 1948 for this court to assume the duty of reviewing the discretion of the local authority, and substituting their own opinion as to what was for the benefit of the child."

Then later he said (15):

> "I put my judgment in this way: first, as the child got into the possession of the foster parents simply by virtue of the machinery of the Children Act, I 1948, and the rules, one of the statutory provisions being that the child is to be returned to the local authority if they demand it, there is no answer to the claim by the local authority when they say: 'Give us back the child'. Parliament did not consider, nor will this court presume, that the local authority are not proper persons to have the child back."

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(13) [1954] 2 All E.R. 287; [1954] 2 Q.B. 385.
(14) [1954] 2 Q.B. at p. 396; [1954] 2 All E.R. at p. 290.
(15) [1954] 2 Q.B. at p. 398; [1954] 2 All E.R. at p. 291.

I cite also one sentence from the judgment of DONOVAN, J., who said (16):

> " Thus far, at any rate, Parliament has entrusted the welfare of the child to the local authority, and to that extent the prerogative right to secure the welfare of the child is, in my view, by necessary implication, restricted."

Counsel for the appellant challenged the validity of that decision, but in my judgment it should be supported and was correct. Though the prerogative jurisdiction was referred to, the case was not one, as I have said, in which the child was a ward, but I find nothing in the judgment involving in its result that in all cases of children within the comprehension of the Act of 1948 it necessarily follows that the prerogative jurisdiction exercised by the Chancery Division is for all purposes ousted.

It may perhaps be useful for me to add by way of summary the following:

(i) The prerogative right of the Queen as parens patriae in relation to infants within the realm is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948: in particular the power to make an infant a ward of court by invocation of s. 9 of the Act of 1949 is unaffected.

(ii) But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and in a case such as the present normally will, order that the child cease to be a ward of court. This result will occasion no surprise to those familiar with wardship proceedings, for in many cases where infants are made wards of court, the directions of the court are sought only on particular matters, such, e.g., as the place of education or to control the activities of the infant in relation to marriage or undesirable associations where a united parental control has failed; in such cases the court makes no order as to the custody, care or maintenance, for that remains in the hands of unimpeachable parents and the court does not interfere in relation to such matters

(iii) There remains the right (and duty) of the judge in whom the prerogative power is vested, to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties.

The present case, as I have I hope indicated sufficiently, is in my judgment not within the third proposition which I have stated. In this case no challenge is made as to the propriety of the exercise of the powers by the local authority before us and on the facts before us there can be no object at this stage in maintaining the infant as a ward of court. The power to order that a ward should cease to be a ward has been frequently and usefully exercised since that power was conferred in 1949, and unless there is some real object to be achieved in maintaining the infant as a ward, there is in my view no ground for letting him continue so to be. It is much better to order that he cease to be a ward. If some incident should occur in the future which should make it desirable that he should again become a ward, steps to that end can be instantly taken.

For the reasons which I have tried to express, I think that the learned judge rightly made the order appealed from and I would, therefore, dismiss the appeal.

UPJOHN, L.J.: I agree and do not think that I can usefully add anything.

PEARSON, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Southall & Co.*, Birmingham (for the foster mother); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Birmingham (for the local authority).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(16) [1954] 2 All E.R. at p. 293; [1954] 2 Q.B. at p. 401.

Re E. J. MOREL (1934), LTD.

[CHANCERY DIVISION (Buckley, J.), February 7, 8, 1961.]

Company — Winding-up — Proof — Preferential payment — Bank — Company having three accounts with bank, one frozen account, one current account and a wages account—Frozen account in debt—Current account always in credit—Indebtedness on wages account kept in balance with current account so that indebtedness on frozen account could be reduced from time to time—Whether bank entitled to rank preferentially in respect of debit on wages account—Mutual dealings, credit and set-off—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 319 (4), *s.* 317—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 31.

Bank—Account—Several accounts of one customer—One frozen account, a current account and a wages account—Current and wages accounts interdependent, credit balance on one limiting debit balance on the other—Whether bank entitled to combine the three accounts on the winding-up of the customer, a limited company—Whether bank entitled to rank as preferential creditor for the debit on the wages account—Mutual dealings, credit and set-off—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 319 (4), *s.* 317—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 31.

A company originally had one account with a bank, which became overdrawn. An arrangement, the purpose of which was to reduce the company's indebtedness to the bank, was reached whereby the existing account (then re-named No. 1 account) was frozen, and the company opened a No. 2 account (operated as the company's current account) and a wages account with the bank. The No. 1 account was not operated except that from time to time sums were transferred to it from the No. 2 account to reduce the debit. The No. 2 account was maintained in credit in excess of the debit on the wages account. Money for wages was drawn monthly, and whenever a debit on the wages account became more than four months old, the amount of the debit was transferred from the No. 2 account to the wages account. On June 9, 1958, the company went into compulsory liquidation. At that date the company's debit balance on No. 1 account was £1,839; its credit balance on No. 2 account was £1,544 12s. 4d. and its debit balance on the wages account was £1,623 11s. 11d. The bank lodged a proof in the liquidation for £1,917 19s. 7d. made up by deducting the credit of £1,544 12s. 4d. on No. 2 account from the debit of £1,839 on the No. 1 account and adding the balance (£294 7s. 8d.) to the debit of £1,623 11s. 11d. on the wages account. The bank claimed that, of the total sum for which it proved, a part, viz., £910 14s. 6d. was preferential as representing advances made for the purpose of paying wages to employees under the provisions of s. 319 (4) of the Companies Act, 1948*. The total of the amounts paid by the company to employees for wages and holiday remuneration in the preceding four months was £910 14s. 6d. The liquidator rejected the claim to rank preferentially to the extent of £910 14s. 6d. and admitted it to the extent of £78 19s. 7d., a figure reached by applying what the liquidator admitted to be the true credit balance on the No. 2 account in part satisfaction of what he admitted to be the true debit balance on the wages account.

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* Section 319 (4) reads: " Where any payment has been made—(a) to any clerk, servant, workman or labourer in the employment of a company, on account of wages or salary; or (b) to any such clerk, servant, workman or labourer or, in the case of his death, to any other person in his right, on account of accrued holiday remuneration; out of money advanced by some person for that purpose, the person by whom the money was advanced shall in a winding-up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which the clerk, servant, workman or labourer, or other person in his right, would have been entitled to priority in the winding-up has been diminished by reason of the payment having been made."

Held: the bank was entitled to rank as preferential creditor for £78 19s. 7d., not for £910 14s. 6d., for the following reasons—

(i) (a) although a banker could combine several current accounts of one customer in whatever way the banker chose and could treat them as one, yet he could not combine with current accounts an account such as the No. 1 account which was not a current account (see p. 803, letter C, post).

Dictum of Scrutton, L.J., in *Bradford Old Bank, Ltd.* v. *Sutcliffe* ([1918] 2 K.B. at p. 847) applied.

(b) having regard to the arrangement between the bank and the company the No. 2 account and the wages account were really one account, for the accounts were truly interdependent, such balance between them being always preserved as would result in the credit on the No. 2 account covering the debit on the wages account; and, therefore, the bank had never made advances when it met the company's cheques for wages, for the company was, in substance, drawing from its own moneys credited in No. 2 account (see p. 803, letters D to H, post).

(ii) if, however, the company's three accounts with the bank should all be treated as separate accounts, and the set-off provisions (s. 31 of the Bankruptcy Act, 1914*, as applied by the Companies Act, 1948, s. 317†) were applied, and if it were assumed that all moneys debited on the wages account were advanced to the company for paying wages, then, again, the bank would be left with preferential right in respect only of so much of the debit on the wages account as remained after setting off against that debit the credit balance on No. 2 account, viz., in respect only of £78 19s. 7d. (see p. 805, letter C, post); for a debtor's credit balance should be set primarily against such of his indebtedness as ranked preferentially, since by set-off the creditor obtained payment in full of what was set off (see p. 805, letter A, post).

[As to the preferential right of a person advancing pay of clerk or servant, see 6 Halsbury's Laws (3rd Edn.) 666, para. 1316; and for cases on the subject, see 10 Digest (Repl.) 994-997, *6836-6851.*

As to set-off in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 480, para. 952.

For the Companies Act, 1948, s. 317, s. 319 (4), see 3 Halsbury's Statutes (2nd Edn.) 698, 700.

For the Bankruptcy Act, 1914, s. 31, see 2 Halsbury's Statutes (2nd Edn.) 365.]

Cases referred to:

Bradford Old Bank, Ltd. v. *Sutcliffe*, [1918] 2 K.B. 833; 88 L.J.K.B. 85; 119 L.T. 727; 3 Digest (Repl.) 296, *914.*

Devaynes v. *Noble, Clayton's Case*, (1816), 1 Mer. 572; 32 E.R. 781; 3 Digest (Repl.) 192, *370.*

Garnett v. *McKewan*, (1872), L.R. 8 Exch. 10; 42 L.J.Ex. 1; 27 L.T. 560; 3 Digest (Repl.) 243, *642.*

Primrose (Builders), Ltd., Re, [1950] 2 All E.R. 334; [1950] Ch. 561; 10 Digest (Repl.) 996, *6851.*

Originating Summons.

This was an application by originating summons dated June 5, 1959, by Midland Bank, Ltd., a creditor of E. J. Morel (1934), Ltd., for an order that it might be at liberty to amend its proof of debt so as to claim to rank preferentially for the sums of £66 6s. and £55 17s. 2d. in addition to the sum of £910 14s. 6d. therein claimed as ranking preferentially, making a total preferential claim of £1,032 17s. 8d.; and for an order that the decision of the respondent, Daniel Mahony, the liquidator of E. J. Morel (1934), Ltd., whereby he admitted the proof of the applicant in the above matter for the sum of £1,917 19s. 7d., but rejected its claim to rank preferentially to the extent of £910 14s. 6d. and admitted such claim to the extent of £78 19s. 7d. only, might be varied and that the proof as amended might be ordered to be admitted to rank preferentially to the extent of £1,032 17s. 8d. The facts appear in the judgment.

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* See footnote (8), p. 804, post.

† See footnote (7), p. 804, post.

A. L. Figgis for the applicant, Midland Bank, Ltd.

Sir Lynn Ungoed-Thomas, Q.C., and *Muir Hunter* for the respondent, the liquidator.

BUCKLEY, J.: This is an appeal by Midland Bank, Ltd. against the decision of the liquidator of the company, E. J. Morel (1934), Ltd., so far as he rejected their claim to be preferential creditors in the sum of £910 14s. 6d. The company went into compulsory liquidation on June 9, 1958. At that date, it had three accounts with the bank, a No. 1 account which at that date was in debit to the extent of £1,839, a No. 2 account, which was in credit to a sum of either £1,292 10s. 11d. or £1,544 12s. 4d. and a wages account, which was in debit in a sum of either £1,371 10s. 6d. or £1,623 11s. 11d. The alternative figures which I have stated for the position on the No. 2 account and the wages account do not, I think, affect anything which I have to consider; they depend on whether certain transfers that were made in the accounts after the date of the winding-up were proper or not.

On those figures, the bank was, on over-all balance, a creditor of the company in the sum of £1,917 19s. 7d., and that is common ground. What is not common ground is to what extent that debt ought, in the circumstances, to be regarded as preferential under s. 319 (4) of the Companies Act, 1948, which relates to moneys advanced for the purpose of paying wages. The bank lodged a proof for £1,917 19s. 7d. made up as follows: No. 1 account, debit £1,839; deduct No. 2 account credit £1,544 12s. 4d., leaving a balance of £294 7s. 8d.; add wages account debit £1,623 11s. 11d. making a total of the amount proved for. They added a note to their proof: We claim as preferential part of that sum, viz., £910 14s. 6d., representing advances made for the purpose of payment of wages.

The liquidator, by his notice of rejection, rejected so much of the proof as claimed that the sum of £910 14s. 6d. was payable preferentially, and he rejected that on the following grounds: (i) that the bank were not entitled to combine their three accounts in the manner shown; (ii) that the debit balance on the wages account as at the date of the winding-up order was not £1,623 11s. 11d. as alleged, but £1,371 10s. 6d. and that the bank were not entitled thereafter to adjust the account in the way to which I have referred; (iii) that although the sum of £910 14s. 6d. represents the net aggregate total of the amounts which during four months preceding the winding-up were paid to employees of the company by way of wages and holiday remuneration which, if not paid, would have been preferential debts in the winding-up, and which derived from moneys drawn from the company's wages account, yet the said sum could not be claimed by the bank as preferential as having been advanced by the bank to the company and not repaid, until the bank had applied in satisfaction of the true debit balance on the wages account, the true credit balance on the No. 2 account; (iv) that on such application a debit balance of £78 19s. 7d. would remain on the wages account, which the liquidator was willing to admit as preferential; (v) further or in the alternative that the credit balance on the No. 2 account constituted a security in the hands of the bank to which the bank should first have recourse to satisfy such preferential debt as the bank might be entitled to, before seeking to prove therefor in the winding-up; and (vi) further or in the alternative, that the liquidator and the unsecured creditors of the company in the winding-up were entitled to have the bank's securities marshalled, namely, the credit balance and the bank's right to prove preferentially in the winding-up, so as to throw on the credit balance firstly any preferential debt to which the bank might be entitled, and only thereafter the bank's unsecured debt of £1,839, i.e., the debit balance on the No. 1 account.

Prior to May, 1952, the company maintained only one account with the bank which was substantially overdrawn, and was guaranteed by a certain Mr. Morel as guarantor of the whole of the company's indebtedness to the bank subject to a limit of £12,000. On June 13, 1952, the bank demanded payment by Mr. Morel of the amount then due under his guarantee, but this was not paid. It was then arranged, without prejudice to the liability of the guarantor, that the liability of the company to the bank should be progressively reduced by the company, and in that connexion the existing account, which was then named the No. 1 account, was ruled off and frozen, and this since that date ceased to be an account that the company operated in any way whatsoever, except by transferring from time to time sums from the No. 2 account in reduction of the amount due on the No. 1 account. The company opened a new current account with the bank called the No. 2 account, which became its normal business account. That account was in fact opened on May 19, 1952, earlier than the date when the demand for payment that I have referred to was made, but I do not think anything turns on that date. On May 6 the company opened a third account at the bank known as the wages account, and that account was used in a way which I will explain for providing moneys to pay wages, and some other similar liabilities of the company.

Since matters were rearranged in this way, the bank has never been willing to permit the total indebtedness of the company to become increased, and in fact it was progressively reduced. The No. 2 account has in the main, and as a general rule, been maintained in credit in excess of the amount to which the wages account has from time to time been in debit. The wages moneys were drawn monthly from the wages account, and whenever a debit to the wages account became more than four months' old, a transfer of the amount of that debit was made from the No. 2 account to the wages account, so that subject to certain errors which crept into the operating of the scheme, which I need not go into, the debit on the wages account always represented the total of the four last amounts drawn monthly for wages and the other similar expenditure by the company.

When the credit position on the No. 2 account and the wages account looked at together became sufficiently favourable, the bank and the company would together agree to a transfer from the No. 2 account to the No. 1 account in reduction of the amount outstanding on the debit balance of the No. 1 account. The adjustments which were made between the No. 2 account and the wages account after the date of the winding-up order resulted from some errors which were discovered on perusing the accounts in the operation of the arrangement that I have described with regard to the wages account. Nothing now turns on those figures.

I have evidence before me from Mr. W. G. A. Burgess, the former manager of the West Smithfield branch of the bank, which was the branch at which these accounts were maintained, who was manager of the branch until August, 1957, and from a gentleman who is now manager of that branch, and has been since August, 1957. They both depose to the fact that throughout the period from May, 1952, until the commencement of the winding-up, the bank was continually pressing the company to reduce its over-all indebtedness to the bank, and that whenever the company had any surplus funds available for the purpose, the bank insisted that a transfer should be made from the No. 2 account to the credit of the No. 1 account in permanent reduction of the overdraft on that account. They both say that they would not have permitted the total indebtedness of the company to the bank to increase at any time beyond the amount for the time being standing to the debit of the No. 1 account. Mr. Burgess also says that the arrangement with regard to the management of the wages account and transfers from the No. 2 account to the credit of the wages account which I have described, was one which the bank agreed with the directors of the company, and they both say that if there had not been moneys in the No. 2

account sufficient by transfer each month to repay the sum which had been A paid out of the wages account four months previously, they would not have permitted any further sums to be drawn from the bank for the purpose of providing wages.

Those two gentlemen were cross-examined before me, and it is clear from their evidence, both on affidavit and the evidence they gave in cross-examination, that the transfers from the No. 2 account to the No. 1 account were transfers B made from time to time on the instructions of the company. True, they were transfers that were made at the instance of the bank managers, who were pressing for a reduction of the indebtedness, but they were not transfers made on the initiative of the bank alone; they were transfers made on the instructions of the customer, the company. It is also clear, I think, from their evidence that the whole policy with regard to the operation of the No. 2 account and the wages C account was that the two accounts taken together should always be in credit, possibly with this qualification, that if the bank manager knew that the company was shortly to receive a substantial sum in the ordinary course of business which would restore the position, he might have allowed those two accounts taken together to have become slightly in debit. The bank manager was evidently always closely informed about the progress of the company's business; I was D told by Mr. Burgess that he knew of the orders the company was placing and so forth, and that he watched the business and the account very carefully in order to ensure that the indebtedness of the company should never be increased—on the contrary, the object was that it should be reduced. What they were concerned to see was that the indebtedness of the company never exceeded the amount for the time being standing to the debit of the No. 1 account, that is to E say, the No. 2 account and the wages account looked at together were never to give rise to indebtedness by the company to the bank.

In these circumstances, counsel for the bank says that the bank is admitted to be a creditor for the sum of £1,917 19s. 7d.; he says that it is shown that during the four months before the winding-up order, the bank provided moneys, to use a neutral expression for the moment, to the extent of £910 14s. 6d. for the F payment of wages; he says that on the evidence it is admitted that those moneys were advanced for wages, and in that connexion he relies on para. 6 of the affidavit of Mr. Cooper filed on behalf of the bank, which contains a statement that " since May, 1952, only advances made by the bank to the company for the payment of wages . . . have been debited to the wages account ", and he draws attention to the fact that the liquidator, Mr. Mahony, in his affidavit, says that G he admits the facts alleged in para. 6 of Mr. Cooper's affidavit, and one of counsel's contentions was that that amounted to an admission by the liquidator that the moneys drawn by the company from the wages account were in fact moneys advanced by the bank. Even if that be the proper interpretation to put on para. 6 of Mr. Cooper's affidavit, I do not think that it is right to treat affidavits as pleadings in that sort of way. After all, pleadings can be amended on application H to the court, and affidavits cannot be amended in the same sort of way. There is an essential difference between pleadings and evidence, and I think that I have got to read these affidavits having regard to all the rest of the evidence, and see whether in fact these moneys were advances by the bank, or were not.

Counsel for the bank says that the point that these moneys were not advanced, if it be a point relied on by the liquidator, was not a point taken in his rejection I of the proof; that is true, it is not taken in terms in the rejection of the proof, but again I think that I have got to look at the whole evidence before me, and see whether, on the facts as I think that they are established by the evidence, this is a case which comes within s. 319 (4), and to what extent it comes within the subsection, and I do not think that I could properly decide the case on a technicality of that sort.

In order to justify a claim for preference under s. 319 (4), it must be shown that the moneys in respect of which preference is claimed were moneys advanced

A by the person who claims preference for the purpose of paying wages, and one of the things that I have got to decide in this case is whether on the true view of the facts, there were advances made by the bank for this purpose, or not.

Further, counsel for the bank says that the bank had a right to appropriate the credit balance on the No. 2 account against the debit balances on the No. 1 account and the wages account in such manner as it thought fit, and that it was B acting within its rights when in its proof it in effect appropriated the credit balance on the No. 2 account to repayment of the debit balance on the No. 1 account, leaving the debit balance on the wages account intact.

On the other hand, counsel for the liquidator have contended that the No. 1 account was not a current account which the bank was at liberty to combine with other current accounts of the company and treat as if they were all C one account. They say that, having regard to the whole history of the matter, it is clear that the No. 1 account was to be treated quite separately from the other two accounts. They say that the No. 2 account and the wages account were interdependent accounts operated in such a way that they were in reality one account as between the bank and its customer, the company. They say that as the No. 2 account was maintained in credit to a sufficient extent always to D cover the debit on wages account, that there were never any advances properly so called by the bank for payment of wages at all, with this exception, that at the date of the winding-up in fact there was an excess liability of £78 19s. 7d. for wages which could not be satisfied by the credit in the No. 2 account at that date. They say that except to the extent of that £78 19s. 7d. it is not proved that there were ever any advances made by the bank at all, for when the company drew E cheques on the wages account, in truth it was drawing those cheques against a credit balance on the No. 2 account, and the two accounts being treated as interdependent in that way, they must be regarded as in truth one account. They say that the No. 1 account is really of the same nature as a loan account opened by a banker with a customer; where one has an account between banker and customer which is not a current account and not intended to be operated in the F way in which a current account is operated, and at the same time the customer has a current account with the banker which is the account which he intends to use for the purpose of the current needs of his business, it would be contrary to common sense and to business practice to treat what is paid into the current account from time to time as capable of being appropriated by the bank at any moment to discharge the loan account or the frozen account, because it is of G the essence of the arrangement, they say, that the customer should know that he is able to deal with the credit balance on his current account, and to draw cheques against it for the purpose of his current needs. They say that when in such a case as the present a customer pays a cheque into his current account, he appropriates that cheque to the purposes for which that account is maintained, and makes it clear that the cheque is not intended to be used for the reduction of H the indebtedness on the other account.

I have been referred to various authorities. The first is *Re Primrose (Builders), Ltd.* (1). In that case a company had opened a current account with the National Provincial Bank, Ltd., and had been allowed to overdraw the account. The bank told the company that the overdraft must be reduced, but the company, while it was carrying on business, of course had somehow or other to pay its I wages. The way in which that was arranged was this: cheques specifically designed to provide moneys for payment of wages were presented from time to time, and on every such occasion the bank manager or his assistant required to be satisfied that the company would very shortly receive moneys of a sufficient amount to cover the amount of the wages cheque which the bank was being asked to meet. When they were so satisfied, the bank paid out on the cheque, and the company was thus put in funds to pay its wages, and in due course, in the ordinary course of business the further receipts came in and the position was restored in that way. The question for decision in the case was whether in such a case the bank could be said to be making advances for the payment of wages, or whether there was some special arrangement or agreement by which the moneys which the company was expecting to receive were earmarked to repay the amounts that the bank had provided for payment of wages, so that at the winding-up no amounts were due in respect of the wages cheques.

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(1) [1950] 2 All E.R. 334; [1950] Ch. 561.

In the first place, I would say this about *Re Primrose (Builders), Ltd.* (2). There was only one account with which the court was concerned; the account was always overdrawn, and there could be no question but that when the bank paid on the wages cheque, it was making an advance. The only question was whether those advances were still outstanding at the time of the winding-up, or whether, having regard to the course of business, they ought to be treated as having been repaid. Secondly, the question there really was not whether there were advances or not, but whether there had been some special agreement by which these particular sums advanced by the company had been repaid. I do not think that I find in *Re Primrose (Builders), Ltd.* (2) anything that assists me to decide the present case.

Then counsel for the bank referred me to *Garnett* v. *McKewan* (3), in support of the proposition that a banker has the right at any time to combine accounts of his customer in such a way as the banker thinks fit. In that case the plaintiff had two accounts with the bank, each at a different branch. He had a credit balance on one account, and a debit balance on the other account; if both accounts were looked at together, he was indebted to the bank. He presented a cheque for payment at the branch at which he was in credit, but the bank refused to honour it; the bank, without notice to him, transferred his credit at one branch to the other branch, thus leaving him without a credit at one branch, and still with a debit at the other branch, and then they proceeded to refuse to honour his cheques. The decision of the court in that case was that the bank was perfectly entitled to combine the accounts in that way, and was not bound to pay on the cheques, there being no special agreement or usage which showed that there was any other arrangement between the bank and the customer. I think that counsel for the liquidator is right in saying that that principle is applicable where the accounts are current accounts, but is not applicable where one of the accounts is not a current account but is a loan account, or, I think, an account such as the No. 1 account here, which having been frozen in the way that I have described, and being no longer capable of being operated in the ordinary way as a current account, partakes of the character of a loan account.

In that connexion, counsel for the liquidator referred me to *Bradford Old Bank, Ltd.* v. *Sutcliffe* (4), in which the bank had agreed to grant a company a fixed loan of £3,600 and also to permit an overdraft which together were to be secured by the guarantee of the directors and by the deposit of debentures. Unhappily one of the guarantors became insane, and consequently his liability on his guarantee became fixed at a date in the year 1899. The question which was argued in the case was whether as a result of the subsequent operation of the current account, it could be said that the amount on the loan account had become discharged so that the estate of the director in question was relieved from his obligation under the guarantee. Therefore, the question really was whether the two accounts could be treated as though they were one, payments into the current account being treated under the rule in *Devaynes* v. *Noble, Clayton's Case* (5) as being payments in part discharge of the loan on the loan account. The court came to the conclusion, having regard to the arrangement between the parties, that the payments into the current account were appropriated to that account, and could not be taken in reduction of the loan account. It will be sufficient if I read a short passage from the judgment of SCRUTTON, L.J. (6):

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(2) [1950] 2 All E.R. 334; [1950] Ch. 561.
(3) (1872), L.R. 8 Exch. 10.
(4) [1918] 2 K.B. 833.
(5) (1816), 1 Mer. 572.
(6) [1918] 2 K.B. at p. 847.

A "The first point argued appears to involve a misunderstanding of the relation of loan and current accounts. The sums paid into the current account are appropriated by the customer to that account, and cannot be used by the bank in discharge of the loan account without the consent of the customer. No customer could otherwise have any security in drawing a cheque on his current account if he had a loan account greater than his B credit balance on current account. The £3,400 debit balance on loan account cannot be treated as discharged by subsequent payments into the current account."

In my judgment that case demonstrates that there is an important difference between a case where a customer has several current accounts, and a case where C a customer has an account which is not a current account, and one or more current accounts in the bank. In the first case where all the accounts are current, the banker can combine those accounts in whatever way he chooses, treating them all as being one account of his relationship with his customer. In the other case the accounts are of a different character, and the banker is not free to combine them in that way.

D It seems to me, having regard to the course of conduct of the parties in the present case, that there is substance in the submission of counsel for the liquidator that the No. 2 account and the wages account were in substance one account as between the bank and the company. The whole object of this arrangement was to ensure that the indebtedness of the company to the bank should never exceed the amount of the debit balance for the time being outstanding E on the No. 1 account, and that object was achieved by keeping the wages account and the No. 2 account always in balance with one another in such a way that the credit on the No. 2 account was always sufficient to cover the debit on the wages account. The payments which the company was permitted to make out of the wages account and out of the No. 2 account depended entirely on that balance between those two accounts being maintained, and I think that F those two accounts were truly interdependent so that the bank would never have met a cheque drawn on either one or the other without considering the combined position of those two accounts taken together, and if one reaches that conclusion, the sensible and the right way to regard the matter is to treat those two accounts as though they were in reality one. If that is right then I think that there is substance in the contention that the bank never did in fact make advances to G meet the wages cheques; the company when it drew on its wages account was really drawing its own moneys standing to the credit of the No. 2 account, and the fact that the accounts were kept as two separate accounts, one showing a credit which was not affected by a cheque drawn on the wages account, and the other showing the debit, which was not affected by payments into the No. 2 account, does not seem to me really to touch the substance of the matter.

H The right way to look at the position is to regard those two accounts as being one account, and payments out of them as being payments made from the company's own moneys, so long as there was a credit balance taking both accounts together. The fact that there was a debit on the No. 1 account throughout this period does not seem to me to alter that position at all, because it is clear that the arrangement between the parties was that that debt of the company to the I bank was frozen in 1952, and was treated as a separate liability altogether from the position on the current accounts of the company, and that liability was one which was only reduced from time to time when the company and the bank reached agreement about transfers from the No. 2 account to the No. 1 account. The No. 1 account was operated quite separately and distinctly from the No. 2 account and the wages account. So that, even if at any time payments were made out of the wages account which could properly be described as advances, those advances would have been repaid by credits paid into the No. 2 account before the winding-up commenced; but more probably the proper view is that in fact there were never advances at all except to the extent that at the final date the debit on the wages account exceeded the credit on the No. 2 account, that is to say the sum of £78 19s. 7d. That I think is really the ground numbered (iii) on which the liquidator rejected the claim for preference.

Whether that was really his ground or not, I think that his rejection was well founded. In case the matter should go further, and I were to be held to be wrong in the view that I have taken about the No. 2 account and the wages account, I ought to mention another argument which was put before me with regard to the application of s. 317 of the Companies Act, 1948 (7), and s. 31 of the Bankruptcy Act, 1914, to a case such as this. Section 317 of the Companies Act, 1948, makes s. 31 of the Bankruptcy Act, 1914 (8), applicable in a company's winding-up so far as mutual credits and set-off are concerned.

If it be right to regard all three accounts of the company as separate accounts, of course, there has to be a set-off of the credit on the No. 2 account against the debits on the No. 1 account and the wages account. If I am wrong in treating the wages account and the No. 2 account as being really one account for this purpose, a difficult problem arises how the resulting balance which is left after the set-off has been made ought to be treated as made up. On this part of the case, I will assume that it is established that the debit balance on the wages account is a balance in respect of sums advanced by the bank for the purpose of paying wages within s. 319 (4), and, therefore, if there were no set-off, it would all rank as a preferential debt.

The debit on the No. 1 account is not preferential. When you set off the credit balance on the No. 2 account against those two debits, to what extent, if at all, ought the resulting balance to be treated as representing a debt which can qualify to be treated as preferential? Counsel for the bank says that it is for the liquidator to show that admitted advances for payment of wages have been repaid by the company, and that in these circumstances he cannot show that the resulting balance does not all consist of moneys advanced for the purpose of paying wages.

On the other hand, counsel for the liquidator says that when the statutory set-off has been carried out, all the components have lost their identity, and the resulting balance cannot be said to consist either wholly or as to any ascertainable extent of a debt which qualifies for preference, unless the credit which is to be set off against the debit is less than the debit in respect of advances for wages, in which case manifestly some part of the advance for wages must remain unsatisfied. He says that in those circumstances the person who is claiming preference cannot establish his claim to preference, because he cannot identify the character of any part of the resulting balance. In my view, the right solution for this problem is to treat the balance which results from the set-off as being non-preferential except to the extent that it can be demonstrated that the credit is insufficient to discharge the preferential claim in full. The result of the set-off is to give the creditor payment in full of his claim to the extent of the set-off, and in that way he is better off than creditors who merely have to rely on their right to prove and get a dividend. If he obtains, by set-off, payment in full, it seems reasonable that that payment in full should be treated as being in respect of that part of his debt which would rank first in priority. Moreover, the fact that if the preferential claim exceeds the amount of the credit to be set off against it, there would be some part of the preferential claim which demonstrably had not been paid off, and could still claim preference, is a circumstance that seems to demonstrate that my method of approaching the solution is the right one.

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(7) Section 317 reads as follows: "In the winding-up of an insolvent company registered in England the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up and make such claims against the company as they respectively are entitled to by virtue of this section."

(8) Section 31 is as follows: "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him."

If, therefore, I were wrong in holding that the wages account and the No. 2 account ought for the present purpose to be treated as one account, I should take the view that the effect of applying the mutual credit and set-off provision to circumstances of this kind would be that the bank would be left with its preferential claim only in respect of so much of its original preferential right (if any) as remained available after setting-off the credit on the No. 2 account against that preferential claim.

Order accordingly.

Solicitors: *Wild, Collins & Crosse* (for the applicant, Midland Bank, Ltd.); *Herbert Baron & Co.* (for the respondent, the liquidator).

[*Reported by* Jenifer Sandell, *Barrister-at-Law.*]

Re STIRRUP'S CONTRACT.

[Chancery Division (Wilberforce, J.), February 10, 1961.]

Deed—Assent as—Intention to pass legal estate—Whether instrument effective as a conveyance—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 52 (1).

Sale of Land—Title—Defect—Assent used where conveyance required—Assent executed as a deed—Effectiveness to convey legal estate—Whether purchaser entitled to have formal defect cured—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 52 (1), *s.* 63 (1), *s.* 205 (i) (ii).

In 1932 land forming part of the estate of H. deceased was conveyed to R. and D., her personal representatives. D. survived R. and died in 1957, appointing a bank as his executor. The bank thus became the personal representative by representation of H. As, however, the land had been conveyed to R. and D., s. 36 (1) of the Administration of Estates Act, 1925, did not empower, so it was conceded, the bank to vest the legal estate in the land by means of an assent in the beneficiary entitled to the land under the will of H., but the proper method of transferring the legal estate was by conveyance. By a deed, described as an assent, dated Oct. 28, 1958, the bank as personal representative of D. assented to the vesting of the land in J. in fee simple. The assent recited that J. was entitled to have the land so vested in her. On the question, raised on a subsequent sale of the land, whether the assent was effective,

Held: (i) the deed of assent was effective to pass the legal estate then vested in the bank because (a) the intention to pass the legal estate was clear, and (b) the assent, being a deed, complied with the requirement of s. 52 (1) of the Law of Property Act, 1925, which was the sole formal requirement of the Act, with the consequence that, having regard to s. 63 (1) and the definition of "conveyance" in s. 205 (1) (ii), the deed was effective to pass whatever estate the bank had.

Dicta of Sir Thomas Plumer, M.R., in *Marquis of Cholmondeley* v. *Lord Clinton* ((1820), 2 Jac. & W. at p. 93) Sir Edward Sugden, L.C., in *Clayton*

v. *Earl Glengall* ((1841), 1 Dr. & War. at p. 17) and Lord Mansfield, C.J., in *Goodtitle d. Edwards* v. *Bailey* ((1777), 2 Cowp. at p. 600) applied.

(ii) the purchaser was not entitled to have the formal defect of the assent corrected, for the extent of its right was only to be satisfied that its vendor was shown to be seised of the estate sold and to be in the position, without possibility of dispute or litigation, to pass that estate to the purchaser.

[As to when a deed is necessary under statute, see 11 Halsbury's Laws (3rd Edn.) 330, para. 525; and for cases on the subject, see 17 Digest (Repl.) 260-268, *643-723*.

As to a conveyance passing all the title that the grantor has, see 11 Halsbury's Laws (3rd Edn.) 436, para. 699.

For the Law of Property Act, 1925, s. 52 (1), s. 63 (1) and s. 205 (1), see 20 Halsbury's Statutes (2nd Edn.) 549, 563 and 831 respectively.]

Cases referred to:

Cholmondeley (*Marquis*) v. *Clinton* (*Lord*), (1820), 2 Jac. & W. 1; 37 E.R. 527; *affd.*, (1821), 4 Bli. 1; 17 Digest (Repl.) 268, *719*.

Clayton v. *Glengall* (*Earl*), (1841), 1 Dr. & War. 1; 40 Digest (Repl.) 684, *326*.

Edwards v. *Bailey*, *Goodtitle d.*, (1777), 2 Cowp. 597; 98 E.R. 1260; 17 Digest (Repl.) 261, *649*.

Adjourned Summons.

The applicant, Jane Helen Stirrup, vendor under a contract for sale dated Sept. 3, 1959, of the freehold dwelling-house, shop and premises known as The Beehive, Bulkeley Square, Llangefni in the county of Anglesey, to the respondent, Foel Agricultural Co-operative Society, Ltd., the purchaser, applied to the court by originating summons under s. 49 (1) of the Law of Property Act, 1925, for a declaration that a good title to the property had been shown in accordance with the contract.

By an assent, dated Oct. 28, 1958, executed by National Provincial Bank, Ltd., under seal and stamped as a deed, the bank purported to vest the property in Ruth Jones (the vendor's predecessor in title) in fee simple subject to a mortgage and a short lease. The purchaser contended that an assent was not the appropriate document to pass the legal estate from the bank to Ruth Jones and that it failed in that purpose, a conveyance being necessary. The vendor maintained that, notwithstanding that a conveyance was normally required, as this assent was an instrument under the seal of the bank and stamped as a deed and intended to take effect as such, it had passed the property to Ruth Jones, and that title had been deduced in accordance with the contract.

B. T. Buckle for the applicant, the vendor.

R. G. Woolley for the respondent, the purchaser.

WILBERFORCE, J.: This is a vendor and purchaser summons taken out in relation to a contract made on Sept. 3, 1959, whereby Jane Helen Stirrup agreed to sell to the Foel Agricultural Co-operative Society, Ltd., freehold premises known as The Beehive, Bulkeley Square, Llangefni in the county of Anglesey. The question raised is whether the vendor has shown a good title in accordance with the contract. The particular question relates to a document executed on Oct. 28, 1958, by National Provincial Bank, Ltd., and described as an assent. By that document the bank purported to pass the fee simple of the property in question to Ruth Jones (widow) who was the predecessor in title of the vendor in this case.

It is necessary to see how it was that this property came into the hands of National Provincial Bank, Ltd. For that purpose it is necessary to go back to 1908. In that year the owner of the property, one Richard Stirrup, the elder, died, having by his will devised the property to his wife for life and after her decease to his married daughter, Hannah, or Nana, Evans. The legal estate in the property vested under the law then applicable in the widow, Jane Stirrup, and remained vested in her until her death on June 5, 1930. Her executor was Richard Stirrup, junior. Meanwhile Hannah Evans had died on Sept. 17, 1925, leaving as her executors the same Richard Stirrup, junior, and David Evans. On July 20, 1932, Richard Stirrup, junior, by a conveyance conveyed the property to himself and David Evans on the trusts of the will of Hannah Evans. It is, however, common ground that it was wrong to say that the property was then held on the trusts of the will of Hannah Evans, because, as appears from a legal charge executed shortly afterwards, on Oct. 20, 1932, the administration of Hannah Evans' estate had not been completed, and consequently the capacity in which Richard Stirrup and David Evans held the property was as legal personal representatives of Hannah Evans.

Both of those legal personal representatives died, Richard Stirrup, the younger, on Sept. 15, 1943, and David Evans on Oct. 27, 1957, and National Provincial Bank, Ltd., was the executor of the last survivor, Evans. That is how they come into the picture. So that they were in effect the legal personal representatives by representation of Hannah Evans. In those circumstances National Provincial Bank, Ltd., executed the document of Oct. 28, 1958, in which was recited the conveyance of July 20, 1932, from Richard Stirrup to himself and David Evans, recited the mortgage or legal charge of Oct. 20, 1932, and various matters relating to that, recited the death of the two legal personal representatives, Richard Stirrup and David Evans, and finally recited that Ruth Jones, described as the beneficiary was entitled to have the property vested in her in fee simple, subject to the legal charge and to a certain lease. The operative part of the assent continued:

> "... the bank as personal representatives of David Tecwyn Evans deceased hereby assent to the vesting in the beneficiary [Ruth Jones] of the property described in the first schedule [the property in question in this summons] to hold the same unto the beneficiary in fee simple subject to the mortgage and subject to the lease."

The description "as personal representatives of David Tecwyn Evans" appears to be incorrect, because the capacity in which the bank were acting was as personal representatives of Hannah Evans deceased. Clause 2 of the document contained a covenant by the beneficiary to pay all moneys due under the legal charge and to observe the covenants contained in the legal charge.

In order to determine whether that assent was a correct document in law, it is necessary to refer to the Administration of Estates Act, 1925, s. 36 (1), which provides:

> "A personal representative may assent to the vesting, in any person who ... may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will ... and which devolved upon the personal representative."

It is said here, and is not disputed by either side, that in view of the wording of s. 36 (1) it was not possible for National Provincial Bank, Ltd., to execute an assent because the property had not devolved on them as personal representatives but had been conveyed to Richard Stirrup, junior, and David Evans after the death of Hannah Evans by Richard Stirrup, junior, by the conveyance of July 20, 1932. So it appears to be common ground here that the mechanism of an assent was not available to National Provincial Bank, Ltd., and that the document that should have been used in order to pass the property to Ruth Jones was a conveyance.

It is contended by the vendor, but denied by the purchaser, that notwithstanding that the document is described as an assent and that an assent was not the appropriate type of document to use, it can nevertheless take effect as a conveyance, and it is pointed out that the document is under seal (perhaps by some fortunate accident) and that, being under seal, it is effective, however it is described, to pass the fee simple of the property to Ruth Jones once it appears that it was the intention of National Provincial Bank, Ltd., as appearing from the document itself, to pass the fee simple in that way.

The argument for the vendor is put in two ways. It is first of all rested on the general law. I have been referred to various passages from NORTON ON DEEDS (7th Edn.) at pp. 52, 54, and from various authorities which are cited in order to make good the proposition there stated. I was referred in particular to a passage from a judgment of SIR THOMAS PLUMER, M.R., in *Marquis of Cholmondeley* v. *Lord Clinton* (1), in which the learned Master of the Rolls considers at some length how, once the intention of the framer of a deed can be discovered, effect may be given to the intention by the court. In particular he says (2):

> “. . . if the meaning and intention of the grantor be clearly manifested on the face of the instrument, as to the person or character intended to be the object of grant, and if the words which he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or dictum to be found which requires the court to adopt the technical sense, in opposition to the actual meaning [of] the party; on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form.”

Then reference was made to *Clayton* v. *Earl of Glengall* (3), where similar statements are made, this time by SIR EDWARD SUGDEN, L.C. It is true that the question in that case was rather a different one from what I have to consider here, viz., whether it was intended to give interest in respect of some portions; but in that case the learned lord chancellor sets out (4) at some length and with some care the principle (5) that the court should, if it is satisfied as to the intention of a document, struggle with difficulties in order to meet the intention of the parties without, of course, speculating or indulging in mere conjectures as to the intention.

Lastly, reference was made to *Goodtitle d. Edwards* v. *Bailey* (6), decided by LORD MANSFIELD, C.J., in 1777, where the following passage is found (7):

> “ The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense: that they shall operate according to the intention of the parties, if by law they may: and if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention.”

Those are general statements used in a context which is not the same as the context that I have here; but I feel that they are persuasive in this direction, that simply as a matter of general approach to this document, once one is satisfied that the intention of it was to pass the legal estate in fee simple, the court should not allow that intention to be defeated by the fact that instead of the word “ grant ” or “ conveyance ”, the word “ assent ” is used.

As to intention, it seems to me manifest that the intention of the document was to pass the legal estate in fee simple to the beneficiary. Recital 6 states that the beneficiary was entitled to the fee simple subject to the mortgage. Clause 1 of the operative part contains an habendum by which the property is expressed to be transferred to the beneficiary in fee simple, and cl. 2 is a clause by which the beneficiary assumes the obligation of the mortgage, which, of course, would be quite inappropriate unless National Provincial Bank, Ltd., were to be relieved itself of the legal estate in fee simple subject to the mortgage. So that it seems to me that, as a matter of general law, this document is amply brought within the type of case illustrated by the passages to which I have referred in which it is possible, and indeed right, for the court, having ascertained the intention of the document, to allow it to take effect notwithstanding that a wrong technical method may have been chosen.

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(1) (1820), 2 Jac. & W. at pp. 91-93.
(2) (1820), 2 Jac. & W. at p. 93.
(3) (1841), 1 Dr. & War. 1.
(4) (1841), 1 Dr. & War. at p. 14.
(5) (1841), 1 Dr. & War. at p. 17.
(6) (1777), 2 Cowp. 597.
(7) (1777), 2 Cowp. at p. 600.

However, the matter is carried further, in my judgment, by specific provisions in the Law of Property Act, 1925. Section 51 which reproduces with minor amendments provisions of the Real Property Act, 1845, states specifically, that lands lie in grant; and by sub-s. (2) provides " The use of the word grant is not necessary to convey land or to create any interest therein ". The sub-section, it is to be noted, does not say that any other word is necessary or that any limited alternative words must be used. It is purely negative and it leaves the implication quite clear that any word will do in order to pass the legal estate if the intention is so to pass it. Section 52 (1) lays down the positive requirement that unless the document intended to pass a legal estate is a deed it shall be ineffective for the purpose of passing the legal estate. That is the only positive requirement which one finds in this Act as to the form of a document necessary to transfer a legal estate, and that is complied with in this case.

Section 63 (1) states that every conveyance is effectual to pass all the estate which the conveying party has or which is intended to be so passed, and if one reads that in conjunction with the definition in s. 205 (1) (ii), in which the expression " conveyance " is stated to include an assent, that seems to produce the result that an assent, provided that it is under seal, is effective to pass whatever estate the conveying party has.

I would be reluctant to decide this case on the basis of a mechanical argument of that kind alone, but I think that on the broad framework of the Act the position is established that provided the sole formal requirement of being under seal is complied with, any document, since 1925 at any rate, is effective to pass a legal estate provided that the intention so to pass it can be ascertained.

I therefore consider on both branches of the argument that the vendor is correct in saying that although the document is described as an assent, and although admittedly the case was not one for using an assent, yet nevertheless on the intention to be ascertained from it and having regard to the statutory provisions, it is perfectly effective to pass the fee simple to the purchaser, and I propose so to declare.

I need only deal with one other point. It is said by the purchaser that it is not enough merely to show that in fact the document passes the legal estate. The purchaser is entitled to have a good title and is entitled to have his requisitions answered or any defects put in order. The answer which lies to that is that what a purchaser is entitled to is to be satisfied that his vendor is seised of the estate which he is purporting to sell, in this case the fee simple, and that he is in the position, without the possibility of dispute or litigation, to pass that fee simple to the purchaser. It is quite immaterial, in my judgment, to a purchaser whether a particular form, name or description of document is used as long as it is there to show beyond doubt that his vendor is in possession of the estate and that he is in a position to convey it without any blot or possibility of litigation to the purchaser. That, I think, the vendor establishes in this case, and therefore, in my judgment, the vendor has succeeded in showing a good title to the property in question.

Order accordingly.

Solicitors: *T. D. Jones & Co.*, agents for *Laurie & Co.*, Llangefni, Anglesey (for the applicant, the vendor); *Jaques & Co.*, agents for *Carter, Vincent & Co.*, Bangor, Caernarvon (for the respondent, the purchaser).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

BUTLER *v.* BUTLER.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), February 13, 1961.]

Divorce—Maintenance—Set-off—Debt owing from wife to husband—Husband ordered to pay to wife by way of maintenance annual sum " less tax "—Debt owing from wife to husband to be set-off against maintenance by instalments not exceeding " amount . . . awarded " to her for maintenance—Whether " amount awarded " gross annual sum or annual sum after deduction of income tax—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 10), *s.* 169 (1).

A husband and wife, who had separated, agreed that the wife should purchase the husband's interest in certain properties for £610, of which £150 should be paid forthwith to the husband. By an order of the Queen's Bench Division made by consent in proceedings under s. 17 of the Married Women's Property Act, 1882, the remainder of the purchase price was to be " set off by instalments not exceeding such amount as may be . . . awarded to the [wife] by way of . . . maintenance ". The wife obtained a decree absolute of divorce and an order for maintenance was made in the Divorce Division for the husband to pay her " £200 per annum less tax ". The husband furnished certificates of deduction of income tax, in accordance with s. 169 (1)* of the Income Tax Act, 1952, at the standard rate from the £200 annually, the total tax so deducted in one year being £85, leaving £115 payable. The certificates were used by the wife for the purpose of obtaining repayment of tax. On the question whether the wife was entitled, under the order of the Queen's Bench Division, to set off £200 or £115 annually against her debt to the husband,

Held: the wife was entitled to set off only £115 annually against her debt to the husband because the words " amount . . . awarded to the [wife] ", in the order of the Queen's Bench Division, meant the amount which the husband would have to pay in cash to the wife under the maintenance order (namely £200 less tax, i.e., £115 net), and did not include deductions for income tax (viz., £85 per annum) made pursuant to s. 169 (1) of the Income Tax Act, 1952.

Appeal allowed.

[As to deduction of income tax from annual payments made out of taxed income, see 20 HALSBURY'S LAWS (3rd Edn.) 368, 369, and 372, paras. 673, 674, and 679; and for cases on the subject, see 28 DIGEST (Repl.) 188, 189, *778-780*.

For the Income Tax Act, 1952, s. 169 (1) and s. 221, see 31 HALSBURY'S STATUTES (2nd Edn.) 162, 211.]

Case referred to:

Taylor v. *Taylor*, [1937] 3 All E.R. 571; [1938] 1 K.B. 320; 107 L.J.K.B. 340; 28 Digest (Repl.) 188, *778*.

Appeal.

This was an appeal by the husband from an order made by COLLINGWOOD, J., on Mar. 28, 1960, and varied on July 18, 1960, on a judgment summons† issued by the wife in respect of moneys alleged to be due to her under a maintenance order dated July 3, 1957.

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* By s. 169 (1) of the Income Tax Act, 1952: " Where any . . . annual payment is payable wholly out of profits or gains brought into charge to tax . . . (c) the person liable to make the payment . . . shall be entitled, on making the payment, to deduct and retain out of it a sum representing the amount of the tax thereon at the standard rate for the year in which the amount payable becomes due . . ."

The terms of s. 169 (1) (d) are printed at p. 812, letter C, post.

† If an order for maintenance is not complied with, it is enforceable by judgment summons under s. 5 of the Debtors Act, 1869. Jurisdiction as to committal orders in matrimonial causes is assigned to the Probate Division by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932 (S.R. & O. 1932 No. 503).

Under the terms of an agreed order made by Master Harwood on June 22, 1955, in proceedings between the wife and the husband under s. 17 of the Married Women's Property Act, 1882, the wife was to purchase the husband's interest in a house for the sum of £610, of which £150 was to be paid within twenty-eight days and the remainder was to be " set off by instalments not exceeding such amount as may be agreed or awarded to the [wife] by way of . . . maintenance." The £150 was paid by the wife within the time specified. On Mar. 20, 1956, the wife filed a petition for divorce. On May 15, 1956, she was granted a decree nisi which was made absolute on July 3, 1956. Under the maintenance order of July 3, 1957, the husband was ordered to pay maintenance to the wife at " the rate of £200 per annum less tax payable monthly " as from July 3, 1956. No money had been received by the wife under this order, but the husband had supplied her each year with tax deduction certificates showing that £85 a year had been deducted from the sum of £200 payable to her.

At the hearing of the wife's judgment summons, it was contended on her behalf that there was at Jan. 4, 1960, £241 7s. 5d. owing to her from the husband under the maintenance order after her debt of £460 (the balance due to him under the order of June 22, 1955) had been set off against the sum of £200 a year due to her under the maintenance order. The husband claimed that the £460 due to him from the wife had not yet been paid in full, because only £115 a year, and not £200 a year, should be credited against the maintenance payable by him. Collingwood, J., held that the sum of £200 a year was to be credited against the balance of £460 due from the wife and gave judgment for the wife for £241 7s. 5d., varied on July 18, 1960, to £144 8s. 5d. On July 18, 1960, His Lordship made an order committing the husband to prison for non-payment of the £144 8s. 5d., the order to be suspended so long as the husband paid, in addition to the amount accruing due under the maintenance order, the sum of 10s. a week until the amount of the judgment debt was discharged. By his appeal, the husband asked for the order of Mar. 28, 1960, as varied, to be set aside and the committal order to be stayed.

L. F. W. White for the husband.
J. B. Gardner for the wife.

HOLROYD PEARCE, L.J.: This is an appeal from a suspended order of committal made by Collingwood, J., in respect of certain arrears of maintenance. The question in issue is whether any such arrears exist. The answer to that question depends on the construction and the legal effect of a bargain made between the parties and embodied in a court order in the Queen's Bench Division.

In 1952 the husband left the wife. In 1953 the wife brought proceedings under s. 17 of the Married Women's Property Act, 1882, in the Queen's Bench Division concerning certain landed property. At that time three years' desertion had not run in the wife's favour against the husband; but both parties expected that in due course there would be a decree of divorce and an order for maintenance. It was agreed between the parties and embodied in the master's order that the wife should buy the property in dispute for the sum of £610 from the husband. Clause 3 of the terms of payment provides:

> " That the said sum of £610 shall be paid as to £150 thereof within twenty-eight days from the date hereof by the [wife] to the [husband] and that the remainder be set off by instalments not exceeding such amount as may be agreed or awarded to the [wife] by way of alimony and/or maintenance."

The £150 was duly paid by the wife, leaving £460 owing by her. The wife in due course obtained a decree absolute on the ground of the husband's desertion, and (after an interim order) on July 3, 1957, an order for maintenance was made in the wife's favour in the sum of £200 per annum less tax payable monthly from a certain date. The question here is: Can the wife each year set off against the debt which she owes £200, or only £115, being so much of the £200 as would be paid to her after the deduction by the husband of £85 tax each year. The husband duly supplied the wife with tax deduction certificates showing that £85 had been deducted, and the wife used those certificates in order to obtain a repayment of tax.

The situation under the Income Tax Act, 1952, with regard to deductions of tax is this. By s. 169 (1):

> " Where any yearly interest of money, annuity or other annual payment is payable wholly out of profits or gains brought into charge to tax . . . (d) the person to whom the payment is made shall allow the deduction on receipt of the residue of the payment, and the person making the deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid."

Therefore, each year out of the £200 which was to be paid to the wife, the wife had to allow the husband £85 deduction, and the husband was discharged of the liability to her in respect of the £85 so deducted. Section 221 reads:

> " A claimant shall not be entitled to relief under the preceding provisions of this Part (1) of this Act in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain or satisfy out of any payment which he is liable to make to any other person."

That section shows that, whatever the tax position of the husband, he cannot get any benefit from the £85 which he deducts.

As the husband duly gave the tax certificates purporting to make the tax deductions at the time when the money would (apart from the set-off) have been due, no difficulty arises in his way as arose in *Taylor* v. *Taylor* (2). The learned judge held the view that the contentions of the wife were correct, and that she was entitled each year to have a set-off of £200 under the master's order. He said:

> " In my opinion, the contention on the part of the wife is the correct one. The [maintenance] order is for £200 a year, and whether the order is less tax or is silent as to tax the result is the same; the husband is entitled, in making the payment, to deduct from it the amount representing the tax thereon at the standard rate for the year and he is entitled to be acquitted and discharged of so much money as is represented by the deduction as if that sum had actually been paid. The husband is merely acting as agent for the Inland Revenue in making this deduction. The amount awarded to the [wife] by way of maintenance is, therefore, £200 per annum and that is the amount which is to be credited against the balance of £460 due from the wife."

With all respect to the learned judge, I find myself unable to take that view of the matter. In interpreting the words of the maintenance order for this purpose—" £200 less tax "—one must read it as saying that the liability of the husband in respect of actual payments to the wife in any year was limited to £115. The balance of £85 he had to pay to the Inland Revenue. So long as he did not fail to pay the wife sums amounting in the year to £115, he could not be brought up before the court, nor could it be suggested that he was failing to comply with the maintenance order. It is impossible, in my view, to arrive at the learned judge's conclusion without ignoring the words " less tax " which occur in the order. The annual payment less tax is £115. One cannot ignore the provision of s. 169, the effect of which is that an order of an annual payment of £200 less tax is discharged by paying only £115 to the wife and £85 to the Inland Revenue. Moreover, I think that the only reasonable construction of cl. 3 of the master's order is that the words " amount . . . awarded to the [wife] " mean the amount which under any order the husband will have to pay in cash to the wife, and do not include any deductions which he must pay to the Inland Revenue. So read, the bargain made between the parties on which the order is founded is sensible and just and in accordance with the Income Tax Acts. In my view, the wife is not entitled to any larger set-off than the annual amount of £115 under this order. The result of that is that there are no arrears of maintenance, and the committal order must be discharged.

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(1) Part 8, which consists of s. 208 to s. 228. Section 208 to s. 220 are under the sub-heading " Personal Reliefs ".

(2) [1937] 3 All E.R. 571; [1938] 1 K.B. 320.

HARMAN, L.J.: I agree. The amount payable by the husband to the wife under the Divorce Court order is not in doubt. The only doubt arises from the fact that the wife is his debtor, and the question is how much she is entitled to be released from her debt by reason of the Divorce Court order. When one works it out, it seems clear that she cannot be relieved of her debt at the rate of £200 a year when, in fact, the husband does not owe her that sum. He owes her £115, and £85 to the Inland Revenue. She is no worse off because, owing to the amount of her income, she gets back practically the whole of the £85 from the Inland Revenue. I do not see why she should be entitled in that way to obtain credit against the sum which she owes to her husband, and then move to commit him when she still owes him money. In my judgment, the confusion here has arisen because of the odd kind of set-off which exists under the order of the Queen's Bench Division. My Lord has put the position clearly, and I agree with him.

DAVIES, L.J.: I also agree.

Appeal allowed.

Solicitors: *Gamlen, Bowerman & Forward*, agents for *Lovegrove & Durant*, Windsor (for the husband); *Cartwright, Cunningham*, agents for *T. W. Stuchbery & Son*, Windsor (for the wife).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

RANDOLPH *v.* TUCK AND OTHERS.

[QUEEN'S BENCH DIVISION (Lawton, J.), January 25, 26, 27, 30, February 6, 1961.]

Estoppel—Estoppel by record—Two actions depending on same facts—Collision between two motor cars—Driver of one car and passenger in that car injured—Action in county court by injured driver against other driver dismissed, injured driver being held solely liable for accident—Subsequent action in High Court by passenger against both drivers—Third-party proceedings against injured driver by other driver—Whether injured driver bound in High Court by decision of county court—Whether county court judge's notes of evidence admissible—Whether cause of action could be based on an estoppel by record—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *& 26 Geo.* 5 *c.* 30), *s.* 6 (1) (*c*), *s.* 6 (2).

On July 19, 1957, a collision occurred between two motor cars, one of which was driven by T. and the other by S. T. and the plaintiff, who was a passenger in T.'s car, were both injured as a result of the collision. T. brought an action against S. in the county court, claiming damages for the injuries which he had suffered, but, in a judgment given on July 31, 1958, the county court judge held that S. was not to blame and that the accident was due to the negligence of T. On Oct. 15, 1959, the plaintiff commenced an action in the High Court against T. and S. for damages for personal injuries suffered by her as a result of the collision. T. and S. each denied liability and blamed the other. S. served a third-party notice on T. claiming to be indemnified by him, by reason of the decision of the county court judge, in respect of any damages which S. might have to pay to the plaintiff. At the trial of the action, the court held that the damage suffered by the plaintiff was caused by the negligence of both T. and S., and that they were equally responsible. In the third-party proceedings, S. claimed (a) that, as he had obtained judgment in the county court action, he was a person " entitled to be indemnified " by T., within s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, and (b) that, by reason of the county court judgment, T. must be deemed to have admitted his sole responsibility for the damage suffered by the plaintiff. In the course of the hearing T. objected that the court was not entitled to admit in evidence the county court judge's notes of the evidence.

Held: (i) a cause of action could not be based at common law on an estoppel by record (dicta of BOWEN, L.J., in *Low* v. *Bouverie* ([1891] 3 Ch. at p. 105) applied), and neither did s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, allow that to be done (see p. 818, letter A, post).

(ii) S. had failed to establish an estoppel by record against T., because the precise question arising in the High Court proceedings, namely, whether T. and S., or either of them, were in breach of their respective duties to the plaintiff, was not before the county court; moreover the question of the extent of the responsibilities of T. and S., as between themselves for the damage to the plaintiff had not been before the county court and was not substantially the same as the issue which had been before that court (see p. 818, letters D and G, post), and T. and S. were accordingly liable in equal proportions for the damage suffered by the plaintiff.

Jackson v. *Goldsmith* ((1950), 81 C.L.R. 446) and *Neenan* v. *Woodside Astoria Transportation Co.* ((1932), 256 New York Supp. 38) applied.

Marginson v. *Blackburn Borough Council* ([1939] 1 All E.R. 273) distinguished.

Bell v. *Holmes* ([1956] 3 All E.R. 449) and *Clyne* v. *Yardley* ([1959] N.Z.L.R. 617) not followed.

(iii) the court was entitled to admit in evidence the county court judge's notes of the evidence, because, in order to discover what was decided in the county court proceedings, recourse could be had to such information as was to be derived from reading a record of the proceedings (see p. 817, letter C, post).

Marginson v. *Blackburn Borough Council* ([1939] 1 All E.R. 273) followed.

[As to res judicata, see 15 Halsbury's Laws (3rd Edn.) 184-186, paras. 357-359.

For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, see 25 Halsbury's Statutes (2nd Edn.) 359.]

Cases referred to:

Bell v. *Holmes*, [1956] 3 All E.R. 449; [1956] 1 W.L.R. 1359; 13 Digest (Repl.) 441, *664*.

Broken Hill Proprietary Co. v. *Broken Hill Municipal Council*, [1925] All E.R. Rep. 672; [1926] A.C. 94; 95 L.J.P.C. 33; 134 L.T. 335; Digest Supp.

Cavanagh v. *London Transport Executive*, (Oct. 22, 1956), "The Times", Oct. 23, 1956.

Clyne v. *Yardley*, [1959] N.Z.L.R. 617; 3rd Digest Supp.

Hay (or Bourhill) v. *Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 36 Digest (Repl.) 16, *66*.

Jackson v. *Goldsmith*, (1950), 81 C.L.R. 446.

Low v. *Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 21 Digest 136, *5*.

Marginson v. *Blackburn Borough Council*, [1939] 1 All E.R. 273; [1939] 2 K.B. 426; 108 L.J.K.B. 563; 160 L.T. 234; Digest Supp.

Neenan v. *Woodside Astoria Transp. Co.*, (1932), 256 New York Supp. 38.

New Brunswick Ry. Co. v. *British & French Trust Corpn., Ltd.*, [1938] 4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; Digest Supp.

Ord v. *Ord*, [1923] All E.R. Rep. 206; [1923] 2 K.B. 432; 92 L.J.K.B. 859; 129 L.T. 605; 21 Digest 152, *140*.

Stapley v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; [1953] 3 W.L.R. 279; 3rd Digest Supp.

Action.

In this action, which was commenced on Oct. 15, 1959, the plaintiff, Olive Kathleen Randolph, claimed damages against the defendants, Desmond Adolph Tuck, Norfolk Animal Products, Ltd. and Robert Davies Steele, for personal injuries, loss and damage suffered by her as a result of an accident on July 19, 1957, when a motor car which was owned and being driven by the first defendant, and in which the plaintiff was a passenger, came into collision with a motor car owned by the second defendants and being driven by the third defendant. The first defendant, by his defence, denied liability and alleged that the collision was caused by the negligence of the third defendant, driving as the servant or agent of the second defendants. The second and third defendants, by their defence, denied that the collision was brought about by the negligent driving of the third defendant and alleged that it was caused by the negligent driving of the first defendant. Pursuant to an order dated Dec. 29, 1959, under R.S.C., Ord. 16A, r. 12, the second and third defendants served a third-party notice, dated Jan. 1, 1960, on the first defendant, claiming to be indemnified by him in the event of their being held to be liable to the plaintiff. In their statement of claim in the third-party proceedings, the second and third defendants pleaded that the issue between them and the first defendant in regard to liability for the collision was joined and tried in the West London County Court on July 24 and 31, 1958, before His Honour Judge Daynes, who found that the first defendant was wholly to blame and gave judgment for the second and third defendants.

In the present action, Lawton, J., held that the damage suffered by the plaintiff was caused by the negligence of both the first defendant and the third defendant and assessed their responsibility as being equal. The report is confined to the judgment on the issues raised by the third-party proceedings.

Ryder Richardson, Q.C., and *D. G. A. Lowe* for the plaintiff.
Montague Berryman, Q.C., and *Hugh Griffiths* for the first defendant.
Stanley Rees, Q.C., and *I. S. Hill* for the second and third defendants.

Cur. adv. vult.

Feb. 6. **LAWTON, J.**, read the following judgment: Before I delivered judgment in the action by the plaintiff against the defendants, it was agreed by counsel for all the defendants that I should decide on the parol evidence given in that action, but without prejudice to any of the issues raised in the third-party proceedings, what was the extent of the responsibility of each of the defendants Tuck and Steele (the first defendant and the third defendant, respectively) for the damage suffered by the plaintiff. It was accepted that the second defendants, Norfolk Animal Products, Ltd., were vicariously responsible for any negligence proved against the third defendant. In the action I adjudged that the damage suffered by the plaintiff was caused by the negligence of both the first defendant and the third defendant in the driving of their respective motor cars and, on the parol evidence, I assessed the extent of the responsibility of each of them as equal.

The order for third-party directions which was made in these proceedings on Oct. 12, 1960, provided for the delivery of third-party pleadings and for the question of the liability of the first defendant to indemnify the other defendants to be tried at the trial of the action but subsequent thereto. Pursuant to that order, the second and third defendants delivered a third-party statement of claim against the first defendant in which they claimed to be indemnified by the first defendant against such liability as they might be adjudged to have to the plaintiff. Paragraph 4 of that statement of claim was as follows:

> "The aforesaid issue [that is, whether the negligence of the first defendant caused the collision] between [the second and third] defendants and the third party [the first defendant] was joined and tried in the West London County Court, Plaint No. 0899 of 1958, on July 24 and 31, 1958, before His Honour Judge Daynes and upon the said trial it was found that the third party herein was wholly to blame and judgment was accordingly entered for [the second and third] defendants and the said judgment still remains in full force."

The first defendant delivered a third-party defence to this statement of claim in which he admitted that he brought an action against the second and third defendants to recover damages in respect of injuries which he received in the said accident, and that this action was tried in the West London County Court by His Honour Judge Daynes on July 24 and 31, 1958, judgment being entered for the second and third defendants. He denied that the second and third defendants were entitled to an indemnity or any other relief against him. He did not, by his pleading, claim any relief against the second and third defendants, but, at the hearing before me of the third-party proceedings, by his counsel he asked me to make an order for the second and third defendants to contribute to any damages which he might have to pay to the plaintiff. Counsel for the second and third defendants raised no objection to my making such an order if any findings on the issues raised by the third-party pleadings would allow me to do so.

It seems clear from the submissions of counsel, that these issues, or at least ones similar to them, had caused differences of judicial opinion in the Commonwealth. As far as the researches of counsel have gone—and I am sure that they have gone to the limits of what was reasonably possible—the precise point which I have had to decide has never been dealt with in any reported English case; but counsel for the second and third defendants submitted that what was described in argument as the converse of this point was decided by the Court of Appeal in *Marginson* v. *Blackburn Borough Council* (1), and that the ratio decidendi of that decision applies to these third-party proceedings.

The second and third defendants produced in evidence the county court file of the action intituled "Tuck *v.* Norfolk Animal Products, Ltd. and Steele, Plaint No. 0899 of 1958", the learned county court judge's notes of evidence and some notes of the reasons for judgment taken by one of the counsel in that case and by a solicitor's managing clerk. Counsel for the first defendant submitted that I was not entitled to admit in evidence the learned judge's notes of the evidence. In my judgment, I was so entitled because, in order to discover what was decided in the county court proceedings, recourse can be had to such information as is to be derived from reading a record of the proceedings: see the judgment of the Court of Appeal, delivered by Slesser, L.J., in *Marginson* v. *Blackburn Borough Council* (2). In this county court action, as appears from the pleadings, the first defendant claimed against the second and third defendants damages for personal injuries and for damage done to his clothing sustained when his motor car collided with the third defendant's motor car. He alleged that this collision had been caused by the third defendant's negligence. The third defendant denied negligence and alleged that the collision had been caused solely, or, alternatively, had been contributed to, by the first defendant's own negligence. As appeared from the evidence in the action before me, the plaintiff had been travelling in the first defendant's motor car when the collision occurred, and the first defendant's own claim arose out of the circumstances of that same collision. The learned county court judge, according to the notes of his reasons for judgment taken by the solicitor's managing clerk, made the following finding:

> "The defendant [that is, the third defendant] not in any way to blame and that the accident was due to the negligence of the plaintiff [that is, the first defendant]."

Counsel's note was to the same effect. There was no appeal from this judgment, and the time for appealing has long since expired.

It was on these facts and in these circumstances that counsel for the second and third defendants put forward their claim against the first defendant for an indemnity against any damages which they might have to pay to the plaintiff. That claim was based, and had to be based, on the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935. Counsel for the second and third defendants submitted, first, that, his clients, having obtained judgment in the county court, were persons "entitled to be indemnified" by the first defendant within the meaning of the concluding words of s. 6 (1) (c) of that Act; and, secondly, that, when deciding what was "just and equitable" within the meaning of s. 6 (2), I was bound to proceed on the basis that the first defendant, by reason of the judgment in the county court, must be deemed to have admitted conclusively his own sole responsibility for the damage suffered by the plaintiff.

The second submission amounted to a plea of estoppel by record, or, as it has been termed in Australia, an issue estoppel. Estoppels, which, in Sir Edward Coke's words (3), are "an excellent and curious kinde of learning", go oddly with a statute which requires the court to do that which is just and equitable and whose short title begins with the words "Law Reform"; but, when considering the issues raised, I reminded myself of the warning given by that same learned judge, namely (4):

> ". . . to leave all causes to be measured by the golden and streight metwand of the law, and not to the incertain and crooked cord of discretion"

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(1) [1939] 1 All E.R. 273; [1939] 2 K.B. 426.

(2) [1939] 1 All E.R. at p. 278; [1939] 2 K.B. at p. 437.

(3) 1 Coke's Institutes, Book 3, ch. 12, s. 667.

(4) 4 Coke's Institutes, ch. 1, p. 41.

—and of the comment of LORD MAUGHAM, L.C., in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (5) that " The doctrine of estoppel is one founded on considerations of justice and good sense."

As to the first of counsel's submissions, it seems to me that he was seeking to base a cause of action on an estoppel by record. At common law this cannot be done: see *Low* v. *Bouverie* (6), per BOWEN, L.J. In my judgment, s. 6 (1) (c) does not allow that which the common law would not.

The validity of the second submission depends on the second and third defendants establishing that in the county court action there was put in issue and decided " the precise question, the precise fact " which arises in these third-party proceedings: see *Ord* v. *Ord* (7), per LUSH, J. What was " the precise question, the precise fact " which was put in issue and decided in the county court action? In my judgment it was that the damage suffered by the first defendant was caused, not by any breach of duty owed to him by the third defendant, but by his failure to take proper care for his own safety. In the action before me, the question in issue and for decision was whether the damage suffered by the plaintiff had been caused by any breach of duty owed to her by the first defendant and the third defendant or by either of them. The nature and extent of their duty to her may have been similar to the nature and extent of their duty to each other, but, if I understand *Hay (or Bourhill)* v. *Young* (8) correctly, they were separate and distinct duties, not two aspects of a general duty which, as motorists, they owed to all road users and which the learned county court judge had decided had not been broken by the third defendant. The issue whether the first defendant and the third defendant, or either of them, were in breach of their respective duties to the plaintiff was never before the county court. The fact that issues in two actions are similar does not raise an estoppel: see *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (9) and *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (10), in which LORD ROMER said (11):

> " It is no doubt true to say that, whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter. However, this is very different from saying that he may not thereafter litigate, not the same question, but a question that is merely substantially similar to the one that has already been decided."

Now that the first defendant and the third defendant have each been adjudged to have been in breach of duty to the plaintiff. a further question arises between them as to the extent of their respective responsibilities for the damage suffered by the plaintiff. This issue was never before the county court and was not substantially the same as that which was. The county court action was concerned with causation, whereas I have had to consider both causation and blameworthiness—and the factor of blameworthiness may have an important bearing on the extent of responsibility: see *Stapley* v. *Gypsum Mines, Ltd.* (12) and *Cavanagh* v. *London Transport Executive* (13). It follows, so it seems to me, in principle, and in the absence of any binding authority, that the second and third defendants have not established an estoppel by record. On broadly similar facts the High Court of Australia, in *Jackson* v. *Goldsmith* (14), and the Appellate Division of the Supreme Court of the State of New York, in *Neenan* v. *Woodside Astoria Transp. Co.* (15), held that no estoppels were raised.

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(5) [1938] 4 All E.R. at p. 754; [1939] A.C. at p. 19. (6) [1891] 3 Ch. at p. 105.
(7) [1923] All E.R. Rep. at p. 210; [1923] 2 K.B. at p. 440.
(8) [1942] 2 All E.R. 396; [1943] A.C. 92.
(9) [1925] All E.R. Rep. 672; [1926] A.C. 94.
(10) [1938] 4 All E.R. 747; [1939] A.C. 1.
(11) [1938] 4 All E.R. at p. 770; [1939] A.C. at p. 43.
(12) [1953] 2 All E.R. 478; [1953] A.C. 663.
(13) (Oct. 22, 1956), " The Times," Oct. 23, 1956. (14) (1950), 81 C.L.R. 446.
(15) (1932), 256 New York Supp. 38.

Counsel for the second and third defendants submitted that the ratio decidendi of *Marginson* v. *Blackburn Borough Council* (16) bound me to decide that his clients had established an estoppel. I have found it necessary to examine that case in detail in order to discover what was decided. The facts were that an omnibus owned by the corporation and a motor car in which Marginson was travelling as a passenger, and which was being driven by his wife as his agent, collided, and the omnibus ran into and damaged some shop premises. Marginson's wife was killed as a result of the accident. The owners of those premises sued both the corporation and Marginson in the county court. Both denied liability and each alleged that the accident was solely caused by the negligence of the other. Thereafter they proceeded by third-party notice to bring claims against one another for indemnity or, alternatively, for contribution; but, in addition to such claims, the corporation, in their third-party notice to Marginson claimed damages in respect of damage done to their omnibus by Marginson's motor car. The learned county court judge held both defendants to blame for the damage done to the shop premises, bearing the loss in equal proportions. He then proceeded to deal with the corporation's claim against Marginson, treating that claim as a separate action, and said: " There I think I am entitled not to award any damage. I find they were both to blame for the damage to the bus." This judgment was given, of course, before the Law Reform (Contributory Negligence) Act, 1945, was passed. Later, Marginson sued the corporation for the injuries which he had sustained in the accident, and under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of his wife's death. To those claims the corporation pleaded that Marginson ought not to be permitted to make them by reason of the county court judgment. LEWIS, J., found for Marginson on this plea. In the Court of Appeal counsel for the corporation submitted that Marginson was estopped for three reasons: (i) because the county court had adjudged that the corporation and Marginson were both to blame for the damage to the shop premises; (ii) because they had been adjudged liable to contribute equally to the amount of the damages; and (iii) because Marginson had been adjudged not liable to the corporation for damage to the omnibus on the ground that both parties were to blame.

In a reserved judgment of the court, which was delivered by SLESSER, L.J., it was adjudged that Marginson's personal claim against the corporation, but not his claim in his representative capacity, was estopped by the county court judgment. SLESSER, L.J., dealt with the estoppel held to have been established in these terms (17):

> " On this view, and having regard to what the county court judge was asked to decide as between the plaintiff and the defendants in the present action, he has undoubtedly ruled that the plaintiff could not be responsible to the defendants, because, in the matter of alleged negligence in the driving of the motor omnibus and motor car, which, as he says, was a separate claim from that of the owners of the shops, both parties were to blame. This seems to us to be a clear decision on the same issue between the same persons litigating in the present case, and establishes conclusively, albeit in the county court, in a claim by the defendants against the present plaintiff, that both were equally to blame."

The claims for personal injuries and damage to the omnibus arose from damage caused by breaches of duty owed by the corporation and Marginson to each other. As I understand this judgment, the estoppel arose because of the learned county court judge's adjudication on the breaches of duty: in other words, the Court of Appeal accepted the corporation's third reason for submitting that there was an estoppel. Nothing was said about the estoppel being established because the learned county court judge had decided that the corporation and

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(16) [1939] 1 All E.R. 273; [1939] 2 K.B. 426.
(17) [1939] 1 All E.R. at p. 278; [1939] 2 K.B. at p. 437.

Marginson had both been in breach of duty to the owners of the shop premises, or that they were responsible in equal proportion for the damage to the shop premises. In these circumstances, I have decided that *Marginson* v. *Blackburn Borough Council* (18) is not an authority which deals with the question before me in these third-party proceedings.

Finally, I come to consider the persuasive authority of the judgment of McNair, J., in *Bell* v. *Holmes* (19). The facts were broadly the same as in *Marginson* v. *Blackburn Borough Council* (18), save that there were no formal third-party proceedings in the county court, the learned judge, at the defendants' request, apportioning the blame at the end of his judgment in the action. There was nothing in the way of a separate claim by one defendant against the other, as in *Marginson* v. *Blackburn Borough Council* (18). The attention of McNair, J., was invited to the fact that the proceedings before him related to different breaches of duty from those considered in the county court. He dealt with this point in these terms (20):

> "Those are different legal issues of course, in a sense, but I do not feel that the fact that they are technically different should prevent effect being given to the plea of estoppel in a case where, having examined the pleadings in the county court action and compared them with the pleadings in the present action, I am satisfied that the issues of fact, and the evidence to support them in respect of liability, would be identically the same."

McNair, J., saw only a short citation of the judgment of the High Court of Australia in *Jackson* v. *Goldsmith* (21) and had no opportunity, as I have had, of considering the judgment in the American case, *Neenan* v. *Woodside Astoria Transp. Co.* (22). After mentioning *Jackson* v. *Goldsmith* (21), he said (23):

> "It seems to me that there is a distinction between that case and this, as in the Australian case the judgment which it was sought to set up as an estoppel was a judgment in an action between two only of the three parties who were involved in the collision, and I can well understand that the introduction of an additional party might operate to destroy the conclusiveness of the judgment given in the earlier action."

In 1959 the Supreme Court of New Zealand, in *Clyne* v. *Yardley* (24), had to consider the same point as I have had to consider, the facts being much the same. That court decided to follow the reasoning of McNair, J., in *Bell* v. *Holmes* (23) in the passage to which I have already made reference. With diffidence and regret, I feel unable to do the same. I prefer the persuasive authority of the Australian and American cases which I have mentioned. In these circumstances, I adjudge that the first defendant and the third defendant are responsible in equal proportions for the damage suffered by the plaintiff.

Order accordingly.

Solicitors: *Edward Thompson & Co.* (for the plaintiff); *Berrymans* (for the first defendant); *Stanley & Co.* (for the second and third defendants).

[*Reported by* C. G. Leonard, Esq., *Barrister-at-Law.*]

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(18) [1939] 1 All E.R. 273; [1939] 2 K.B. 426.
(19) [1956] 3 All E.R. 449.
(20) [1956] 3 All E.R. at p. 455.
(21) (1950), 81 C.L.R. 446.
(22) (1932), 256 New York Supp. 38.
(23) [1956] 3 All E.R. at p. 456.
(24) [1959] N.Z.L.R. 617.

Re COLLARD'S WILL TRUSTS. LLOYDS BANK, LTD. *v.* REES AND OTHERS.

[CHANCERY DIVISION (Buckley, J.), February 23, 1961.]

Trust and Trustee—Powers of trustee—Power of advancement—Proposed advancement by conveyance of land—Avoidance of incidence of estate duty—Whether trustees could convey land to beneficiary in exercise of power conferred by Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 32.

By his will a testator provided that the income of one moiety of his residuary estate should be held on protective trusts for his daughter during her life and subject thereto on trust as to both capital and income for such of her children as might be living at the testator's death or who should be born thereafter, or who should attain the age of twenty-one or previously marry. At the date of the summons the daughter was past the age of child-bearing and had only one son who had attained the age of twenty-one. Under a deed of family arrangement a farm was appropriated to the daughter's share of settled residue and her son, J., carried on the business of farmer there paying rent, rates, taxes, etc. Clause 7 of the will provided: "I declare that the statutory power of advancement of capital given to my trustees by s. 32 of the Trustee Act, 1925*, shall apply to the trusts hereof as if incorporated herein save that no such advancement shall be made to or on behalf of any beneficiary for the purpose of acquiring a share or interest in or setting the said beneficiary up in any business or for any purposes connected with business . . ." The question arose whether under the power of advancement contained in s. 32 of the Trustee Act, 1925*, the trustees could, having regard also to cl. 7 of the will, convey the farm to J., with a view to the avoidance of the incidence of estate duty on the death of the testator's daughter.

Held: the trustees had power to convey the farm to the son, J., by way of advancement for the following reasons—

(i) the court would not insist on circuity of action where the same result as could be achieved legitimately by circuitous action could be achieved by direct action; accordingly as the trustees could properly advance cash to J. and then sell the farm to him for that amount of cash, so they could exercise the power of advancement by conveying the farm to J. for its market value, treating the conveyance as an advancement of the amount of that value.

Dictum of NEVILLE, J., in *Sprange* v. *Lee* ([1908] 1 Ch. at p. 430) applied.

(ii) the purpose of avoiding the incidence of estate duty was not a purpose connected with J.'s business of farming; therefore, the trustees' power of advancement was not excluded by the saving words in cl. 7 of the will.

[As to powers and discretions of trustees, see 33 HALSBURY'S LAWS (2nd Edn.) 244 et seq.; and for cases on the subject, see 43 DIGEST 789, 790, *2274-2285*.

For the Trustee Act, 1925, s. 32, s. 33, see 26 HALSBURY'S STATUTES (2nd Edn.) 99, 102.

For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Case referred to:

Sprange v. *Lee*, *Lee* v. *Sprange*, [1908] 1 Ch. 424; 77 L.J.Ch. 274; 98 L.T. 400; 23 Digest (Repl.) 336, *4024*.

Adjourned Summons.

This was an application by originating summons dated July 6, 1960, by the plaintiff, Lloyds Bank, Ltd., one of the trustees of the will dated Feb. 2, 1941, of Fred Collard, deceased, to determine whether on the true construction of the will and in the events which had happened, (a) cl. 7 thereof authorised the trustees to exercise the power of advancement conferred by that clause in respect of the moiety of the residuary estate defined as the " elder daughter's trust fund " to convey to the third defendant John Collard Rees in fee simple the messuage and land known as Upper Townhill Farm, West End, Southampton, or (b) whether cl. 7 of the will did not authorise the trustees to exercise the power of advancement in this manner. The originating summons also asked, if the question were answered in the terms of alternative (b) that the arrangement specified in the schedule to the summons might be approved by the court under the provisions of the Variation of Trusts Act, 1958, on behalf of any husband the first defendant might marry after the determination of her subsisting marriage and of any child or remoter issue of the third defendant. The arrangement provided that notwithstanding cl. 7 of the will, the trustees should have power to advance to the third defendant, by conveying to him in fee simple, the messuage and land named above. The defendants were Margaret Rees, who was beneficially interested during her life under the will dated Feb. 2, 1941, of Fred Collard and was one of the trustees thereof; Eric Vivian Rees, who as husband of the first defendant was beneficially interested during her lifetime under discretionary trusts arising on forfeiture by the first defendant of her protected life interest, and was a trustee of the will; and John Collard Rees, who was interested in the residuary estate subject to the interests therein subsisting during the lifetime of the first defendant. The facts appear in the judgment.

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* See p. 823, letter B, post.

P. S. A. Rossdale for the plaintiff.
Owen Swingland for the defendants.

BUCKLEY, J.: The testator's will was made on Feb. 2, 1941. He died on June 25, 1952, leaving two daughters surviving him, one of whom, Mrs. Rees, was a beneficiary in respect of one-half of his residuary estate, and it is that half of his residuary estate with which I am concerned. Mrs. Rees, who is now past the age of child-bearing has had one child only, the third defendant, John Collard Rees, who has attained the age of twenty-one years.

By his will the testator disposed of his residue in moieties subject to an interest which he gave to his wife who in fact predeceased him. As regards one moiety called in his will " my elder daughter's fund " he directed that it should be held on protective trusts for his daughter Mrs. Rees during her life. Those are protective trusts as defined in s. 33 of the Trustee Act, 1925. Subject thereto he directed that this moiety of his residuary estate should be held, as to both capital and income, on trust for such children of Mrs. Rees as might be living at the testator's death or should be born thereafter and who should attain the age of twenty-one years or previously marry and if more than one in equal shares absolutely. Clause 7 of the will is in the following terms:

> " I declare that the statutory power of advancement of capital given to my trustees by s. 32 of the Trustee Act, 1925, shall apply to the trusts hereof as if incorporated herein save that no such advancement shall be made to or on behalf of any beneficiary for the purpose of acquiring a share or interest in or setting the said beneficiary up in any business or for any purposes connected with business excepting that my trustees may if necessary make such advancement for the purpose of paying any fees or premium required for business education or apprenticeship."

Under a deed of family arrangement, which was entered into in 1954, a certain farm known as Upper Townhill Farm was appropriated to Mrs. Rees' share of residue and now forms part of her settled share of residue. I am asked to decide whether on the true construction of the testator's will in the events which have happened cl. 7 of his will authorises the trustees to convey the farm to the third defendant in fee simple, or whether cl. 7 of the will does not authorise the trustees to make such a conveyance.

The first question to be considered is whether under the statutory powers of advancement the trustees can convey the land to the beneficiary. That power is contained in s. 32 of the Trustee Act, 1925, which, so far as material, provides:

> "(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently . . . or subject to a gift over . . . or on the occurrence of any other event, and whether in possession or in remainder or reversion . . .
>
> "(2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale . . . or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925."

The first thing to notice is that what s. 32 (1) authorises is that the trustees may make payments or apply capital moneys in certain ways, and primarily the power is a power to deal with cash. But it is said that a court of equity will never insist on circuity of action, and if the trustees could properly make an advancement of cash, and having done so could properly sell some part of the trust property to the beneficiary for that sum of cash, so also they can exercise the power of advancement by merely transferring property to the beneficiary without going through the process of making the cash advancement and a sale. There is no doubt that the statutory power of advancement is constantly exercised by trustees transferring to beneficiaries Stock Exchange investments by way of advancement. Is there any distinction to be drawn in this respect between land and Stock Exchange investments ? It is true that Stock Exchange investments are a form of property of which it is much easier to ascertain the value with accuracy than land. On the other hand, it may equally be said that Stock Exchange investments by and large are much more likely to fluctuate in value than is land. Those are considerations, however, which do not really go to principle. The principle is that the court will not insist on circuity of action if the same result as can legitimately be achieved by circuitous action can be achieved by direct action. I have been referred in this connexion to one dictum to which, perhaps, I should make reference now. It is an observation of Neville, J., in *Sprange* v. *Lee* (1). The facts of that case are far removed from what I have to consider in the present case and I do not propose to refer to them. What the learned judge said is this (2):

> "I have thought whether I could deal with the transaction as being equivalent to payment by the husband and repayment by the wife. If that could be done, it is a principle of equity that the court does not require unnecessary formalities to be gone through. Consequently, where we find on one side a debt immediately payable and on the other (say) a sale of property for a price equal to the amount of the debt, it is not necessary that cheques should be exchanged in order that there may be a discharge of the debt by a transfer of the property. But in those cases there is always a legal obligation on either side. I cannot introduce any such notional payment here, for this reason (among others) that the husband had a good reason for not paying this amount to his wife. Whether if he had paid it she would have repaid it we do not know. But he had obtained a covenant by his wife that she would not sue, under which, if she had sued him, she might be liable in damages."

In that passage the learned judge does recognise that the court will not insist on unnecessary formalities where the result which it is proposed to achieve could be achieved more simply and directly. In such a case the court will allow the process to be short-circuited. In the present case the farm has been recently valued by qualified valuers at £20,000, and an advance of £20,000 would be within the financial limit of the power of advancement that the trustees have got for the time being having regard to the value of Mrs. Rees' settled share. There would, so far as I can see, be nothing wrong in the trustees making an advance in cash to Mr. Rees of £20,000 and subsequently selling the farm to Mr. Rees for £20,000. In those circumstances, it seems to me that the court need not insist on that process being gone through, but that the right view is that the trustees have power to convey the farm to Mr. Rees and treat that conveyance as an advancement to him of the market value of the farm.

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(1) [1908] 1 Ch. 424.

(2) [1908] 1 Ch. at p. 430.

However, a further question arises as a result of the terms of cl. 7 of the testator's will because Mr. Rees is at present engaged in farming activities on the farm. Since March, 1952, he has occupied the farm as a tenant of the trustees under two tenancy agreements dated Oct. 21, 1952, at a rental of £156 per annum, and he farms agricultural land there by way of business. It is a full-time occupation. He and his mother have sworn an affidavit in which they depose to the fact that their purpose in desiring that the farm should be transferred to Mr. Rees is to reduce the estate duty prospectively payable on the death of Mrs. Rees. With that end in view, they naturally want the conveyance to Mr. Rees to be made at the earliest possible date so that the statutory period by which they may achieve exemption from death duties shall start to run as soon as possible. Mr. Rees deposes in para. 2 of the affidavit:

> "I carry on the business of a farmer at Upper Townhill Farm and I have done so since March, 1952. I pay all rates, taxes, occupier's drainage rates and other outgoings of an annual and recurring nature payable in respect of the farm except landlord's property tax, land tax, owner's drainage rates and tithe redemption annuities and any other landlord's outgoings. The only immediate effect of the advancement so far as I am concerned will be the cesser of my obligation to pay a total of £156 per annum in rent and the assumption of the liability for all landlord's repairs the burden of which has been entirely borne by me for the past six years in order to relieve my mother the said Margaret Rees; I shall also become responsible for fire insurance premiums amounting to about £36 per annum: there are no other outgoings affecting the farm apart from the rates which have been paid by me as tenant and the usual liability for income tax on the annual value of the farm or the rent paid for the farm. These changes will have no material effect upon my business. I have not in mind any business transaction to which the transfer to me of the freehold reversion of the farm has any relevance."

The question that I have to consider in this respect is whether, if the farm is conveyed to Mr. Rees, it can be said that the advancement would be for any purpose connected with his business within the meaning of cl. 7 of the testator's will. I have felt a little doubt about this in the course of the argument because it seems to me that if Mr. Rees were buying the freehold reversion of his farm from some stranger to the trust and the trustees were advancing him the necessary purchase money, it would be difficult to say that the purchase was not one that he was making for a purpose connected with his business. I think, however, that I have to look at the matter in the light of the facts of this particular case. He is the tenant of the farm paying what is clearly a very low rental. He has at present under the Agricultural Holdings Act, 1948, security of tenure so long as he farms the farm satisfactorily. The purchase of the freehold reversion is not, I think, a matter which will really be of advantage to him as a farmer. Indeed, looking at the matter purely from the point of view of his position as a farmer, it seems to me that financially he is better off as a tenant under the tenancy agreements than he would be as a freeholder acquiring the freehold at the price of £20,000.

I think that I am justified in taking the view that the purpose of this advancement is the avoidance of estate duty which it is proposed to achieve. That is not a purpose connected with Mr. Rees's business. Consequently, I reach the conclusion that this is not an advancement of a kind which is excluded from the trustees' powers by the express terms of cl. 7 of the will, and I think that this transaction is one which the trustees have power to carry out.

Declaration accordingly.

Solicitors: *Tarry, Sherlock & King*, agents for *Townsends*, Swindon (for all parties).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

R. *v.* CHERTSEY JUSTICES, *Ex parte* FRANKS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, JJ.), February 2, 3, 14, 1961.]

Town and Country Planning—Enforcement notice—Contravention—Information—Third offence—Fine imposed computed at £3 daily for a period extending more than six months before the date of the information —Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 24 (3)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 104.

The applicant was the owner and occupier of land which was used at all material times as a caravan site. It appeared to the local council that such use was begun without planning permission and they, therefore, served on him an enforcement notice dated Oct. 5, 1957, under s. 23 of the Town and Country Planning Act, 1947*, requiring him to discontinue such use and to remove the caravans from the land. The applicant failed to comply with that notice and, on July 2, 1958, he was convicted by the justices of an offence under s. 24 (3) of the Act of 1947†. In spite of this conviction the applicant continued to ignore the enforcement notice and on Dec. 17, 1958, he was convicted of an offence created by the final sentence of s. 24 (3), in that he continued the offending use after his initial conviction, and was fined £334, which was a sum calculated at the rate of £2 per day over a period of 167 days' default. Despite these two convictions against him, the applicant still continued to use this land as a caravan site and on Nov. 13, 1959, a further information was laid on behalf of the local district council alleging an offence in contravention of s. 24 (3) aforesaid. On Mar. 9, 1960, this information came before the justices, who, in the applicant's absence, convicted him of the offence charged and fined him £1,338; this sum was, it appeared, reached by imposing a fine at £3 a day from the date of the last conviction, namely, Dec. 17, 1958, to Mar. 9, 1960, viz., 446 days. On application for certiorari that the justices had no jurisdiction by virtue of s. 104 of the Magistrates' Courts Act, 1952‡, to hear the information of Nov. 13, 1959, in so far as it alleged an offence committed more than six months prior to its date,

Held: (i) the offence was a continuing offence and as such s. 104 of the Act of 1952‡ was effective to prevent the justices from hearing the information so far as it alleged an offence committed six months before its date. *Verney* v. *Mark Fletcher & Sons, Ltd.* ([1909] 1 K.B. 444) applied.

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* For s. 23 of the Act of 1947, see 25 HALSBURY'S STATUTES (2nd Edn.) 524.

† The relevant part of s. 24 (3) is set out at p. 827, letter A, post.

‡ The relevant part of s. 104 is set out at p. 827, letter F, post.

(ii) in s. 24 (3) of the Town and Country Planning Act, 1947, the words "liable . . . to a fine not exceeding £20 for every day on which the use is so continued" were to be construed as meaning a fine not exceeding £20 for every day on which an offence triable by the justices was committed; thus the justices could not impose a penalty for any day falling six months prior to the laying of the information on Nov. 13, 1959.

(iii) what was sought to be quashed was the oral order of the justices announced by the chairman, and, as this gave reasons which disclosed an error in principle, viz., fines for days falling outside the six months' period mentioned at (i) ante, certiorari would be granted, as the court had no power to alter the fine, the conviction and sentence being before s. 16 of the Administration of Justice Act, 1960, came into force.

[**Editorial Note.** The present case was concerned with events prior to the licensing system introduced by the Caravan Sites and Control of Development Act, 1960, which came into force on Aug. 29, 1960; and, among other matters, amended s. 24 (3) of the Town and Country Planning Act, 1947.

As to enforcement notices, see Supplement to 32 HALSBURY'S LAWS (2nd Edn.), para. 448I; and for cases on the subject, see 3rd DIGEST Supplement.

For the Magistrates' Courts Act, 1952, s. 104, see 32 HALSBURY'S STATUTES (2nd Edn.) 503.

For the Town and Country Planning Act, 1947, s. 24 (3), see 25 HALSBURY'S STATUTES (2nd Edn.) 527.]

Cases referred to:

R. v. *Slade, Ex p. Saunders*, [1895] 2 Q.B. 247; 64 L.J.M.C. 232; 73 L.T. 343; 59 J.P. 471; 33 Digest 357, *666*.

Verney v. *Fletcher (Mark) & Sons, Ltd.*, [1909] 1 K.B. 444; 78 L.J.K.B. 292; 100 L.T. 348; 73 J.P. 131; 24 Digest (Repl.) 1044, *156*.

Motion for certiorari.

This was a motion on behalf of Eric Ralph Pentz Franks for an order of certiorari to remove into the High Court and quash an order made by the justices for the petty sessional division of Chertsey in the county of Surrey on Mar. 9, 1960, when they convicted him of failing to comply with an enforcement notice under s. 24 (3) of the Town and Country Planning Act, 1947, and fined him £1,338 with £10 10s. costs. The facts and contentions of counsel are set out in the judgment of the court.

D. G. H. Frank for the applicant.

N. N. McKinnon, Q.C., and *J. L. Harman* for the respondent local planning authority.

Cur. adv. vult.

Feb. 14. **WIDGERY, J.**, at the request of LORD PARKER, C.J., gave the judgment of the court: The facts giving rise to this application are as follows. The applicant is the owner and occupier of Glendridge Farm in the urban district of Egham which at all material times was used by him as a caravan site. It appearing to Egham Urban District Council, to whom the appropriate powers had been delegated by Surrey County Council, that such use was begun without planning permission under the Act of 1947, the urban district council on Oct. 7, 1957, served on the applicant an enforcement notice (1) under s. 23 of that Act requiring the applicant to discontinue such use and to remove the caravans from the land.

The applicant failed to comply with the enforcement notice and on July 2, 1958, he was convicted by the justices of an offence under s. 24 (3) of the Act, (2). Section 24 (3), so far as it is material, provides as follows:

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(1) The enforcement notice was dated Oct. 5, 1957, and required discontinuance etc. from Nov. 4, 1957.

(2) This section was amended in respects not material to the present decision, on Aug. 16, 1959, by s. 58 (1) (a) of and Sch. 7 to the Town and Country Planning Act, 1959.

> "Where, by virtue of an enforcement notice, any use of land is required to be discontinued . . . then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits the land to be used . . . in contravention of the notice, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding £50; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding £20 for every day on which the use is so continued."

Despite his conviction on July 2, 1958, the applicant continued to ignore the enforcement notice and on Dec. 17, 1958, he was convicted of an offence of the kind created by the final sentence of s. 24 (3), that is to say, of continuing the offending use after his initial conviction; and on this occasion he was fined £334 which was a sum calculated at the rate of £2 per day over a period of 167 days' default.

The applicant appears to have been undeterred by these two convictions because his use of the land as a caravan site continued and on Nov. 13, 1959, a further information was laid on behalf of the urban district council alleging an offence under s. 24 (3). This information, after reciting the conviction of Dec. 17, 1958, alleged that the applicant had nevertheless continued and continues

> "to use or permit to be used the said land in contravention of previous planning control and of the terms of the said notice and of s. 24 (3) of the Town and Country Planning Act, 1947."

The information of Nov. 13, 1959, was not heard until Mar. 9, 1960, on which date the applicant was convicted of the offence charged and fined £1,338. The notice of fine subsequently sent by the court to the applicant does not disclose how this sum was arrived at, and we have not seen the register of conviction; but it appears from the affidavit of Kenneth Greenwood (3) and it is not disputed by the respondents, that in announcing the decision of the justices their chairman used words to the following effect: "We find the case proved and we shall impose a fine at the rate of £3 a day from the date of the last conviction to date, that is 446 days".

In attacking this decision of the justices counsel for the applicant refers us to s. 104 of the Magistrates' Courts Act, 1952, which is in the following terms:

> "Except as otherwise expressly provided by any enactment, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within six months from the time when the offence was committed, or the matter of complaint arose . . ."

Counsel for the applicant contends that though the offence charged is a continuing offence committed the day after the initial conviction and thereafter occurring and repeated each day the time limit in the Magistrates' Courts Act, 1952, runs from each day as though charged as a separate offence. It follows, in his submission, that the magistrates had no jurisdiction to hear the information so far as it alleged or may be taken to have alleged any offence committed more than six months prior to its date. It would also follow, according to his argument, that the daily penalty of £20 could not be imposed in respect of any day prior to the earliest day to which the magistrates could have regard for the purpose of deciding whether an offence was then committed. He referred us to *R.* v. *Slade, Ex p. Saunders* (4), where an order for payment of a daily penalty on failure to comply with a closing order under the Public Health (London) Act, 1891, had been quashed on the ground that it could not validly be made in respect of a longer period than that of six months prescribed by s. 11 of the Summary Jurisdiction Act, 1848 (5).

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(3) Mr. Greenwood was a solicitor in the firm of Horne, Engall & Freeman, the applicant's country solicitors. Mr. Greenwood had appeared on behalf of the applicant on Mar. 9, 1960, at the Chertsey magistrates' court.

(4) [1895] 2 Q.B. 247.

(5) Repealed and re-enacted by s. 104 of the Magistrates' Courts Act, 1952.

Counsel for the applicant contends that in the present case the magistrates A have clearly imposed the reduced daily penalty of £3 over and in respect of a longer period than that of six months prior to the date of the information and that as the conviction and sentence occurred prior to the coming into force of s. 16 of the Administration of Justice Act, 1960, this court has no power to rectify the error by amendment (6).

The argument put forward by counsel for the local planning authority can be B summarised in three main propositions. First it is said that the offence of continuing an unlawful use after the initial conviction is a single offence, albeit a continuing one, and that if that offence continues for as much as one day into the period of six months preceding the information, the magistrates may hear that information, and s. 104 of the Magistrates' Courts Act, 1952, contains nothing to limit the penalty to be imposed when once it is established that the information C itself can be heard.

Secondly, and alternatively, counsel for the local planning authority says that, if the justices are required to disregard that part of the information which relates to an offence committed outside the six months' period, the daily penalty is no more than a measuring rod to determine the maximum penalty for those offences and that on proof of an offence within the six months' period the penalty for D that offence can be calculated throughout the whole period for which the offending use has continued subsequent to the previous conviction. If this be correct it seems logical that, in the present case, the penalty imposed on Mar. 9, 1960, might have been calculated with reference to the entire period since July 2, 1958, notwithstanding the intervening conviction and fine on Dec. 17, 1958, but counsel for the local planning authority says that such apparent duplication of E penalties would be contrary to a general principle of the common law that a man may not be punished twice for the same default. Lastly, counsel for the local planning authority contends that there is no excess of jurisdiction or error of law on the face of the record and that this is not a proper case for certiorari.

We cannot accept counsel for the local planning authority's first contention. In our judgment this continuing offence occurs from day to day as did the F infringement of the Factory and Workshop Act, 1901, in *Verney* v. *Mark Fletcher & Sons, Ltd.* (7), and s. 104 of the Magistrates' Courts Act, 1952, is effective to prevent the magistrates from hearing the information so far as it alleged an offence occurring more than six months before its date. Apart from the fact that that occurrence from day to day is a natural feature of such a continuing offence, it seems to us that counsel for the local planning authority's insistence on the G offence being one and indivisible is inconsistent with the local planning authority's own view—which we accept—that the conviction on Dec. 17, 1958, did not present the applicant with a defence of autrefois convict when the information of Nov. 13, 1959, was heard.

The question raised by counsel for the local planning authority's second contention turns on the proper construction of s. 24 (3) of the Act of 1947. H After consideration we think that the final sentence of the subsection, namely, " he shall be guilty of a further offence and liable . . . to a fine not exceeding £20 for every day on which the use is so continued " is to be construed as meaning a fine not exceeding £20 for every day on which an offence triable by the justices

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(6) Section 16, so far as material, reads: " (1) Where a person who has been sentenced for an offence by a magistrates' court . . . applies to the High Court for an order of I certiorari to remove the proceedings of the magistrates' court . . . into the High Court, and the High Court determines that the magistrates' court . . . had no power to pass the sentence, the High Court may, instead of quashing the conviction, amend it by substituting for the sentence passed any sentence which the magistrates' court had power to impose.

" (2) Any sentence passed by the High Court by virtue of this section in substitution for the sentence passed in the proceedings of the magistrates' court . . . shall, unless the High Court otherwise directs, begin to run from the time when it would have begun to run if passed in those proceedings . . ." The Act came into operation on Oct. 27, 1960.

(7) [1909] 1 K.B. 444.

A was committed. The alternative meaning which the language of the section could be said to bear would be much more onerous for the offender. If he were to be made liable indirectly to a penalty referable to each day on which he de facto offended but in respect of which no triable offence could have been alleged by the information initiating the charge (or if so alleged could not have been the subject of a conviction) some such periphrasis as " to a fine not exceeding an amount B equivalent to £20 per day on which . . . " would have been more appropriate and could easily and naturally have been employed. The expression " fine . . . for every day . . . " tends to connote a fine for an offence on a day falling in point of date within the trial jurisdiction rather than a daily factor of calculation of the total.

In our judgment a penal provision of this kind should not be given a wider C interpretation in the absence of clear words, and we prefer a construction which avoids the possible duplication of penalties referred to earlier in this judgment even though we recognise that Parliament may have intended to increase the severity of successive sentences as a deterrent to the persistent offender. In view of the terms of s. 104 of the Magistrates' Courts Act, 1952, the justices in the present case were not concerned with an offence committed on any day D falling more than six months prior to the information, nor could they, in our judgment, impose a daily penalty in respect of any such day.

Even on this basis it was open to the justices to impose a very much heavier penalty than the fine of £1,338, which they inflicted on the applicant and this is the basis of counsel for the local planning authority's submission that no excess of jurisdiction is disclosed in the notice of fine. Where, however, the chair- E man of justices announces the decision of the bench it is this oral order and not the written register of convictions which the applicant must seek to quash. Where, as in this case, the oral decision is a speaking order, and gives reasons which disclose an error of principle, certiorari will go. In the absence of any power to alter the fine, this court must, with some reluctance, quash the conviction.

[Counsel for the local planning authority applied for leave to appeal to the F House of Lords. Counsel for the applicant drew attention to s. 16 of the Administration of Justice Act, 1960 (8), and submitted that in view of that provision the decision in the present case was only of historical interest. LORD PARKER, C.J., intimated that there might be a point of law of general public importance as to the penalty. The court certified that a point of law of general public importance was involved in the decision, but refused leave to appeal (9).]

Order of certiorari. Conviction quashed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Horne, Engall & Freeman*, Egham, Surrey (for the applicant); *Champion & Co.* (for the respondent local planning authority).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(8) See p. 828, footnote (6), ante.

(9) Thus this case is an example of an occasion on which application for leave to appeal to the House of Lords would lie to that House consistently with the observations of VISCOUNT SIMONDS in *Gelberg* v. *Miller*, at p. 619 ante.

SAVAGE AND OTHERS *v.* UWECHIA.

[PRIVY COUNCIL (Lord Tucker, Lord Hodson and Mr. L. M. D. de Silva), January 24, 25, 26, February 21, 1961.]

Privy Council—Nigeria—Specific performance—Conditional contract—Promissory note—Document promising to pay money for " value received " or in default to convey property—Whether conditional contract for sale of land of which specific performance would be decreed.

In August, 1954, R. signed the following document, which was headed " Promissory Note ":—" I promise to pay to [the respondent] or order three months after date the sum of £780 for value received or in default to convey to him all those messuages together with appurtenances thereto situate at No. 6 New Market Road in the township of Onitsha, to hold the same unto the [respondent] or order in fee simple ". R. died in September, 1954, the £780 not having been paid. The respondent sought specific performance of the document against the trustees of R.'s will on the ground that there was a conditional contract to convey.

Held: on the true construction of the document, the relationship of vendor and purchaser was never established between the respondent and R., since the words " value received " revealed no ascertained or ascertainable price and since value received, if referring to a past consideration, would be insufficient to support a contract for the sale of land; therefore, specific performance would not be granted.

Tapply v. *Sheather* ((1862), 7 L.T. 298) distinguished.

Appeal allowed.

[As to when specific performance will be ordered on a conditional contract, see 31 HALSBURY'S LAWS (2nd Edn.) 336, para. 369; and for cases on the subject, see 42 DIGEST 441, *117*, *118*.]

Case referred to:

Tapply v. *Sheather*, (1862), 7 L.T. 298; 35 Digest 242, *27*.

Appeal.

Appeal by special leave by C. A. Savage, Solomon Kayode and Jonathan Sunday Rotibi, trustees of the will of S. O. Rotibi, deceased, from an order of the Federal Supreme Court of Nigeria (SIR STAFFORD FOSTER SUTTON, F.C.J., OLUMUYIWA JIBOWU, F.J., and M. C. NAGEON DE LESTANG, F.J.) dated Mar. 18, 1957, allowing an appeal by the respondent, M. O. Uwechia from a decision of the Supreme Court of Nigeria (BROWN, J.), dated Dec. 14, 1955, dismissing an action by the respondent for specific performance. The facts are set out in the judgment of the Board.

Ian Percival for the appellants.

Dingle Foot, Q.C., and *R. Millner* for the respondent.

LORD HODSON: This is an appeal against an order dated Mar. 18, 1957, made by the Federal Supreme Court of Nigeria allowing an appeal from a dismissal by the Supreme Court of Nigeria of a claim for specific performance.

The appellants are the trustees of the will of Samson Omolona Rotibi deceased. The respondent by his statement of claim alleged that, by an agreement to convey made between him and the deceased on Aug. 24, 1954, the deceased agreed to convey to him for the sum of £780 after three months from the date mentioned his freehold properties at No. 6 New Market Road, Onitsha. The deceased died on Sept. 9, 1954. The respondent himself gave no evidence as to the circumstances in which the agreement was reached, and relied solely on the copy of a document in the following terms:

" PROMISSORY NOTE

£780 Owerri.
Aug. 24, 1954.

I promise to pay to Mathew Uwechia or order three months after date the sum of £780 for value received or in default to convey to him all those messuages together with appurtenances thereto situate at No. 6 New Market Road in the township of Onitsha, to hold the same unto the said Mathew Uwechia or order in fee simple.

(Sgd.) S. O. Rotibi."

The original of this document, which does not correspond in terms with the agreement alleged in the statement of claim, was not produced by the respondent but was said to be in the possession of one of the appellants, namely, Savage; it was proved that the document was shown to the appellants on Sept. 14, 1954. On this evidence, the case proceeded on the footing that the deceased and, after his death, the appellants, who stood in his shoes although they did not obtain probate until July 28, 1956, were in default, in that the £780 had not been paid. It was submitted by the respondent in the Federal Supreme Court that there was here a conditional contract to convey.

The trial judge dismissed the claim for a reason which is not now supported and need not be discussed. The Federal Supreme Court, however, admitted the claim and made an order for specific performance, having arrived at the following conclusion (expressed by the Federal Chief Justice with whom the other members of the court agreed):

> "It [that is to say the document of Aug. 24, 1954] is an agreement to pay a specific sum by a certain date, and in default of such payment to convey the property referred to."

In ordering specific performance as they did, the court must have treated the agreement as a contract for the sale of land on the footing that the value received for the promise to pay £780 had been converted into the purchase price for the land. It is clear that, unless there is such a contract, namely, a contract for the sale of land at an ascertained or ascertainable price, specific performance cannot be ordered. Their Lordships agree with the Federal Supreme Court that the question whether the remedy of specific performance is available to the respondent turns on the construction of the document, but they do not agree with the conclusion that there was an agreement which amounts to a contract for the sale of land.

Argument has been directed to various meanings which the document is said to be susceptible of bearing. It was, for example, submitted that it is a mortgage, that the land was made security for the £780 and that it is necessary to imply the words "by way of security for the debt" at the end of the document. The respondent's remedy thus, it is said, would be by way of foreclosure action. Their Lordships are in agreement with the Federal Supreme Court in rejecting this submission. The document contains none of the ingredients of a mortgage and no words to indicate that the respondent was to have security for his debt; see *Tapply* v. *Sheather* (1), to which reference will later be made.

It is, in their Lordships' view, unnecessary to consider the various other submissions made by the appellants, for they are of opinion that the appeal succeeds on the ground that, on the true construction of the document, there was no contract for the sale of land or, to put the matter in another way, the relationship of vendor and purchaser was never established between the respondent and the deceased.

It is not without significance that the document is called a promissory note. It is true that the title given to it may not be an accurate description of it, but it is certainly appropriate to describe the first part down to and including the words "for value received". These words are commonly included in promissory notes, and may refer to a consideration which is past, remembering that past consideration is sufficient to support a promise in a promissory note: see the Nigerian Bills of Exchange Ordinance (2). The words "for value received" are the only words in the document which refer to consideration moving from the promisee and there is nothing in them to show what the consideration was. In short, no price is stated. It is left uncertain and is neither ascertained nor ascertainable. Moreover, value received, if referring to a past consideration, would be insufficient to support a contract for the sale of land although, as stated earlier, it would be sufficient to support a promise to pay given in a promissory note.

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(1) (1862), 7 L.T. 298.

(2) Laws of the Federation of Nigeria and Lagos, 1958, Vol. 1, c. 21.

The case is, in their Lordships' opinion, different from *Tapply* v. *Sheather* (3) where the consideration for the sale of land was clearly expressed in the contract. There, an agreement was entered into between the plaintiff and the defendant which, after reciting that the latter was entitled to two leasehold farms, and that the plaintiff had lent to him a certain sum and had agreed to make him further advances in consideration of the agreement thereinafter contained, it was agreed that the said sum and such further sums as should be advanced, with interest, should be repaid on a day named but, if default should be made in payment, the defendant agreed to assign to the plaintiff the said leases for the residue of the terms without any further consideration together with the furniture, etc., growing crops, etc., at a valuation. It was held by Lord Westbury, L.C., reversing the decision of Sir Samuel Romilly, M.R., that the relationship of vendor and purchaser and not that of mortgagor and mortgagee was constituted by the agreement. Accordingly, as there was nothing in the agreement which should cause the court to refuse to exercise its discretion to grant specific performance, the agreement, he said, ought to be specifically performed. This case was naturally relied on by the respondent as bearing a strong resemblance to his own case on the facts, but their Lordships are of opinion that there is a vital distinction in that there was, in *Tapply's* case (3) a consideration clearly ascertainable in the document then to be considered, whereas here the requirements of consideration are not fulfilled and there is, therefore, no contract for the sale of land.

This is sufficient to dispose of the appeal, but their Lordships are of the further opinion that, had it been necessary to consider the question of the exercise of the discretion to decree specific performance, they would have required to be satisfied that the circumstances were such that it was equitable to make a decree. The evidence before the court was meagre indeed. The respondent, who was the plaintiff in the suit, gave no evidence and failed in any way to explain the transaction which he had entered into with the deceased leading to the promise to pay £780 " for value received ", whatever that may have been. It would be relevant also to take into consideration the position of the appellants who, though standing in the shoes of the deceased, had at the time of the default not yet obtained probate. Even if they could have raised the money before the expiration of the three months, they would have been under a duty to consider the interests of the beneficiaries entitled to share in the estate of the deceased under his will.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Federal Supreme Court set aside and the judgment of the trial judge restored. The respondent must pay the costs of the appellants, including the costs of the petition for special leave to appeal.

Appeal allowed.

Solicitors: *Knapp-Fishers & Blake & Redden* (for the appellants); *Rexworthy, Bonser & Simons* (for the respondent).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

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(3) (1862), 7 L.T. 298.

Re PRENN'S SETTLEMENT.
TRUVOX ENGINEERING CO., LTD. *v.* BOARD OF TRADE.

[COURT OF APPEAL (Lord Evershed, M.R., Upjohn and Pearson, L.JJ.), February 16, 17, 1961.]

Company—Private company—Exempt private company—Loss of exemption—Person other than holder having interest in company's shares—Exception of shares held by trustees on the trusts of a family settlement disposing of the shares—Shares acquired by trustees by purchase after execution of settlement—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 129, *Sch.* 7, *para.* 3 (1) (*b*).

On Mar. 19, 1951, a settlor executed a settlement of £200, which he had paid to trustees, in favour of relatives of his. On the same day, T. E., Ltd., an exempt private company within s. 129 of the Companies Act, 1948*, resolved to capitalise part of its profits and apply it in paying up in full a number of its unissued preference shares and ordinary shares, and to allot those shares to existing shareholders. Also on the same day, the settlor arranged for the allotment to the trustees of the settlement of some of the newly paid-up shares (which otherwise would have been allotted to him) in consideration of the payment to him by the trustees of £150, part of the £200. On the question whether the exception enacted by para. 3 (1) (b) of Sch. 7 to the Companies Act, 1948†, then applied to the shares held by the trustees, or whether, as would be the consequence if it did not, the company ceased to be an exempt private company,

Held: the company lost its status as an exempt private company because the shares allotted to the trustees were not within the description " any shares . . . held by trustees on the trusts of a . . . family settlement disposing of the shares " in para. 3 (1) (b), since those shares were not disposed of by the settlement, but were acquired by the trustees by purchase after execution of the settlement.

Decision of CROSS, J. ([1960] 3 All E.R. 564) affirmed.

[As to exempt private company and the basic conditions required to be satisfied and exceptions therefrom, see 6 HALSBURY'S LAWS (3rd Edn.) 357, para. 701.

For the Companies Act, 1948, s. 129 and Sch. 7, see 3 HALSBURY'S STATUTES (2nd Edn.) 559, 857.]

Appeal.

This was an appeal by Truvox Engineering Co., Ltd., from an order of CROSS, J., dated Oct. 21, 1960, and reported [1960] 3 All E.R. 564. Truvox Engineering Co., Ltd. applied to the court by originating summons for (i) the determination of the question whether on the assumption that each of two settlements, dated Mar. 19, 1951, were family settlements as defined in the Companies Act, 1948, Sch. 7, para. 3 (2) (b), each of the settlements was such a settlement disposing of the shares in the company subject to the trusts thereof respectively within para. 3 (1) (b) of Sch. 7 to the Act, notwithstanding that such shares were not expressly settled by each settlement or either of them; and (ii) a declaration that each of the settlements was a settlement within the definition in para. 3 (1) (b) disposing of such shares, and that the company was not disentitled to the status of an exempt private company for the purpose of the Companies Act, 1948, s. 129. CROSS, J., held that the company had lost its status as an exempt private company within the Companies Act, 1948, s. 129. The facts appear in the judgment of LORD EVERSHED, M.R.

K. W. MacKinnon, Q.C., and *R. A. K. Wright* for the company.

E. Blanshard Stamp for the Board of Trade.

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* The relevant terms of s. 129 are printed at p. 834, letters D and E, post.

† The relevant terms of para. 3 (1) are printed at p. 834, letter H, post.

LORD EVERSHED, M.R.: The appellant in this case, Truvox Engineering Co., Ltd., a private company, is seeking a declaration to the effect that it is still entitled to the exemption from delivering accounts, etc. formulated by s. 129 of the Companies Act, 1948. The matter has arisen in this way. The principal shareholder in the company is a Mr. Prenn, and on Mar. 19, 1951, he made two settlements of £200 in cash in each case. Those settlements were in favour of members of his family and qualified, beyond a peradventure, as family settlements within the meaning of that phrase in Sch. 7 to the Companies Act, 1948. On the same day Truvox Engineering Co., Ltd. proceeded in the well known way to capitalise part of its profits and then to issue to its shareholders paid up shares out of the sums so capitalised; and so Mr. Prenn became entitled to the allotment of these bonus shares. The trustees of the two settlements then applied, in each case we were informed, £150 of the £200 settled in acquiring from Mr. Prenn the shares to which he had become entitled or some part of them. Then the blow fell so far as the company was concerned, for it was and has since been contended by the Board of Trade that in the circumstances the company no longer qualifies for the exemption under the Act.

I now turn to the relevant sections and the Schedule. Private companies are defined by s. 28 of the Act and I do not take time to refer to that section. I pass to s. 129, sub-s. (1) of which provides:

> " A private company shall be excepted from the requirements imposed by s. 127 of this Act [the requirements of delivering accounts, etc.] if, but only if—(a) the conditions mentioned in the next following subsection are satisfied "

at the date stated. Subsection (2) provides:

> " The said conditions are—(a) that the conditions contained in Sch. 7 to this Act are satisfied as to the persons interested in the company's shares . . . ; and (b) that the number of persons holding debentures of the company is not more than fifty . . .; and (c) that no body corporate is a director of the company and neither the company nor any of the directors is party or privy to any arrangement whereby the policy of the company is capable of being determined by persons other than the directors, members and debenture holders or trustees for debenture holders."

I turn next to Sch. 7, the conditions of which, it will be recalled, must be satisfied. I should state that the heading of the first paragraph is " Basic conditions " and it provides:

> " The basic conditions as to the shares . . . of the company . . . whose exemption is in question are . . . (b) that no person other than the holder has any interest in any of the shares . . . but these conditions are subject to the exceptions provided for by the following paragraphs of this Schedule."

I turn then to para. 3 which is headed " Exceptions for cases of death and for family settlements ", and which provides:

> " (1) The basic conditions shall be subject to exceptions for—(a) any shares . . . forming part of the estate of a deceased holder thereof, so long as administration of his estate has not been completed; and (b) any shares . . . held by trustees on the trusts of a will or family settlement disposing of the shares . . . so long as no body corporate has for the time being any immediate interest under the said trusts . . .
>
> " (2) For the purposes of this paragraph—(a) shares . . . held by trustees on trusts arising on an intestacy shall, if the shares . . . or an interest therein formed part of the intestate's estate at the time of his death, be treated as if the trusts arose under a will disposing of the shares . . . (f) any reference to a will or family settlement disposing of any shares . . . shall include a will or family settlement disposing of an interest under another will or family settlement disposing of the shares . . ."

Of the foregoing, para. 3 (1) (b) is the vital provision in this case. I have passed over para. 3 (2) (b), which defines what is meant by a family settlement, because it is not here in question that Mr. Prenn's settlements qualified as such. It is, however, just worth observing (because it is necessary to pay some regard to the general scope of these provisions) that the persons in whose favour a family settlement may operate are stated as including any individual who at the date of the settlement is a member of the company.

These paragraphs are of a somewhat elaborate character, as, indeed, is not to be wondered at, for here a particular privilege is being given, a privilege of exemption from disclosing balance sheets and figures, and there are other like privileges too. When an exemption of that kind is found in an Act the court must see that anyone claiming the benefit of it does, without reasonable doubt, bring himself within the language conferring the exemption. I would at this stage add another point. The first basic condition, it will be recalled, is that no one save the registered shareholder should have any interest in the shares, and that one may link with the provision that there must be no secret arrangement whereby the control of the company is really in someone's hands other than the directors, shareholders, etc. of the company. In other words, it is a basic condition, as I read it, of this exemption that prima facie the persons on the register of the company claiming exemption should be in truth the beneficial holders of the shares, and the sub-paragraphs which I have read from para. 3 of the schedule are the sole qualifications of that general rule.

Now I come back to the essential language. Paragraph 3 (1) (b) states, it will be recalled, that there is an exception for any shares held by trustees on the trusts of a family settlement disposing of the shares. It was the contention of counsel for the company that those words are here satisfied. True it is that when each settlement was made its subject matter was a sum of cash, but the trustees then out of the cash acquired the shares, and (so runs the argument) it is, therefore, true to say that the trusts of the family settlement dispose of the shares in the sense that the shares are subject, as regards their future devolution etc., to the terms of the settlement trusts. That argument would be easier to accept if one could relate the words " disposing of the shares " back to the words " on the trusts "—as though, that is to say, it read " any shares held by trustees on the trusts disposing of the shares ". I am, however, satisfied that one cannot so relate back those words. As a matter of strict grammar it would be difficult; and I find clear compulsion to the contrary in sub-para. (2), from which I have already made citations. Sub-paragraph (2) (a), it will be recalled, contains, among other things, this language, that

> " shares . . . held by trustees on trusts arising on an intestacy shall . . . be treated as if the trusts arose under a will disposing of the shares . . ."

There is a similar collocation of words in sub-para. (f). Those instances are I think compelling to the conclusion that in this vital sub-para. (1) (b) the words " disposing of the shares " are related to the immediately preceding words " family settlement ". Therefore, one is back at the short problem—can it be said on the facts of this case that these settlements of Mar. 19, 1951, dispose of the shares? In my judgment as a matter of ordinary use of language that question must be answered in the negative. I dare say that by a stretch of language one might give the words that meaning, but I have already indicated that I do not think that the court should stretch language in this way in a case where what is sought is a general exemption from the provisions of the Companies Act, 1948. I think that the short answer is that as a matter of ordinary language it must be the family settlement which disposes of the shares, i.e., it must be that it was by the settlement that the settlor handed over the shares and disposed of them to the trustees to be held on the family trusts.

I might leave the matter there but in deference to the arguments which have been addressed to us I mention one further point. Counsel for the company appreciated the difficulties, but he said that the benevolence of construction for which he asked, was desirable as avoiding possible anomalies. I understand that the practice of the Board of Trade has been that in an ordinary case where the settlement did settle shares and then the trustees as the registered shareholders obtain later some bonus shares, the Board have taken the view that it can fairly be said that what was the fruit of the settled property was equally within the scope of the paragraph; I am certainly not anxious to say anything which would cast doubt on the propriety of that practice. On the other hand, as counsel for the Board of Trade pointed out, if this case may seem a hard one, as in a sense it is because the shares were acquired on the very same day as the settlement was made, if the argument of counsel for the company were right, then it would follow that the exemption provisions would apply when the shares were acquired by the trustees not the next day after the settlement, but ten or twenty years after. If that is right, one is involved in very considerable difficulties. The scheme and the fundamental point underlying these exemptions seem to be that prima facie it is a basic condition—I am using the statutory language—that the registered shareholder must in truth be the beneficial owner of the shares. Then there are certain exceptions; one is where he dies and for a time those administering his estate would be interested in the shares and thereafter those concerned under his will. That is one exception. The other is this case of a family settlement. If counsel for the company is right, then the settlor never need have been a shareholder in the company at all. Someone could make a settlement of cash, and then the trustees could buy shares which they would put in their own names and could hold the shares on trusts for the settlor, for he is one of those included among the permitted objects of a family settlement, so that he never would at any stage be or have been a shareholder. That does, I confess, seem to me to be inconsistent with what is called the basic condition already mentioned.

I do not think that I can usefully add anything by further elaboration. I have mentioned that point because I think that it adds support to the conclusion which I feel the ordinary use of language inevitably compels, and taking that view, which is the view taken by Cross, J., I would dismiss the appeal.

UPJOHN, L.J.: I agree. It seems to me clear, as Lord Evershed, M.R., has said, that the natural meaning of the words " family settlement disposing of the shares " is a settlement which settles " the shares " and does not include shares which may be acquired afterwards on some change of investment. I desire only to add one point which supports that view, if indeed support be necessary. It is this. If one looks at para. 3 (1) (a), which is dealing (1) with shares or debentures forming part of the estate of a deceased holder, so long as administration has not been completed, it is perfectly clear that the reference is to shares or debentures which were held by the deceased. Then sub-para. (b) the other limb, refers to a will disposing of shares or debentures; and there again it seems to me to be quite clear that that must refer to shares held by the deceased and not to shares which might be acquired many years later by the trustees. Finally, it is made clear beyond doubt in para. 3 (2) (a) that when dealing with an intestate's estate the shares must have been owned by the intestate and not acquired afterwards by his administrators. Those considerations afford some support for the view that the words " family settlement disposing of the shares " must have their ordinary meaning, and I agree that this appeal should be dismissed.

PEARSON, L.J.: I agree and have nothing to add.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Kenneth Brown, Baker, Baker* (for the company); *Solicitor, Board of Trade.*

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

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(1) The terms of para. 3 (1) (a) are printed at p. 834, letter H, ante.

BRITISH TRANSPORT COMMISSION *v.* HINGLEY (VALUATION OFFICER) AND ANOTHER.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), January 11, 12, 13, February 16, 1961.]

Rates—Valuation—Dock undertaking—Profits basis—Nil assessment—Loss on dock undertaking—Part of British Transport Commission's undertaking—No obligation to adjust charges to cover costs—Stock and loan interest excluded from dock accounts—Whether departure from profits basis justified.

The British Transport Commission owned and occupied as part of its undertaking Grimsby Docks, which extended into two parishes. It made a heavy loss on the operation of the docks, which was reimbursed at first out of bank loans and then out of loans by the Exchequer which might never be repaid and might, therefore, ultimately be met by the taxpayer. It was not required to adjust charges to cover costs in any part of its undertaking and its dock accounts did not include interest on its stock so far as attributable to the docks or on a loan raised for the construction of the latest dock. The docks, which comprised two hereditaments, were assessed at £6,177 and £70 net annual value in the valuation lists of two boroughs; the total of these two values was the aggregate figure at which the hereditaments were entered in the third quinquennial railway valuation roll under the Railways (Valuation for Rating) Act, 1930, s. 3 (repealed in 1948). This aggregate figure was obtained by an apportionment of a value for the whole London & North Eastern Railway computed on a profits basis. The Lands Tribunal found that either the commission or some other person would have taken a tenancy of the docks but at no rent and that the hypothetical landlord would have accepted this offer "knowing that the docks would be operated and kept in good order". It therefore reduced the assessment to nil. On appeal,

Held: the decision of the tribunal must be upheld for the following reasons:

(i) as a public utility undertaking the docks should be valued on the profits basis, whether it extended over several rating areas or was confined to one, unless there were special circumstances justifying a departure from the method (see p. 844, letter H, post).

(ii) special circumstances justifying a departure from the profits basis were not constituted by the following—(a) the fact that the profits basis produced a nil value (see p. 844, letter F, post; *Barking Rating Authority* v. *Central Electricity Board*, [1940] 3 All E.R. 477, applied); (b) the absence of a duty to adjust charges to cover costs of any part of the commission's undertaking (see p. 845, letter C, post); (c) the exclusion from the dock accounts of interest on the commission's stock, no portion of which could be said to represent the value of the docks, or the loan interest which would not produce a profit unless the large annual deficit were met by reimbursement, as it was not, actual reimbursement being legally payable (see p. 845, letters F to I, post); or (d) the fact that the profitable part of the commission's undertaking would not bear rates which the unprofitable part escaped owing to the exemption of railways, since they made payments in lieu of rates presumably based on profits (see p. 845, letters D to E, post).

(iii) notwithstanding the absence of any return to the hypothetical landlord on his enormous capital outlay, the tribunal had had in mind the true question to be determined, what rent the hypothetical tenant would pay, and its finding that he would pay and the landlord would accept no rent was therefore a finding of fact with which the court could not interfere (see p. 846, letter E, and p. 847, letter A, post).

(iv) the value yielded by the profits basis could not be modified in the absence of special circumstances justifying such a course, and such special circumstances did not exist; moreover, in any event there was no figure to replace the value so yielded, the original assessment of £6,247 being one for which there was no basis at all as an amount of rent that a hypothetical tenant would be willing to pay (see p. 847, letter E, post). A

Appeal dismissed.

[As to undertakings valued on the profits basis and the valuation of dock undertakings, see 32 HALSBURY'S LAWS (3rd Edn.) 86, para. 120, and 90, para. 124; and for cases on the subject, see 38 DIGEST (Repl.) 609, 610, *839-844*; 666-669, *1173-1192*.] B

Cases referred to:

Barking Rating Authority v. *Central Electricity Board*, [1940] 2 All E.R. 341; [1940] 2 K.B. 51; *affd.* C.A., [1940] 3 All E.R. 477; [1940] 2 K.B. 493; 109 L.J.K.B. 778; 163 L.T. 214; 104 J.P. 363; 38 Digest (Repl.) 610, *842*. C

British Transport Commission v. *Hingley and Robinson and Grimsby Rural District Council*, (1960), 53 R. & I.T. 249.

Clayton v. *British Transport Commission*, [1955] 2 All E.R. 274; 119 J.P. 395; [1955] 1 W.L.R. 504; 38 Digest (Repl.) 667, *1177*. D

Dewsbury Waterworks Board v. *Penistone Union Assessment Committee*, (1885), 16 Q.B.D. 585; *affd.* C.A., (1886), 17 Q.B.D. 384; 55 L.J.M.C. 121; 54 L.T. 592; 50 J.P. 644; 38 Digest (Repl.) 651, *1083*.

Great Central Ry. Co. v. *Banbury Union, Sheffield Union* v. *Great Central Ry. Co.*, [1909] A.C. 78; 78 L.J.K.B. 225; 100 L.T. 89; 73 J.P. 69; 38 Digest (Repl.) 646, *1055*. E

Kingston Union v. *Metropolitan Water Board*, [1925] 2 K.B. 509; *affd.* H.L., [1926] All E.R. Rep. 1; [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; 38 Digest (Repl.) 650, *1081*.

London County Council v. *Erith Parish (Churchwardens, etc.) & Dartford Union Assessment Committee, etc.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 38 Digest (Repl.) 481, *47*. F

London County Council v. *Wilkins*, [1956] 3 All E.R. 38; [1957] A.C. 362; 120 J.P. 481; [1956] 3 W.L.R. 505; 38 Digest (Repl.) 478, *29*.

Manchester Ship Canal Co.'s & Dock & Harbour Authorities Assocn.'s Applications, [1927] 2 K.B. 154; 96 L.J.K.B. 421; 137 L.T. 39; 38 Digest (Repl.) 423, *792*.

Mersey Docks & Harbour Board v. *Birkenhead Assessment Committee*, [1901] A.C. 175; 70 L.J.K.B. 584; 84 L.T. 542; 65 J.P. 579; 38 Digest (Repl.) 620, *886*. G

Merthyr Tydfil Local Board of Health v. *Merthyr Tydfil Assessment Committee*, [1891] 1 Q.B. 186; 60 L.J.M.C. 42; 63 L.T. 647; 55 J.P. 294; 38 Digest (Repl.) 652, *1086*.

Metropolitan Water Board v. *Chertsey Assessment Committee*, [1916] 1 A.C. 337; 85 L.J.K.B. 296; 114 L.T. 380; 80 J.P. 137; 38 Digest (Repl.) 656, *1103*. H

Metropolitan Water Board v. *Hertford Corpn., Hertford Corpn.* v. *Metropolitan Water Board*, [1953] 1 All E.R. 1047; 117 J.P. 265; [1953] 1 W.L.R. 622; 38 Digest (Repl.) 650, *1082*.

Mid-Northamptonshire Water Board v. *Lee*, [1956] 2 All E.R. 59; [1956] 2 Q.B. 55; *affd.* H.L., [1957] 2 All E.R. 143; [1958] A.C. 68; 121 J.P. 340; 38 Digest (Repl.) 652, *1087*. I

R. v. *London & North Western Ry. Co.*, (1874), L.R. 9 Q.B. 134; 29 L.T. 910; 38 J.P. 245; sub nom. *R.* v. *Bedford Union Assessment Committee & Goldington Parish Overseers*, 43 L.J.M.C. 81; 38 Digest (Repl.) 646, *1058*.

R. v. *Southampton Dock Co.*, (1851), 14 Q.B. 587; 20 L.J.M.C. 155; 16 L.T.O.S. 460; 15 J.P. 145; 117 E.R. 227; 38 Digest (Repl.) 622, *893*.

A *St. James' & Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Committee*, [1933] All E.R. Rep. 98; [1934] A.C. 33; 103 L.J.K.B. 9; 150 L.T. 123; 98 J.P. 20; Digest Supp.

Sculcoates Union v. *Kingston-upon-Hull Docks Co.*, [1895] A.C. 136; 64 L.J.M.C. 49; 71 L.T. 642; 59 J.P. 612; 38 Digest (Repl.) 668, *1189*.

West Kent Main Sewerage Board v. *Dartford Union Assessment Committee, etc.*, B [1911] A.C. 171; 80 L.J.K.B. 805; 104 L.T. 357; 75 J.P. 305; 38 Digest (Repl.) 492, *119*.

Case Stated.

The respondent ratepayers were the owners and occupiers of Grimsby Docks, assessed as two hereditaments at £6,177 net annual value, £1,562 rateable value in the valuation list for Grimsby County Borough and £70 net annual value, C £11 rateable value in the valuation list for Cleethorpes Borough. These assessments were confirmed on appeal by a local valuation court of Lincolnshire Local Valuation Panel given on Mar. 21, 1958, but were reduced to nil on appeal to the Lands Tribunal (ERSKINE SIMES, ESQ., Q.C., and H. P. HOBBS, ESQ.), on Mar. 7, 1960. The valuation officer and the rating authority appealed by way of Case Stated against the tribunal's decision. They contended that the tribunal was D wrong in law in holding or finding that it was bound to value the hereditaments on the profits basis, and that there were no special circumstances which justified a departure from or modification of that basis; that it was wrong in law in concluding that a hypothetical tenant of the hereditaments would have considered that the loss in operating the docks was such that he would not be justified in offering to pay any rent but only to operate the docks and keep them E in good order, and that the landlord would accept such an offer; and that, on the facts, the tribunal ought to have held or found that the profits basis of valuation was inappropriate or fell to be modified in its application to the hereditaments, and that the hereditaments had been correctly assessed under the decision of the local valuation court.

F *The Solicitor-General* (*Sir Jocelyn Simon, Q.C.*) and *A. S. Orr* for the valuation officer.

A. S. Orr for the rating authority.

P. R. E. Browne, Q.C., and *H. Marnham* for the ratepayers.

Cur. adv. vult.

G Feb. 16. **HOLROYD PEARCE, L.J.**: The judgment that I am about to read is the judgment of the court. This is an appeal by the valuation officer and Grimsby County Borough Council against a decision of the Lands Tribunal in respect of the assessments of two hereditaments comprising the Grimsby Docks which are part of the undertaking of the British Transport Commission, the ratepayers. It raises the question whether a profits basis of assessment H should be applied to these hereditaments, and if so how it should be applied. If it is to be applied in the normal form, the result must be a nil assessment, for the docks have consistently made large losses for many years past, and the parties were agreed that a valuation on the normal profits basis produces a substantial deficit.

The local valuation court ordered the two hereditaments to be entered respec- I tively at £6,177 net annual value, £1,562 rateable value in the valuation list for Grimsby County Borough and £70 net annual value, £11 rateable value in the valuation list for the adjoining borough of Cleethorpes. The valuation officer had caused the hereditaments to be entered at those figures. No basis for those figures was put forward, and no evidence was given by the valuation officer to support them.

The Lands Tribunal allowed the appeal from the decision of the local valuation court, and reduced the assessments to nil. Counsel for the valuation officer argues that such a decision cannot be right. These docks, he argues, are a large industrial enterprise. They have had some millions of capital spent on them; they extend over some hundreds of acres; they employ directly one thousand persons, and have many others dependent on the enterprise. They must surely, he urged, make some contribution to the rates from which the enterprise draws inter alia the benefits of sewerage and lighting, and education for the children of its employees.

It was admitted by the chief estate and rating surveyor for the ratepayers that the prosperity of the town is bound up with the port, that it was unthinkable that the docks would be allowed to close down, and that, if the ratepayers did not operate them, somebody would be required to do so. The same witness said that he would not complain of the valuation officer's assessments totalling £6,247 if the strict profits basis were not applicable, but that this was not a view based on any matter of method or indeed valuation, and involved the assumption that the loss at Grimsby was not brought into valuation.

The first of the docks was constructed in 1852, and the most recent in about 1930. The hereditaments have always been railway docks. Under the scheme of 1926 they were grouped with the London & North Eastern Railway, and they were nationalised in 1947. Certain properties on or near the docks and within the hereditaments are let out by the ratepayers at rents totalling about £80,000. Those properties are separately assessed, and have little relevance to this case, save that it was argued before the Lands Tribunal that their existence created a moral or legal duty on the ratepayers to keep the docks open because of those lettings. But we cannot think that such a duty exists. It was not argued that these receipts ought to be set off against, or absorbed in, the losses of the rest of the dock undertaking.

It was conceded that the dock undertaking was properly treated as a separate undertaking, that being the method that the valuation officer has applied to other docks. The dock is in fact a part of the undertaking of the ratepayers which by s. 3 (4) of the Transport Act, 1947, forms one undertaking. That one undertaking is to be so conducted

> ". . . as to secure that the revenue of the [ratepayers] is not less than sufficient for making provision for the meeting of charges properly chargeable to revenue, taking one year with another."

Any loss made by the ratepayers was met, we are told, by loans first from the bank and latterly by the Exchequer. These loans at all material times were theoretically repayable by the ratepayers (see Transport (Railway Finances) Act, 1957). It is not therefore strictly correct to say that any losses are made good by the taxpayer, though in the end the taxpayer will probably have to assume liability for the loans to the ratepayers.

The ratepayers, by s. 25 (1) (e) of the Transport Act, 1953, have a general duty

> " to provide . . . port facilities in such places as may appear to them to be expedient . . . due regard being had, as respects all the services and facilities . . . to efficiency, economy and safety of operation and to the needs of the public, agriculture, commerce and industry."

They continue to maintain these docks, albeit at a loss, because no doubt in the light of the above mentioned matters it appears to them expedient to do so.

The hereditaments were entered in the third quinquennial roll under the Railways (Valuation for Rating) Act, 1930, s. 3, (1), at £6,000, and there was later an addition of £247 in respect of a new export shed at the docks. The figure of £6,000, however, does not have any contemporary significance, since it was apparently computed on a profits basis from the traffic receipts over the whole London & North Eastern Railway between 1936 and 1941 (see s. 4, s. 5 and s. 6)

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(1) The Railways (Valuation for Rating) Act, 1930, was repealed (except for one or two minor and irrelevant enactments) by the Local Government Act, 1948, s. 147 and Sch. 2, Part III.

A apportioned according to an apportionment scheme under s. 6 and s. 13. Moreover, it was not a valuation of the docks as a separate entity, but was an apportioned part of the value of the whole railway undertaking.

This value of £6,247 was apparently the sole foundation for the valuation officer's present figure of £6,247, divided between the two hereditaments into two sums of £6,177 and £70. No particulars or computations in support of B such valuations were lodged under r. 11 (iii) of the Lands Tribunal Rules, 1956. In the absence of evidence to support those figures, they can claim no merit save that the ratepayers' witness, while contending that they were wrong, conceded that he would not complain of them.

The Lands Tribunal decided that there were no special circumstances justifying a departure from the profits basis. In accepting that basis it said:

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> "We find no unreality in deciding that a tenant might be found who either for moral, social or statutory reasons would accept liability for running the docks, but would not be prepared to pay any rent."

Again, it concluded:

> "It has been argued that the boundaries of the docks are arbitrary; that D the accounts are largely an inter-departmental matter; that the railways benefit from the dock traffic, and that any loss in running Grimsby Docks is made up from other sources within the commission, but it seems to us that all these and other similar matters would have received full consideration following the decision of the Court of Appeal in *Manchester Ship Canal Co.'s & Dock & Harbour Authorities Assocn.'s Applications* (2), and E we do not think that they can be held to be special circumstances such as to invalidate the use of the profits basis.
>
> "We think that the [ratepayers] or possibly some other body viewing the docks vacant and to let would be willing to enter into a tenancy, and when deciding upon the rent would know that for many years the docks had been run at a loss; they would be aware that a profits valuation F produced a substantial deficit before any allowance for tenant's share; they would know that part of the income arose from rents from properties so let out as to be capable of separate assessment, and that the prosperity of the tenants of those properties depended largely upon the docks; they would realise the size and importance of the docks, but they would also consider that the loss in operating was such that they would not be justified G in offering anything as rent, and we believe that the landlord would accept such an offer knowing that the docks would be operated and kept in good order."

That question of railway benefit from dock traffic was dealt with somewhat cursorily, no doubt for the following reason. Immediately after hearing the present case (and before giving its decision on it) the same tribunal heard an H appeal concerning the Immingham Docks (3) which lie a few miles away from Grimsby Docks and are also part of the ratepayers' undertaking. The Immingham Docks showed a profit on accounts drawn on a like principle as Grimsby, and the valuation officer put forward a valuation on a profits basis, and there was in that case an investigation of figures in relation to railway benefit from dock traffic. But in the present case counsel for the valuation officer did not I investigate such figures in cross-examination, since the loss on these docks was so great that obviously no cross-examination on figures could turn the loss into a profit; this argument was directed to excluding the profits basis on principle.

The sole statutory authority for the valuation of a hereditament is contained in s. 22 (1) (b) of the Rating and Valuation Act, 1925, which provides that the net annual value of a hereditament is an estimate of the rent at which it might reasonably be expected to let from year to year, the tenant paying rates, taxes, repairs, insurance and other expenses of maintenance. That formula dates from the Parochial Assessments Act, 1836, and from an early date, in order to ascertain the net annual value of premises where there was no letting as a guide to value, the courts were forced to adopt certain hypotheses of which the foremost were two: (a) the contractor's basis, which starts from a consideration of the cost of the construction of the hereditaments; and (b) the profits basis, which starts from a consideration of the accounts to find what are the receipts of the tenant.

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(2) [1927] 2 K.B. 154.

(3) *British Transport Commission* v. *Hingley and Robinson and Grimsby Rural District Council*, (1960), 53 R. & I.T. 249.

The contractor's basis has been consistently applied to cases where, for instance, a local authority has to provide a sewage works that could not produce a revenue, or an educational institution whose object is not the collection of revenue. It is assumed that the authority which has to construct the works or the building would as a hypothetical tenant be prepared to pay as rent a reasonable percentage on the cost of the works or building which it would otherwise have to construct (see *West Kent Main Sewerage Board* v. *Dartford Union Assessment Committee, etc.* (4)). It is conceded in this case that any assessment founded on the contractor's basis would produce far too high a figure owing to the very large cost of constructing these docks, and that the contractor's basis was inapplicable.

The profits basis is founded on the theory that a hypothetical tenant will take into account the receipts and be prepared, after deducting the expenses and a reasonable living for himself, to pay the balance as rent. That basis has been consistently applied to public utility undertakings (including docks) whose object is to collect a revenue. For the distinction between the two classes of case see per LORD HERSCHELL, L.C., in *London County Council* v. *Erith Parish (Churchwardens, etc.) & Dartford Union Assessment Committee, etc.* (5). In the present case not only the motive, but the statutory duty of the undertaking, is to collect a revenue and to cover its expenses. As early as 1851 in *R.* v. *Southampton Dock Co.* (6) the profits basis was taken as the correct basis in assessing docks all of which were apparently in the same rating area. That basis became the accepted basis for valuing such undertakings. No case has been cited in which a dock undertaking has in this century ever been assessed on any other than a profits basis.

In *Kingston Union* v. *Metropolitan Water Board* (7) VISCOUNT CAVE, L.C., referred to the great difficulties encountered in applying to certain classes of hereditaments the apparently simple principle of estimating the rent at which the premises might reasonably be expected to let from year to year. As a result (8):

> ". . . it was found necessary for rating authorities and the courts to have recourse to hypotheses of a more or less violent character. In particular, there was an obvious difficulty in applying the general principle laid down . . . to a water company or other body supplying water in a number of different parishes . . ."

In these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on a sum exceeding the aggregate yearly value of their undertaking. He came to the conclusion in that case, where in fact the water company carried on its undertaking over a widely diffused area, that the profits basis must be applied

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(4) [1911] A.C. 171. (5) [1893] A.C. at p. 592. (6) (1851), 14 Q.B. 587.
(7) [1926] All E.R. Rep. 1; [1926] A.C. 331.
(8) [1926] All E.R. Rep. at p. 6; [1926] A.C. at p. 338.

A in view of the long practice of the courts in using it for such cases (9). He conceded the force of the reasoning which led ATKIN, L.J., in the court below (10) to a conclusion that the contractor's basis was to be preferred, but he said (11):

> "... the contrary view has prevailed for nearly eighty years, and I venture to think that it is now too late for the courts to adopt a different course."

B In a passage on which counsel for the valuation officer relies he said (12):

> "By this I do not mean that in no case can another method be adopted by a rating authority in assessing waterworks for rating purposes; but in order to justify that course it would be necessary that the authority should be satisfied that there are special circumstances in the case sufficient to make C it necessary for them to exclude the recognised formula of assessment and to resort to some other principle, and in the case now under consideration no such circumstances are found."

LORD BUCKMASTER said (13):

> "It does not follow that it has ever been laid down that such method is exclusive and must be of universal application ..."

D He added (13):

> "... where there is a company which, either by reason of its special and peculiar statutory restrictions or by reason of any other fact, cannot be regarded in the same light as that of an ordinary water company, it is open to consider whether other methods of valuation may not properly be E adopted."

The House was there directing its mind largely to the difficulty raised particularly in the case of water boards through the undertaking being scattered over various parishes. Moreover, it was clear that the profits basis was enjoined merely as a hypothesis intended to solve an otherwise insoluble problem, that it was one of "certain empirical rules", to use the words of LORD PARKER OF WADDINGTON F in *Metropolitan Water Board* v. *Chertsey Assessment Committee* (14), and that in cases for which the hypothesis was shown to be inapt it should be discarded in favour of some more workable hypothesis. In *Barking Rating Authority* v. *Central Electricity Board* (15) both in the Divisional Court and in the Court of Appeal it was said that only where the basis was "impossible" was there justification for discarding it.

G Later cases adhered to this standpoint. The profits basis continued to gain additional validity by the progress of time, but always with the rider that it could be discarded or modified if special circumstances justified a departure from it. This rider has never in any reported case been put into practice in the case of a public utility undertaking. There were cited to us, however, three cases before the Lands Tribunal in which the profits basis has been applied with some H modification based on other considerations to concerns which were not strictly public utility undertakings. JENKINS, L.J., put the matter clearly in *Metropolitan Water Board* v. *Hertford Corpn.* (16) in a passage which the Lands Tribunal rightly adopted as a summary of the law on this point:

> "... it must be borne in mind that the 'profits basis' has no statutory I authority, and sets up no new standard of rateable value, the one and only standard (so far as is here material) being the rent at which the hereditament might reasonably be expected to let from year to year on the terms stated

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(9) [1926] All E.R. Rep. at p. 7; [1926] A.C. at p. 340. (10) [1925] 2 K.B. 509.
(11) [1926] All E.R. Rep. at p. 9; [1926] A.C. at p. 344.
(12) [1926] All E.R. Rep. at p. 10; [1926] A.C. at p. 345.
(13) [1926] All E.R. Rep. at p. 13; [1926] A.C. at p. 352.
(14) [1916] 1 A.C. at p. 360.
(15) [1940] 2 All E.R. 341; [1940] 2 K.B. 51; C.A., [1940] 3 All E.R. 477; [1940] 2 K.B. 493.
(16) [1953] 1 All E.R. at p. 1055.

> A in s. 22 (1) (b) of the Act of 1925. The 'profits basis' is no more than an aid to the ascertainment of that rent in cases of a particular class. It lays down no inflexible code. The manner of applying its general principles, no doubt, admits of variation to suit the peculiarities of individual cases, and (no doubt) there may be cases in which there are special circumstances sufficing to justify its total exclusion. Nevertheless, the 'profits basis' B has behind it the sanction of long practice and of judicial approval over many years, and at the present time it may, I think, be said that as a matter of law it is prima facie the right method to apply in a case of this kind, the onus of showing special circumstances justifying a departure from it being on those who advocate such departure."

C That passage was followed with approval by this court in *Clayton* v. *British Transport Commission* (17). The latter case does not bear on the present problem, since it deals with the attempted excision of certain profitable hereditaments from a dock undertaking to which admittedly the profits basis was applicable. But SIR RAYMOND EVERSHED, M.R. (18), emphasised the fact that a dock undertaking was admittedly an undertaking appropriate for assessment D on a profits basis and alluded to the sanctity that this method of assessment has acquired (18).

LORD ATKIN in *St. James' & Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Committee* (19) gave, as examples of the public utility undertakings to which the profits basis should be applied, mines, docks and harbours, sewage and drainage works, railways, water, gas and electric lighting works. That E category is referred to as a class, with the omission of mines and the addition of lighthouses, in Sch. 1 to the War Damage (Public Utility Undertakings, etc.) Act, 1949.

The question before us, therefore, is whether the Lands Tribunal was right in thinking that no such special circumstances had been made out as would justify the jettison of the profits basis. The mere fact that the profits basis produces a F nil assessment for a large industrial concern is not a special circumstance which makes the profits basis inapplicable (*Barking Rating Authority* v. *Central Electricity Board* (20)). In that case one of the special circumstances alleged was (as here) that in spite of the result of the accounts, a tenant would be prepared to pay a rent (21). Even if the profits basis produces anomalies, it has been found to be the best available method (see the speeches of LORD RADCLIFFE and of LORD KEITH OF AVONHOLM in *Mid-Northamptonshire Water Board* v. G *Lee* (22)).

Counsel for the valuation officer contends that a departure from the profits basis is more easily justified where, as here, only two parishes are concerned, and the difficulties arising from diffusion are theoretical rather than real. But in *R.* v. *Southampton Dock Co.* (23), *St. James' & Pall Mall Electric Light Co., Ltd.* H v. *Westminster Assessment Committee* (24) and *Sculcoates Union* v. *Kingston-upon-Hull Docks Co.* (25), although the undertakings were all contained in one parish, the profits basis was held to apply. Although the diffusion of an undertaking is a strong, if not a major, reason for the application of the profits basis, that basis has received so strong a sanction by use that, alike whether an undertaking be diffused over several rating areas or confined to one, very I strong reasons must exist in order to justify any departure from it and the disturbance of so long a tradition of practice. On any hypothesis anomalies may be produced, but in order to avoid chaotic results it is desirable to adhere where possible to known principles. In the case of the Immingham Docks (26), which made a profit, it suited the Valuation Office to regard the profits, and to value on the profits basis. In the present case, where a loss is made, it suits it to disregard the loss (which must be partially paid out of the profits from Immingham) and discard the profits basis. Prima facie, however, the Valuation Office, like the ratepayers, must take the rough with the smooth and set its gains against its losses.

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(17) [1955] 2 All E.R. 274. (18) [1955] 2 All E.R. at p. 279.
(19) [1933] All E.R. Rep. at p. 100; [1934] A.C. at p. 41.
(20) [1940] 2 All E.R. 341; [1940] 2 K.B. 51; C.A., [1940] 3 All E.R. 477; [1940] 2 K.B. 493. (21) [1940] 2 All E.R. at p. 348; [1940] 2 K.B. at p. 60.
(22) [1957] 2 All E.R. at pp. 150, 153; [1958] A.C. at pp. 88 and 92.
(23) (1851), 14 Q.B. 587.
(24) [1933] 1 K.B. 605; H.L., [1933] All E.R. Rep. 98; [1934] A.C. 33.
(25) [1895] A.C. 136.

Counsel for the ratepayers in argument conceded that he would have no objection to all the ratepayers' dock undertakings being valued as a whole. If, however, the docks that make a profit are to be valued on a profits basis, and those that make a loss on a different basis, it would be inequitable, and lead to one of the injustices which, as the *Kingston Union* case (27) shows, the profits basis was designed to avoid.

Counsel for the valuation officer relies as a special reason for departure from the profits basis on the fact that the ratepayers are not bound to adjust their charges so as to cover costs in any particular part of the undertaking. But no suggestion was made in cross-examination before the Lands Tribunal that any figures were misleading in this respect or that the large deficit could by any adjustment be converted into a profit.

Again, it is argued that a major part, viz., the railway part, of the ratepayers' undertaking is not rated at all (Local Government Act, 1948, s. 85) and therefore it cannot be said that the profitable part of it will bear rates which the unprofitable part avoids. But the railway part of the undertaking does in fact make payments in lieu of rates (see the Local Government Act, 1948, s. 93). These payments are allocated according to the respective rateable valuations of the rating areas (s. 100 (2)) and are presumably on a profits basis. If so, this argument is a reason for rather than against the application of a profits basis to the parts of the undertaking not so covered.

Counsel for the valuation officer also puts forward as a special reason the facts that the interest on the British Transport Stock issued to former owners of the railway stock, and the payment of £50,000 per annum interest on the loan which we are told was raised for the construction of the latest dock, form no part of the dock accounts before us. Anomalies like these import a certain unreality into the accounts, and counsel seized on this fact as a foundation for an argument that " it was impossible " to work out what is really the profit or loss on the docks. It is true that all the figures wear an air of unreality. That is inevitable where the unit of assessment is in fact only a part of a far larger undertaking, all by statute to be treated as one.

The British Transport Stock was issued in exchange for the London & North Eastern Railway Stock at the market value of that stock on a certain date. We find it impossible to say that any portion of that stock represents the value attributed by the market to the Grimsby Docks. We find it impossible to draw any inference from the payment of interest on the British Transport Stock, or to hold that it is a special circumstance. The payment of interest was not referred to in the Case Stated, and we feel some doubt whether we would be entitled to hold that this was a determining factor. As to the Grimsby loan, no evidence was adduced, nor (as we understand it) was it ever mentioned at the hearing. Even if it be proper to consider it, it would be insufficient to overcome the very large annual deficit unless it can be established that that deficit as such is made good by some reimbursement.

Counsel for the valuation officer argues that in the ultimate resort the taxpayer makes good the deficit, but it must be remembered that reimbursement only produces equilibrium in the accounts. It does not produce a profit. We have been referred to various cases relating to precepts. In *Dewsbury Waterworks*

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(26) (1960), 53 R. & I.T. 249. (27) [1926] All E.R. Rep. 1; [1926] A.C. 331.

Board v. *Penistone Union Assessment Committee* (28) it was held that, in assessing a water board on the profits basis, account could be taken of the amount of water rate which could be levied to meet such expenses of maintaining the waterworks as the amount of water rents and payments for the supply of water should not be sufficient to discharge. In *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee* (29), it was held that in such cases the true question was whether such sums were received by the water board so as to make it potentially available to them as an item of gross profit. In giving the judgment of the court, VAUGHAN WILLIAMS, J., said (30):

> "It is so available if the money is received as the price of water supplied, or as an unconditional aid augmenting the receipts of the tenant; but it is not so received if the tenant received the money on terms that he shall repay it, if he receives it in short by way of loan. Now, do the appellants receive this money as they would money raised by a rate in aid, as an unconditional aid, or do they receive it by way of loan or otherwise on terms which render it not an item of gross profit?"

Applying that question to the present case, we are not satisfied that any making good of the deficit can be said to be unconditional aid to the dock undertaking. No investigation of the matter was made in the evidence, and we doubt if we are justified in drawing any inferences. If we were, it seems to us that the inferences point the other way. The deficit, so it seems, accumulates, being financed by loans which, so far as they come from the taxpayer or the Exchequer, are repayable even though never in fact repaid. If then the commission be a hypothetical tenant, there is no reimbursement, but merely a facility to borrow.

Counsel for the valuation officer further argued that the profits basis is only a means to the end of finding what the hypothetical tenant would pay, and that the tribunal failed to consider the real position of the hypothetical landlord in enforcing some payment of rent as a return on his enormous capital outlay. He relies on the passage in the judgment of the court given by DENNING, L.J., in *Mid-Northamptonshire Water Board* v. *Lee* (31):

> "The hypothetical landlord who builds a waterworks would reasonably expect to receive enough rent to enable him to pay interest on money he has borrowed and also to put something aside for a sinking fund. It is true that the question is what the hypothetical tenant can afford to pay, but in these cases the tenant has the power to raise the additional revenue required to enable him to pay the rent which the landlord would reasonably expect to receive."

This might be an argument if the Valuation Office were contending for the contractor's basis, but from that common sense recoils, and it was not relied on. Against this, moreover, must be set the dictum of LORD DUNEDIN in *Great Central Ry. Co.* v. *Banbury Union* (32):

> "Cost of construction is obviously an irrelevant consideration in getting at the rent to be paid by a hypothetical tenant. It was said to be so categorically by BLACKBURN, J., in *R.* v. *London & North Western Ry. Co.* (33)."

Such considerations are but guides to a decision in each case. The tribunal, though applying the profits basis, has had in mind the aim of that hypothesis which is to find what rent the tenant would pay. It has found specifically that the hypothetical tenants

> "would also consider that the loss in operating was such that they would not be justified in offering anything as rent, and we believe that the landlord would accept such an offer knowing that the docks would be operated and kept in good order."

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(28) (1886), 17 Q.B.D. 384. (29) [1891] 1 Q.B. 186. (30) [1891] 1 Q.B. at p. 193.
(31) [1956] 2 All E.R. at p. 63; [1956] 2 Q.B. at p. 68. (32) [1909] A.C. at p. 96.
(33) (1874), L.R. 9 Q.B. 134.

A Although that finding is of necessity a finding on hypothetical facts, it is a finding of fact (see per the EARL OF HALSBURY, L.C., in *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (34)). Providing that there was material on which the tribunal could properly so find, we could not in our judgment interfere with it, even if we ourselves would have found otherwise.

By the Lands Tribunal Act, 1949, s. 3 (4), the appeal to this court is on law B only. In *London County Council* v. *Wilkins* (35), an appeal from the Lands Tribunal, VISCOUNT KILMUIR, L.C., said (36):

> " It must not, however, be forgotten that, by virtue of the Lands Tribunal Act, 1949, s. 3 (4), a decision of the tribunal is final; but a person aggrieved by such a decision, as being erroneous on a point of law, is entitled to require the tribunal to state a Case for the decision of the Court of Appeal. It is, C in my view, particularly important in these days, when juries in civil matters are seldom seen, that reserved fields of fact should be inviolate and that appellate courts should not, by the intrusion of their factual opinions, make more difficult the correct decision on particular circumstances."

Counsel for the valuation officer relies on the three decisions in the Lands D Tribunal in which the profits basis has been adopted in principle, but its results have been somewhat modified in the resultant decision. He asks us to do likewise. Those cases, however, were not dealing with undertakings which come within the class of public utility undertakings. In the case of such other undertakings such modification seems to us a matter for the Lands Tribunal and not for this court. Those cases show that the tribunal is in such cases on occasion prepared E to modify the figures resulting from a profits basis where it thinks that on the facts such a course is justified. In the present case in our judgment we are not entitled to do so in the absence of special circumstances that justify it. We find none here. Moreover, there is no material on which this court could so modify the nil valuation. If the profits basis is to be rejected or modified, something must be put in its place. Here there is nothing. The only figure put forward in opposition F to the nil valuation is the valuation officer's figure of £6,247 for which there is no justification or basis at all. It would not be possible for the tribunal to find that figure to be the amount which a hypothetical tenant would have been willing to pay as there was no evidence to justify it. The tribunal did not so find, and it is therefore clear that this court cannot either.

In our judgment the appeal fails and must be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Town clerk*, Grimsby (for the rating authority); *M. H. B. Gilmour* (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(34) [1901] A.C. at p. 180.
(35) [1956] 3 All E.R. 38; [1957] A.C. 362.
(36) [1956] 3 All E.R. at p. 42; [1957] A.C. at p. 371.

Re HAIN'S SETTLEMENT. TOOTH AND ANOTHER *v.* HAIN AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Upjohn and Pearson, L.JJ.), February 9, 10, 1961.]

Settlement—Trust—Uncertainty—Discretionary trust—Class of beneficiaries including past present or future employees of settlor—Date of ascertainment of class—Whether trust valid.

In May, 1954, a settlor, who was then thirty-four years of age, settled a trust fund on trust (by cl. 3) that the trustees should pay or apply the income of the trust fund for the benefit of all or one or more of " the beneficiaries " as the trustees should think fit, or should accumulate the whole or part of the income. The settlement defined (by cl. 2) " the beneficiaries " to mean such of the following persons as should for the time being be in existence, namely, the children and remoter issue of the settlor and the past present or future employees of the settlor. At the time of the settlement the settlor had had in his employment only indoor and outdoor domestic servants, of whom there would have been in all about two dozen persons, but it was deposed that at the date of the proceedings in 1960 he would be unable to compile a complete list of all his present and past employees. It was not established that such a list could not have been made at the date of the settlement. On the question whether cl. 3 was valid or was void for uncertainty,

Held: assuming that cl. 3 of the settlement constituted a trust and not a power, the question was whether at the date of the settlement, which was the relevant date, the class of beneficiaries defined in cl. 2 was incapable of being ascertained, for, if the trust were valid at the date of the settlement, it would not be rendered invalid by the subsequent disappearance of some members of the class; there was no difficulty of ascertainment save in regard to past employees, and, as on the evidence it was not proved that they were unascertainable, the trust was valid.

Inland Revenue Comrs. v. *Broadway Cottages Trust* ([1954] 3 All E.R. 120) considered.

Appeal dismissed.

[As to certainty of the objects of a trust, see 33 HALSBURY'S LAWS (2nd Edn.) 101, para. 166; and for cases on the subject, see 43 DIGEST 593-595, *419-437*.]

Cases referred to:

Eden, Re, Ellis v. *Crampton*, [1957] 2 All E.R. 430; [1957] 1 W.L.R. 788; 3rd Digest Supp.

Hooper's 1949 Settlement, Re, (1955), 34 A.T.C. 3.

Inland Revenue Comrs. v. *Broadway Cottages Trust, Inland Revenue Comrs.* v. *Sunnylands Trust*, [1954] 3 All E.R. 120; [1955] Ch. 20; [1954] 3 W.L.R. 438; 3rd Digest Supp.

Ogden, Re, Brydon v. *Samuel*, [1933] All E.R. Rep. 720; [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.

Appeal.

This was an appeal by Denis Edward Hain, the first defendant (who was the settlor under a settlement of personalty dated May 28, 1954) against so much of an order made by DANCKWERTS, J., dated May 17, 1960, as declared that a trust or power, contained in cl. 3 of the settlement, to pay or apply income or for its accumulation, was valid, and for a declaration in lieu that the trust funds comprised in the settlement were held on a resulting trust for the settlor. There was no appeal from so much of the order of DANCKWERTS, J., as upheld the validity of cl. 4 and cl. 5 of the settlement.

By originating summons, dated Jan. 28, 1960, the plaintiffs (two of the trustees of the settlement) applied for the determination of the question (among other questions) whether the trust or power conferred by cl. 3 of the settlement to pay or apply the income of the trust fund comprised therein during the appointed period to or for the benefit of the beneficiaries therein mentioned was valid or void for uncertainty. The trustees of the settlement were the settlor and Waltheof Edwin Shepperson Tooth and Yvonne Mary Keturah Hain (formerly the wife of the settlor); the second to fifth defendants were the settlor's infant children, Felicity Garland Hain, Marilyn Loveday Hain, Timothy Edward Hain and Keturah Verity Hain, and the sixth defendant was Colenso Olive Durrance, who was a past employee of the settlor. Clause 2 of the settlement defined the "appointed period" to mean the life of the last survivor of the settlor's children living at the date of the settlement (all the infant defendants were in fact then living) and the term of twenty years after the death of such last survivor or the period of fifty years from the date of the settlement, whichever period should be the shorter. The definition of "the beneficiaries" and the terms of cl. 3 and other relevant clauses of the settlement, and the relevant facts, appear in the judgment of LORD EVERSHED, M.R., at pp. 849, 850.

J. M. Price for the first defendant, who was the settlor and a trustee of the settlement.

A. J. Blackett-Ord for the second to fifth defendants, the infant children of the settlor.

M. C. Nourse for the sixth defendant, a former employee of the settlor.

S. W. Templeman for the plaintiffs, two of the three trustees of the settlement.

LORD EVERSHED, M.R.: By a settlement made on May 28, 1954, the appellant in this court, Denis Edward Hain, settled a substantial sum of money. Clause 2 of the settlement defined the phrase "the appointed period"; it also defined the expression "the beneficiaries" to mean

> "such of the following persons as shall for the time being be in existence namely the children and remoter issue of the settlor and the past present or future employees of the settlor."

I pause at this point to dispose of one small matter. It was suggested (though counsel for the settlor in his very gallant argument, did not press the point) that the word "future" in its context had this result, that anyone now in existence who in the future might become or should become an employee of the settlor would be within the class, a result which, if right, would mean that at the date of the settlement and now the class would be quite incapable of ascertainment. I do not, however, give that meaning to the formula. I think, with the learned judge, that it is quite clear that the inclusion of future employees only operates to make them members of the class as and when they are in fact employed and, therefore, necessarily ascertained.

Clause 3 is the income provision during the appointed period and it is on this clause that the debate has turned. It is as follows:

> "During the appointed period the trustees shall pay or apply the income of the trust fund unto or for the maintenance support or benefit of all or any one or more exclusively of the other or others of the beneficiaries at such time in such shares and upon such terms and conditions and in such manner generally as the trustees in their absolute discretion shall from time to time think fit and so that in the case of any of the beneficiaries who is for the time being under the age of twenty-one years the trustees may pay any such income to his or her parent or guardian for the benefit of such person without seeing to the application thereof Provided Always that the trustees in their absolute discretion may at and for any time or times during the appointed period accumulate any part or parts of the income of the trust fund in the way of compound interest by investing the same . . . and shall hold any accumulations so made as part of the capital of the trust fund but so that the trustees shall have power at any time to resort to any

> accumulations so made and apply the same as if they were income of the trust fund."

Clause 4 is clearly a power, for it provides that " the trustees may at any time " if they think fit pay to any beneficiary any part of the capital of the trust fund. The final trusts of the distribution are in cl. 5, which reads:

> " At the expiration of the appointed period the capital of the trust fund or so much thereof as shall not already have been paid over by virtue of the last preceding clause hereof shall be distributed among all or any one or more exclusively of the others or other of the beneficiaries in such shares and proportions as the trustees shall in their absolute discretion determine and in default of and subject to any determination to the contrary by the trustees shall be held in trust for all or any of the children or child of the settlor living at the expiration of the appointed period . . ."

Before DANCKWERTS, J., the validity not only of cl. 3, but also of cl. 5 was challenged, on the broad ground that the class of beneficiaries being unascertainable, the clauses were accordingly void. The learned judge decided both points adversely to the settlor, and as regards corpus there is no appeal to this court; it is, in other words, conceded that cl. 5 is valid. The premise on which that concession has rested is that the provision as to distribution which first occurs in the clause is but a power. It is expressed, as will be recalled, in language which is, on the face of it, imperative—" the capital . . . shall be distributed among all or any one or more . . . of the beneficiaries ", a formula which corresponds verbally almost precisely with the language of cl. 3 relating to income. In cl. 5, however, there is in default of the determination under the initial provision, a gift over; and so it has been conceded that in spite of the imperative " shall " cl. 5 opens with but a power. It is, however, strenuously contended that there can be no such construction of cl. 3, because although there is a reference to the determination of the trustees at their absolute discretion, there is no provision for distributing the income in default of the exercise of the discretion. For my part I must say that I have thought there would be something of force to be said for the view that, construing the document as a whole, when the settlor used the formula in cl. 3—" the trustees shall pay or apply " among the class in their absolute discretion—he meant no more than he did when he came to the capital clause, viz., he meant to confer no more than a power, and that, if there were an absence of the exercise of that power and also of the power to accumulate, there would be a trust resulting to the settlor. The learned judge, however, concluded that cl. 3 did operate as a trust. We have not heard counsel for the sixth defendant (a former employee of the settlor) and I shall for present purposes, therefore, be content to assume that the opening language of cl. 3 constituted a trust as distinct from a mere power. I wondered whether it would be disadvantageous to those concerned to leave the matter thus, but I think not for reasons which I will expound briefly hereafter.

Proceeding, then, on the view that we are here concerned with a trust, the question arises: is the trust valid? I conceive that if the answer be that it is not, it must be shown that it was invalid at the date of the settlement. Nothing has occurred as a matter of fact which could translate a valid trust into an invalid trust. It may be that if the trustees have forborne from taking a note of who has come into the class between 1954 and 1960, they have added to some of their present difficulties, but if the trust was valid on its coming into operation, on the ground that the class of beneficiaries was then properly ascertainable, it seems to me quite impossible to say that it has since become invalid because on the evidence of the settlor his memory has somewhat failed in some respects in the interval of time.

There can be no doubt, as the result of a case in this court in 1955, viz., *Inland Revenue Comrs.* v. *Broadway Cottages Trust* (1), that there is a distinction in

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(1) [1954] 3 All E.R. 120; [1955] Ch. 20.

A cases of this kind between provisions in a will or settlement which operate as trusts and provisions which operate merely as powers. JENKINS, L.J., in delivering the judgment of the court, stated that he felt some sympathy for the view that the distinction is logically, at any rate, unattractive. He said (2): " We confess to some sympathy for the taxpayers' argument, which has about it an attractive air of common sense . . . ". The court, however, felt compelled to conclude B that, attractive or not, the distinction was there; and we must, of course, accept that result. As the court pointed out, if one takes the extreme case, one can see at once how the distinction becomes effective. By " the extreme case " I mean a case in which by the terms of the will or settlement the trustees are directed to apply the income in equal or unequal shares between all the members of a class. In such a case it is plain that unless the members of the class can be C ascertained, the trust cannot be carried into effect. In the case of a power, as has been pointed out in the many cases which for present purposes may be said to take their origin from that of *Re Ogden, Brydon* v. *Samuel* (3), it is not necessary for its valid and proper exercise that the trustees should know for certain who every member of the class is; provided they are satisfied that the objects whom they propose to benefit are members of the class, that ordinarily D speaking will suffice. Here it will be noticed there is no direction for division among every member of the class. Assuming that this provision is a trust, there is a direction that the income shall be distributed among such members of the class as the trustees select. It is said (and this is the kernel of the argument of counsel for the settlor which counsel for the settlor's children has supported) that the trustees cannot properly exercise that discretion unless and until they E know of what persons exactly the class consists among whom they are called on to make their selection. When one gets to that stage, the stage illustrated by a case of this kind, I confess that it does seem to me that the distinction which we must accept between a trust and a power is logically unattractive; but accepting the distinction, I accept also the consequence as concisely stated by this court at the end of its judgment in the *Broadway* case (2):

> F " On the contrary, LORD TOMLIN'S view [that is a reference to *Re Ogden* (3)] which we take to be that a trust for such members of a given class of objects as the trustees shall select is void for uncertainty unless the whole range of objects eligible for selection is ascertained or capable of ascertainment, seems to us to be based on sound reasoning and we accept it accordingly."

G On the premise, therefore, on which I am proceeding, the only question is: ought this court to conclude on the material before it in this case that the class which I have read from this definition of " beneficiaries " was not and is not capable of ascertainment? Counsel for the settlor has contended that on the evidence before the court the answer is that the class was and is not so capable. We must, he says, act on the evidence before us. Nothing has been put in by way H of evidence on the side of the respondents to the appeal and so, says he, the proper inference is that the class was and is not capable of ascertainment. Like the learned judge I must confess that I am wholly incapable of accepting that view. One must, as I said a moment ago, take one's mind back to May, 1954, when the settlor was, I gather, some thirty-four years of age and ask the question —was the class, which for present purposes can be confined to present or past I employees of his, incapable of ascertainment? The evidence before us consists first of an affidavit of the settlor himself in which he states who were the persons according to his recollection whom he has employed starting from 1943. It includes references of this kind: " Between 1944 and 1948 I employed a woman to baby-sit and occasionally to help in the house. I do not know her name ". Later as regards outdoor servants he says:

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(2) [1954] 3 All E.R. at p. 128; [1955] Ch. at p. 35.
(3) [1933] All E.R. Rep. 720; [1933] Ch. 678.

> A "I have employed a succession of gardeners and odd-job men at Crow Gables, Cobham, where the garden has an area of about eight acres. I cannot remember all the persons whom I employed and I cannot remember the names of some of them."

I dare say the total class might amount to a couple of dozen. Counsel for the settlor says that this evidence, in the absence of anything else, must be accepted. B He concedes that the question whether they are traceable is another matter. The question is not where they now are or if they can be found, but who they are or were. Counsel for the settlor further says, and says, if I may say so, with some boldness, that the professional trustee has also sworn an affidavit which includes this statement:

> C "The settlor informs me and I verily believe that he is forty years of age and that it would be impossible for him to compile a complete list of all his present and past employees."

Counsel for the settlor has gone on to contend that the trustee having asked that question of the settlor and received that answer, has exhausted all his possible duties as a trustee in the way of ascertaining the membership of the class for D whose benefit he has assumed office as a trustee. I regret to say that I cannot by any possibility accept that as an exhaustive performance of the trustee's office. The matter is not one which is capable of elaboration, but notwithstanding what the settlor has said (and I have no doubt said quite truly) I am quite unable on this material to conclude that this is a trust in favour of an unascertainable class and one which the court could not effectively control. I am making no E criticism of the circumstance that it is the settlor who is now seeking to obtain from the court a declaration that the settlement that he made in favour of a class, which I assume he selected, is and was void for uncertainty. I do say, however, that when a contention of that sort is put forward by the settlor, the court should not be particularly astute to give it effect. That again, I repeat, is no criticism of the settlor, whose affairs I understand have taken in some F respects an unhappy turn, and it may be that others would be advantaged if the court could hold that this trust was invalid. Of the cases which have come before the court, however, and to which we have been referred, it is to be noted that the *Broadway* case (4) in the Court of Appeal is the only one in which the court has held the relevant trust to be invalid on the ground of uncertainty. In the *Broadway* case (4) it was conceded in argument on behalf of the appellants G in this court, who were contending for validity, that the class was unascertainable and had been from the start; and that concession being made, the conclusion which I have read followed from it. In the ordinary way, to judge from the cases cited to us, this point of invalidity has been apt to arise as the result of the intervention in some form or another of the Commissioners of Inland Revenue. That is not so in this case. I observe that the courts have quite plainly been, even H in these other cases, reluctant to hold (and if I may say so, naturally reluctant to hold) that a settlement which has been deliberately made is and was from the start invalid for uncertainty. Two of the cases which I have in mind are *Re Hooper's 1949 Settlement* (5) and *Re Eden, Ellis* v. *Crampton* (6). In those two cases the class of beneficiaries concerned was far larger and far more difficult of ascertainment, so I should have said, than the relatively small class in the I present case; but the court none the less held that the class could not be said to be incapable of ascertainment. It is quite true that those decisions are not binding in this court, and indeed counsel for the settlor suggested that we should now hold that *Re Eden* (6), the second case decided by WYNN-PARRY, J., was wrongly decided. Quite certain it is that if we held this trust invalid, the result would be inconsistent with WYNN-PARRY, J.'s judgment in *Re Eden* (6). I need not pursue this matter; I repeat that for a period of a generation from the time of *Re Ogden* (7) it seems plain enough that the courts have not been astute to hold trusts of this kind invalid for uncertainty, and, without any criticism of the settlor, I take it that the court would be more than normally slow perhaps to hold a trust invalid at the suit of him who deliberately made it. However that may be, I conclude by saying that I agree entirely with the learned judge in the court below in thinking that the proposition for which counsel for the settlor has contended, as I say, with gallantry, cannot be accepted.

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(4) [1954] 3 All E.R. 120; [1955] Ch. 20.

(5) (1955), 34 A.T.C. 3.

(6) [1957] 2 All E.R. 430.

I would only add this. We have proceeded on the view that this is a trust and, therefore, no doubt it is true to say that strictly speaking the trustees, in order properly to perform their duty in dealing with the income unless they choose to accumulate it, should know what the class is. But common sense does come into the matter. It must be quite plain that some members of the class, whose names, at any rate, are known, would not, unless there is something very exceptional about it, be likely objects of the discretion. The three Italians who have returned to Italy and the two Poles who have returned to Poland, are perhaps two examples, and I should have thought a little further inquiry would disclose that some of these odd job men who were employed at the Cobham gardens were not the sort of persons that the settlor could ever have had in mind in creating this trust. For practical purposes I should have thought that the trustees would not find any embarrassment henceforth, as they do not appear to have found in the past, in properly distributing the income. After all, reverting to the distinction between trusts and powers, cases of this kind are those in which the settlor intends to benefit a class of people, and no one, I should have thought, would have any very great difficulty in fairly and properly making a selection. Certainly in this case the task of the trustees will be assisted by the fact that the settlor is one of the trustees and must have some idea in his mind of the kind of people to whom he would feel an obligation. Indeed, if this trust were held invalid, it would not seem to me that the task of the trustees would be very greatly alleviated. Apart from the question of accumulation there is cl. 4 of the deed, to which I have referred, and of course the final distribution, although that is, by reason that the distribution is to occur at the end of the appointed period, some way ahead. I do not pursue the matter further. I have said that I am willing to accept the premise that this opening part of cl. 3 creates a trust as distinct from a mere power and I am quite unable to say that it is invalid for uncertainty, and I would, therefore, dismiss the appeal.

UPJOHN, L.J.: I agree. It has been contended before us that certain provisions of cl. 3 of the settlement are void, because it is not possible to ascertain the class of beneficiaries. Like my Lord, I assume, though I certainly do not decide, that cl. 3 constitutes a trust in contrast to a mere power collateral. The sole question, therefore, that we have to consider is whether the beneficiaries who are defined in cl. 2 are defined in such a manner that they are incapable of ascertainment. That may happen in one of two ways; first, the language used to describe the class may be ambiguous or uncertain as a matter of construction or, secondly, on the evidence the class may in fact be incapable of ascertainment.

There is no ambiguity or uncertainty of construction in this case and the sole question is whether on the facts the class is incapable of ascertainment.

The date on which that matter is to be considered must, it seems to me, quite clearly be the date of the settlement in 1954. If looking at the words the settlor has used in the light of all the relevant facts the beneficiaries are sufficiently defined so as to be capable of ascertainment, the settlement cannot be subsequently invalidated, because some of the class may have disappeared A or become impossible to find or it has been forgotten who they were. That is only a matter which may increase the difficulty of the trustees in the administration of the trust, though, like Lord Evershed, M.R., I do not believe that in this case the fact that some of the servants have returned to their own countries gives rise to any really serious difficulty.

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(7) [1933] All E.R. Rep. 720; [1933] Ch. 678.

The question of certainty then is to be determined by construing the language B the settlor has used in the light of the relevant surrounding circumstances. The definition in cl. 2 starts with the children and remoter issue of the settlor for the time being in existence. That of course includes future issue, but it cannot be suggested that any difficulty can arise about that. Passing over the phrase " past employees " for the moment, no difficulty can arise over the meaning of the phrase " present employees "; that refers to employees employed by the C settlor at the date of the deed, and no difficulty can arise over future employees, because it has not been shown to be impossible to keep a list of those employees who from time to time enter the employment of the settlor. Therefore the attack has been made on the phrase " past employees ". No difficulty arises as a matter of language, but it is said that when one looks at the facts it was impossible in 1954 to find out who those past employees were. The affidavit which has D been filed by the settlor seems to me, as it has seemed to Lord Evershed, M.R., and did seem to the learned judge below, to fall far short of establishing that point as a fact. In 1960 the settlor does appear to be uncertain as to some of the servants that he has employed but there is no evidence whatever that in 1954 it would have been impossible to make a list (and it was quite a short list, as Lord Evershed, M.R., has said, probably something under two dozen) of those whom E he had employed. This is not the case of a man who owns some vast organisation with many employees. He is, fortunately, a man of wealth and the only employees he has are domestic indoor and outdoor servants. He was a young man in his twenties in 1942 when he married and in 1954 it seems to me it must have been not only not difficult, but very easy to have made a list of his past servants. At any rate, the contrary has not been proved and on the evidence it seems to F me impossible to contend with any hope of success that the beneficiaries as defined in cl. 2 of the settlement are incapable of ascertainment.

I agree, therefore, that this appeal should be dismissed.

PEARSON, L.J.: I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Collissons & Dawes* (for all parties).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

NOTE.

Re CHRISTIE-MILLER'S SETTLEMENT TRUSTS. WESTMINSTER BANK, LTD. *v.* CHRISTIE-MILLER AND OTHERS.

[CHANCERY DIVISION (Wilberforce, J.), February 7, 1961.]

Trust and Trustee—Variation of trusts by the court—Parties—Objects of power of appointment in whose favour appointment might be made in future—Partial release of power of appointment so far as necessary to make variation binding—Whether prospective appointees necessary parties—Variation of Trusts Act, 1958 (6 *&* 7 *Eliz.* 2 *c.* 53), *s.* 1 (1).

[For the Variation of Trusts Act, 1958, s. 1 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

This was an application by originating summons, dated Aug. 26, 1960, by Westminster Bank, Ltd. (the trustee of the settlement hereinafter mentioned) for an order under s. 1 of the Variation of Trusts Act, 1958, approving on behalf of all infant unborn and unascertained persons who were or might become interested in the property comprised in the settlement the arrangement subsequently mentioned.

By a settlement dated Oct. 27, 1939, and made on the occasion of the marriage of the respondent John Aylmer Christie-Miller (the husband) and his wife, who was also a respondent to the originating summons, two trust funds, the husband's fund and the wife's fund, were settled. The income of the husband's fund was settled on protective trusts for him for life and after his death on protective trusts for his said wife for life; and the income of the wife's fund was settled on reciprocal trusts for the benefit of the wife for life and then of the husband for life. The capital was settled on usual trusts for the issue of the marriage, as the husband and wife or the survivor of them should appoint, and in default of appointment on trust for the children of the marriage at twenty-one or, if female, on marriage, and if more than one in equal shares. There were three children of the marriage, the respondents Caroline, Lydia and Charlotte, all of whom were infants and unmarried. If the foregoing trusts failed the husband's fund would be held on trust (under cl. 7 of the settlement) for his brothers and sisters and their issue, living at his death, as he should appoint, and in default of appointment for his brothers and sisters then living in equal shares; and the wife's fund would be held on trust for anyone whom she might appoint and in default of appointment in trust for her if she survived the husband, or for her statutory successors on intestacy unmarried if she predeceased him. The husband had two brothers and one sister living, who were respondents to the originating summons; their issue, of whom there were five then living, were not joined as respondents. The sole next-of-kin of the wife, if she were to die at the date of the summons, was joined as respondent thereto.

The arrangement for which approval was sought was an arrangement varying the investment clause in the settlement by removing a restriction on the amount that might be invested in any one investment, being an investment of a nature not authorised by law for the investment of trust money. The question arose whether the issue of the brothers and the sister of the husband (who were objects of the husband's power of appointment under cl. 7 of the settlement) should be parties to the summons as being persons on whose behalf approval of the arrangement was required.

J. A. Brightman for the applicant, the trustee.

J. A. Wolfe for the husband, the wife, his brothers and sister and the wife's next-of-kin.

E. I. Goulding for the infant children of the marriage.

WILBERFORCE, J.: The proceedings have been properly constituted without joining the issue of the brothers and sisters. The appointor (the husband) is a party to the application and he is at liberty to release his power of appointment, if he sees fit, and thereby to extinguish the possible interests of such issue. It has been submitted that in concurring in the application the husband by his conduct has released the power of appointment "pro tanto", and thereby has precluded any appointee from objecting to any act done or omitted pursuant to the arrangement. I cannot decide that question one way or the other on this application. The point will not arise because it has been agreed between counsel that the order should contain the following recital:

> "John Aylmer Christie-Miller by his counsel releasing the power of appointment given to him by cl. 7 of the said settlement so far as necessary to make the said arrangement binding on any child children or remoter issue of his brothers and sisters who may become interested under any exercise of the said power."

The order will be drawn up in that form.

Order accordingly. Costs on a common fund basis; one moiety to be paid out of the husband's fund and the remaining moiety out of the wife's fund.

Solicitors: *Ranger, Burton & Frost* (for all parties).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re BURNEY'S SETTLEMENT TRUSTS.

[CHANCERY DIVISION (Wilberforce, J.), February 14, 22, 1961.]

Trust and Trustee—Variation of trusts by the court—Protective trust—Conversion to absolute life interest—Discretion of court—Matters to be considered——Variation of Trusts Act, 1958 (6 & 7 *Eliz.* 2 *c.* 53), *s.* 1.

Where the variation proposed by an arrangement of which the court's approval is sought under s. 1 (1)* of the Variation of Trusts Act, 1958, consists of the conversion of a protected life interest into an absolute life interest, the court's approval will not be given automatically despite the proviso to that subsection (by reason of which the court is not required to satisfy itself that the carrying out of the arrangement would be for the benefit of those prospectively interested under the protective trusts on whose behalf the court approves the arrangement), but the court's approval should be given or withheld on a judicial exercise of discretion taking into account the purpose of the trust and the intention of the settlor.

Re Steed's Will Trusts ([1960] 1 All E.R. 487) applied.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Case referred to:

Steed's Will Trusts, Re, Sandford v. *Stevenson*, [1960] 1 All E.R. 487; [1960] Ch. 407; [1960] 2 W.L.R. 474.

Adjourned Summons.

This originating summons, dated Sept. 29, 1960, was issued on the application of the settlor and her husband and the two married daughters of the marriage.

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* The relevant words of s. 1 (1) of the Variation of Trusts Act, 1958, are:— "Where property . . . is held on trusts . . . the court may if it thinks fit by order approve on behalf of—. . . (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined, any arrangement . . . varying or revoking all or any of the trusts . . . Provided that except by virtue of para. (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

By a settlement dated Apr. 5, 1927, made on the marriage of the settlor and the husband, the trust funds were held on trust to pay the income thereof to the wife for life and subject thereto to the husband on protective trusts for his life if he survived the wife and after the death of the survivor of the wife and the husband, on trust for the children or remoter issue of the marriage as the wife might by deed or will appoint and in default of such appointment for the children of the marriage who should attain the age of twenty-one years or being female marry under that age in equal shares. The settlement contained a power of advancement and a power for the wife to appoint interests in the trust fund to any subsequent husband or the issue of any subsequent marriage. The investment clause did not permit investment in the ordinary shares of limited companies. There were two children of the marriage, both daughters, who were of full age and married. The proposed arrangement was to convert the husband's reversionary life interest from a protected life interest into an absolute life interest and it conferred no benefit on those who might become interested under the protective trusts. The arrangement also provided for an enlargement of the investment clause so as to enable the trustee to invest in ordinary shares of limited companies so long as the Public Trustee remained a trustee, and also to purchase, with or without vacant possession, land or buildings, whether freehold or leasehold for a term of not less than sixty years, to provide a residence for occupation and further for such purpose to pay out of capital the cost of erecting, pulling down, rebuilding or repairing any house or building.

E. W. Griffith for the applicants.

J. W. Brunyate for the respondent, the Public Trustee, trustee of the trust fund.

E. F. R. Whitehead for the respondents, the infant children of one of the married daughters.

Cur. adv. vult.

Feb. 22. **WILBERFORCE, J.**, read the following judgment: This is an application under the Variation of Trusts Act, 1958, for approval of an arrangement varying the trusts of a marriage settlement made in 1927. The arrangement is not a complicated one; indeed, it was rather on account of its simplicity that I felt that I should put in writing the considerations which seem to me to be relevant in deciding whether the court can and should exercise the jurisdiction conferred by the Act and the result of those considerations in the present case. For there is little in the arrangement, so far as it proposes to vary the beneficial trusts of the settlement, beyond a proposal converting the husband's reversionary life interest, which is a "protected" life interest, into an absolute life interest and it appears to me to be desirable to be clear as to the basis on which this conversion may properly be made. This is all the more necessary in view of the fact that similar conversions are constantly being sought in applications under the Act and that there is a danger, so it seems to me, of it being assumed, in reliance on the proviso to s. 1 of the Act, that they only have to be made to be automatically granted. An unreasoned approval of this application might give encouragement to such an approach.

The settlement was made in 1927, the settled fund being provided by the wife. She was then twenty-three years old, and it can safely be said that the husband's position in his chosen profession was more precarious than it has since become. The trusts were for the wife for life, then for the husband, if surviving, on protective trusts for life, and, subject to these life interests, for the issue of the marriage in the usual way. There was a power for the wife to appoint interests in the trust fund to a subsequent husband or the issue of any subsequent marriage.

In these circumstances, the persons interested in the trust fund, apart from the wife and husband, would be (i) the issue of the marriage, (ii) a future husband of the wife and her issue of a subsequent marriage, and (iii) (under the protective trust) a future wife of the husband and his issue of a subsequent marriage. The wife may be taken to be past the age of child-bearing so that the interests of her future children, by the present or any future marriage, may be disregarded.

Turning now to the proposal to vary the trusts of the husband's reversionary life interest, it is clear from the proviso to s. 1 that I need not be satisfied that the arrangement confers any benefit on the persons who may become interested under the protective trusts. But this does not mean that their interests can be disregarded altogether. The discretionary power conferred on the court by the Act still has to be judicially exercised and it remains incumbent on the applicants to make out a case for that being done. On the present application, the proposal to convert the protected life interest into an absolute life interest is not accompanied, as it is in many cases, by any proposal from the husband to surrender his life interest for the benefit of the remaindermen. It does not go further than to say that the conversion would put him in a position to surrender if he thought fit.

From the decision of the Court of Appeal in *Re Steed's Will Trusts, Sandford* v. *Stevenson* (1), it appears that what I should do is to consider the proposal as a whole, taking into account the purpose of the trust and the intention of the settlor. Having placed the interests of the husband's second spouse and his future issue (described as "spectral" by LORD EVERSHED, M.R. (2)) in this context, I then have to consider whether it is proper to approve a scheme which varies or destroys their interests. Proceeding in this way, the factors which ought to be taken into account seem to be the following: (i) The protected life interest was created in 1927, when the husband's circumstances were very different from what they have happily since become. Moreover, in 1927 settlors and their advisers were not so alive as they have since become to the desirability of leaving it open to beneficiaries of income to surrender their interests in favour of their issue well before their death. In both of these respects, the original purpose for which the protected life interest was created has become obsolete, and a prudent councillor would certainly so advise the settlor. (ii) It cannot have been the intention of the settlor, in creating the protected life interest, to provide benefits for a second wife of the husband or for the issue of a second marriage of his. The settlor in fact states so much in terms in her affidavit. The evident purpose was to protect the husband, as the father of the settlor's family and for the benefit of that family, in the enjoyment of that income. (iii) Although there is no actual proposal by the husband to release his life interest in whole or in part, the effect of the conversion would be to enable him to do so, and though the benefit so created for the issue of the marriage is hypothetical, it is no more so than is the benefit which they might hope to attain through a forfeiture of his life interest. A forfeiture, occurring otherwise than through a disposition by the husband, is almost inconceivable and the possibility that a disposition may be made in favour of the issue rather than in favour of a purchaser of the life interest, seems, not least on account of the husband's age as compared with the wife's, if anything the greater. If those concerned were in existence and able to choose for themselves, I have little doubt which of the alternative possibilities they would prefer. (iv) I mentioned earlier that there is little in the present arrangement, so far as it alters the beneficial trusts, apart from the proposed conversion of the protected life interest. There is, however, something. The wife does undertake, as part of the arrangement, to release her power to confer an interest in the trust fund on a subsequent husband. This evidently confers a specific and substantial benefit on the persons whose interests under the protective trusts have principally to be considered, viz., the wife's issue, and makes the arrangement as a whole appreciably more attractive of the court's discretionary approval.

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(1) [1960] 1 All E.R. 487; [1960] Ch. 407.
(2) [1960] 1 All E.R. at p. 493; [1960] Ch. at p. 421.

I should, I think, be unwise if I were to attempt to separate the considerations that I have mentioned and to say whether or not I would have approved the arrangement had element (iv), or, for that matter, any other element, been missing. It would not even be helpful to do so, because these elements will not, in identical form, be present in any other case. It is sufficient to say that elements such as these appear to me to be relevant in considering whether a protective trust should be interfered with; and, taking them as they exist here, they are of sufficient weight to satisfy me that the arrangement should be approved. I have indicated during the hearing that I was satisfied with regard to the suggested extension of the investment clause, and accordingly I am prepared to approve the arrangement as a whole.

[HIS LORDSHIP affirmed the arrangement on behalf of the infant respondents; all persons as yet unascertained; all persons unborn and all persons who would be objects of the discretionary trust.]

Order accordingly.

Solicitors: *Ashurst, Morris Crisp & Co.* (for all parties).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

ROSE *v.* REGINAM.

[PRIVY COUNCIL (Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest), February 6, 7, 8, March 6, 1961.]

Privy Council—Bahama Islands—Criminal law—Murder—Diminished responsibility—"Abnormality of mind"—"Mental responsibility"—Bahama Islands Homicide (Special Defences) Act, 1959, *s.* 2 (1).

Criminal Law—Murder—Diminished responsibility—"Abnormality of mind"—"Mental responsibility"—Bahama Islands Homicide (Special Defences) Act, 1959, *s.* 2 (1).

The appellant, who at the time was a prisoner serving sentence, stabbed an overseer who refused to give him the key of a gate of the prison, and, as result of the injuries so sustained, the overseer died. At the trial of the appellant on a charge of murder medical evidence was given on his behalf to support a defence of diminished responsibility under s. 2 of the Bahama Islands Homicide (Special Defences) Act, 1959, which provided that a person should not be convicted of murder "if he was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for his acts". The trial judge, in summing-up to the jury, referred to the case as a border-line case of sanity or insanity, explained the meaning of insanity in law according to the M'Naghten Rules, and continued "Do you think here, therefore, that there was this question of border-line? That's what you've got to look at. Do you think that [the appellant] was suffering from this abnormality?" On appeal against conviction,

Held: the conviction should be quashed because—

(i) the direction to the jury in which they were told to assess the degree of abnormality of mind in terms of the border-line between legal insanity and legal sanity, as laid down in the M'Naghten Rules, was a vital misdirection, for abnormality should not be judged by whether it bordered on insanity or not, and

(ii) "mental responsibility" in s. 2 did not connote the standard required for the man to be held responsible in law for his acts, but the words "such abnormality of mind . . . as substantially impaired his mental responsibility" involved a mental state which in popular language (not that of the M'Naghten Rules) a jury would regard as amounting to partial insanity, and, if insanity were to be taken into consideration in relation to the defence of diminished responsibility, the word must be used in its broad popular sense. A

Explanation of the meaning of "abnormality of mind" given by LORD PARKER, C.J., in *R.* v. *Byrne* ([1960] 3 All E.R. at p. 4) approved.

Appeal allowed.

[**Editorial Note.** The Bahama Islands Homicide (Special Defences) Act, 1959, s. 2, is in identical terms with s. 2 of the English Homicide Act, 1957. B

For the Homicide Act, 1957, s. 2, see 37 HALSBURY'S STATUTES (2nd Edn.) 174.]

Cases referred to:

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 14 Digest (Repl.) 60, 246.

R. v. *Byrne*, [1960] 3 All E.R. 1; [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440. C

R. v. *Spriggs*, [1958] 1 All E.R. 300; [1958] 1 Q.B. 270; 42 Cr. App. Rep. 69; [1958] 2 W.L.R. 162; 3rd Digest Supp.

R. v. *Walden*, [1959] 3 All E.R. 203; [1959] 1 W.L.R. 1008; 3rd Digest Supp.

Appeal.

Appeal by special leave in forma pauperis by Elvan Rose from his conviction in the Supreme Court of the Bahama Islands (SIR GUY HENDERSON, Q.C., sitting with a jury) on May 14, 1960, of murder, for which he was sentenced to death. The facts are set out in the judgment of the Board. D

J. T. Molony, Q.C., and *D. A. Grant* for the appellant.

Neil Lawson, Q.C., and *M. Heald* for the Crown.

E

LORD TUCKER: The appellant was convicted of murder after a trial in the Supreme Court of the Bahama Islands before the Chief Justice (SIR GUY HENDERSON, Q.C.) and a jury on May 14, 1960, and was sentenced to death. He has no right of appeal from this conviction other than by special leave to Her Majesty in Council. Leave to appeal in forma pauperis was granted on July 27, 1960. He was charged and tried together with another man named James Ingraham for the murder of Samuel Otis King on Feb. 17, 1960. Ingraham F was also convicted and sentenced to death. He has not appealed. On Feb. 17, 1960, both the accused were prisoners serving sentences in Fox Hill prison where the deceased man King was employed as an overseer. At about 3.30 p.m., an assistant turnkey named Gay was knocked unconscious in a corridor of the prison. He did not see who struck the blow, but shortly afterwards both accused were seen bending over him as though searching him. They then went to the south G main gate where King was in charge and attempted without success to open it. The appellant told King to open it and, when he refused, took out a knife and threatened him with it. King broke away from the appellant who followed him and, after telling him he was going to kill him because he would not give up the keys, stabbed him with a knife inflicting two wounds, one of which was fatal. It is not necessary to refer in further detail to the events of that day as it was not H disputed on the appeal that the accused killed King and that, if the jury had been properly directed on the defence of diminished responsibility, the verdict could not be questioned.

The relevant statutory provisions in the Bahama Islands are contained in s. 2 of the Homicide (Special Defences) Act, 1959, and provide as follows:

> "(1) Where a person kills or is a party to the killing of another, he shall I not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> "(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

> "(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> "(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it."

The language is identical with that of the English Homicide Act, 1957.

It will be convenient at this stage to endeavour to summarise the effect of the medical evidence adduced by the defence in support of the plea of diminished responsibility. It is to be found in the evidence of Dr. Mary Etheridge who had qualified in Paris as a Doctor of Medicine and was a licentiate of the Royal College of Physicians in London and a member of the Royal College of Surgeons. She had specialised in neuro-surgery and neuro-psychiatry in Paris and served as a specialist in the Royal Army Medical Corps in India during the war. She had also worked at the Hammersmith Hospital and at the National Hospital for Nervous Diseases in London. She had acted as consultant in neurology, neuro-surgery and neuro-psychiatry at Princess Margaret Hospital and the Bahamas General Hospital. She had examined the appellant and his history, and said she found a clear cut history of delusions and hallucinations. She found indications of possible head injuries which she subsequently verified. In the cases of three of these injuries, there was a history of subsequent unconsciousness and amnesia. She caused X-ray photographs to be taken, and carried out an examination of his optic nerves. After giving in considerable detail a description in highly technical language, which must have been extremely difficult for the jury to follow or understand, she summarised her conclusions in these words:

> "With the material at our disposal we were forced to certain conclusions, and these were: That we had a man who had given evidence or at least who had suggested to at least one observer—and I'm talking now about Cpl. Hepburn—that he was mentally unbalanced, who had suggested to another observer—and I'm referring now to Dr. Podlewski—that his condition might be delusional, it might have suggested a delusional state as he said and had given to myself evidence of injury to his skull with the possibility—and in view of his history I would say the probability—of underlying brain damage as evidenced by his delusional state, his hallucinations and on at least two occasions, his extremely brutal and violent behaviour—maniacal behaviour—I would say. If I had to put a name on it I would call it with Mr. Adolph Meyer, post-traumatic constitution, with paranoid developments, the thing which we call today the punch drunk syndrome."

In cross-examination, she was asked:

> "Q.—Dr. would you say that all this adds up to being insane? A.—I didn't say such a thing.
>
> "Q.—No. I am asking you? A.—Then I would say no. Not insane in the way which I imagine you mean.
>
> "Q.—Well you don't think he is insane in any way? A.—I didn't say such a thing.
>
> "Q.—No, I am asking you? A.—I showed that he showed mental trouble, mental disorders, disorders of the intellect; he has periods of insanity.
>
> "Q.—Well you are saying that he had periods of insanity? A.—Insane in the way that in general people understand it."

Later on, in answer to the question "Do you now say he has paranoia?", she replied:

> "I said that [the appellant] has had repeated injury to his brain which showed that his intellect had been impaired, which showed that he at

> many times, and he has given you evidence of it, has had completely not only diminished but absent moral responsibility."

The effect of the evidence of Dr. Podlewski, who was recalled in rebuttal by the prosecution, may be summarised by setting out the last two or three questions and answers in his examination in chief:

> "Q.—Is it your opinion that this man is sane or insane. That is was he sane or insane on Feb. 17? A.—My opinion is that there is nothing in what I have seen of him to indicate that he was suffering from any serious mental illness at this time.
>
> "Q.—Could you say whether or not he was on the border-line of insanity? A.—I could definitely say he was not on the border-line.✓
>
> "Q.—I notice you keep saying, doctor, 'any serious mental illness' would you like to explain that to us? A.—Well, in the legal sense when I say 'serious mental illness' I mean the type of mental illness which would✓ substantially diminish his responsibility for his actions.
>
> "Q.—I see. A doctor might think that there might be something wrong with him. Is that what you mean? A.—It is a possibility."

It had been elicited in the cross-examination of this witness when he had given evidence earlier in the trial that the appellant had been convicted of murder and sentenced to death in 1957. On that occasion he had made a report on his mental condition. This was put in evidence, and showed that the appellant at that time had complained of molestation and annoyance by people who were threatening to kill him. The doctor was unable to ascertain whether this belief was delusional or not but, if it was, it would be consistent with the existence of paranoia. His sentence was subsequently commuted to life imprisonment. The above will suffice to indicate the two conflicting medical views of the appellant's condition which the jury were called on to consider in deciding whether, on balance of probability, the defence had established the plea of diminished responsibility which would justify a verdict of manslaughter.

The contention of the appellant is that the jury did not have a correct or sufficient direction in law as to the nature of this defence and, in particular, were misdirected as to the meaning of the words "mental responsibility". Before turning to the passages of which complaint is made, their Lordships desire to emphasise that the Chief Justice was engaged in the difficult task of instructing the jury as to the meaning, and application to the evidence in the present case, of a difficult section which has introduced a novel conception into English criminal law, and, moreover, he was doing this before the Court of Criminal Appeal in this country had given judgment in *R.* v. *Byrne* (1). After reading the section of the Act to the jury and explaining the burden of proof, the learned Chief Justice read to the jury the following extract from the summing-up of PAULL, J., in *R.* v. *Walden* (2) which had received the approval of the Court of Criminal Appeal in England:

> "There are some cases, you may think, where a man has nearly got to that condition, but not quite; where he is wandering on the border-line between being sane and insane, where you can say to yourself, 'Well, really, it may be he is not insane, but he is on the border-line . . . He is not fully responsible for what he has done.' Now you may think, and it is entirely a matter for you, that that is what is meant by these words in the Act . . . 'such abnormality . . . as substantially impaired his mental responsibility.' In other words, he is not really responsible for what he is doing. His responsibility, if not wholly gone, has been impaired."

The Chief Justice then proceeded as follows:

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(1) [1960] 3 All E.R. 1; [1960] 2 Q.B. 396. (2) See [1959] 3 All E.R. at p. 205.

> "That, I think, might help you when you are considering this question of impaired responsibility. And, since that is supposed to be, or is said to be a border-line case of sanity or insanity, then it seems to me that I should explain very briefly what we understand by insanity in law. And that is that the person is so deranged that he doesn't know what he was doing and he doesn't know if what he was doing is right or wrong—he's unable to distinguish."

Then he quoted in full the rule in *M'Naghten's Case* (3), reading it out verbatim. He observed that it was "not this case, but I want you to see what insanity is so that you can see whether it is border-line or not". After quoting it he went on:

> "'Wrong' means legally wrong. Do you think here, therefore, that there was this question of border-line? That's what you've got to look at. Do you think that [the appellant] was suffering from this abnormality?"

It is said by counsel for the appellant that the appellant's abnormality should not be judged by the test whether it bordered on insanity or not, and that no such test is justified by the language of the section. In any event, it is not a conclusive test to be applied in every case. Furthermore, if insanity is to be introduced into the application of the section, there is no justification, he said, for confining it to legal insanity within the M'Naghten definition. For the Crown, it was argued that "mental responsibility" in the section means "mental responsibility in law", i.e., the standard required for a man to be held responsible in law for his acts; and that standard was to be found in the rules in *M'Naghten's Case* (4) because there was no other standard to which it could be referred. It was right, therefore, said the Crown, for the Chief Justice to invite the jury to apply the test of border-line of insanity as defined in the M'Naghten Rules. Their Lordships cannot accept the Crown's contention. It would be an undue limitation of the wide words of the section. In *R.* v. *Byrne* (5), the Lord Chief Justice (LORD PARKER) delivering the judgment of the court, after setting out the matters required to be proved in the defence of diminished responsibility, proceeded:

> "'Abnormality of mind', which has to be contrasted with the time-honoured expression in the M'Naghten Rules 'defect of reason', means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will-power to control his physical acts."

Later, after referring to the citations from Scots cases in *R.* v. *Spriggs* (6), LORD PARKER continued (7):

> "They indicate that such abnormality as 'substantially impairs his mental responsibility' involves a mental state which in popular language (not that of the M'Naghten Rules) a jury would regard as amounting to partial insanity or being on the border-line of insanity."

Their Lordships respectfully accept this interpretation of the words "abnormality of mind" and "mental responsibility" as authoritative and correct.

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(3) (1843), 10 Cl. & Fin. at p. 210.
(4) (1843), 10 Cl. & Fin. 200.
(5) [1960] 3 All E.R. at p. 4; [1960] 2 Q.B. at p. 403.
(6) [1958] 1 All E.R. 300; [1958] 1 Q.B. 270.
(7) [1960] 3 All E.R. at p. 5; [1960] 2 Q.B. at p. 404.

They would not, however, consider that the Court of Criminal Appeal was intending to lay down that, in every case, the jury must necessarily be directed that the test is always to be the border-line of insanity. There may be cases in which the abnormality of mind relied on cannot readily be related to any of the generally recognised types of "insanity". If, however, insanity is to be taken into consideration, as undoubtedly will usually be the case, the word must be used in its broad popular sense. It cannot too often be emphasised that there is no formula that can safely be used in every case—the direction to the jury must always be related to the particular evidence that has been given, and there may be cases where the words "border-line" and "insanity" may not be helpful.

In the result, their Lordships are of opinion that the direction given to the jury by which they were told to assess the degree of abnormality of mind in terms of the border-line between legal insanity and legal sanity as laid down in the M'Naghten Rules was a serious and vital misdirection which would, no doubt, not have been given had the Chief Justice had the benefit of LORD PARKER'S judgment in *R.* v. *Byrne* (8).

There was a further passage in the summing-up which was strongly relied on by counsel for the appellant. Towards the end of his charge, the Chief Justice, referring to the killing, said:

> "Do you think that he did that under the influence of this diminished responsibility, or do you think that he knew just exactly what he was doing? Did he intend to do it? If so, murder; if not, manslaughter."

This was a misdirection. A man may know what he is doing and intend to do it and yet suffer from such abnormality of mind as substantially impairs his mental responsibility. This misdirection, coming where it did, may have been a determining factor in the jury's verdict.

There were two other passages which were the subject of complaint, but their Lordships, although appreciating that they were open to criticism, would not have regarded them standing alone as misdirections which could reasonably have affected the jury's verdict. One of these dealt with the appellant's amnesia which was said to have covered the period from the moment he saw blood when Gay was knocked down until several days later. It is not necessary to set out the passage, but it would seem that the learned judge had not quite appreciated the use which the defence were making of this amnesia if it existed. In the other passage, the Chief Justice, in dealing with the case of the appellant's fellow accused Ingraham, had overlooked the provisions of sub-s. (4) of the Act and told the jury that, if they found that the appellant was suffering from diminished responsibility and, consequently, was guilty only of manslaughter and that Ingraham was acting in concert with him and encouraging him to do what he did, then they should find Ingraham also guilty of manslaughter. As already indicated, their Lordships would not have regarded these passages by themselves as sufficient to vitiate the verdict against the appellant.

In the event, their Lordships are of opinion that the appellant was deprived of his right to have his defence of diminished responsibility properly considered by the jury, and they must consequently humbly advise Her Majesty that the verdict of guilty of murder and the sentence of death passed on the appellant should be quashed and a verdict of guilty of manslaughter and a sentence of imprisonment for life substituted therefor.

Appeal allowed.

Solicitors: *Blyth, Dutton, Wright & Bennett* (for the appellant); *Charles Russell & Co.* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(8) [1960] 3 All E.R. 1; [1960] 2 Q.B. 396.

Re NEW TIMBIQUI GOLD MINES, LTD.

[CHANCERY DIVISION (Buckley, J.), February 20, 21, 1961.]

Company—Registration—Restoration to register—Name of company struck off in 1955—Petitioners subsequently acquired assigned debts and shares in the company—Whether petitioners were entitled to petition—Whether court would exercise its discretion to restore name to register—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 353 (6).

In 1944 bankruptcy proceedings were started against a company in Colombia which were continuing at the date of the petition. The company's name was struck off the register in 1955 by the registrar of companies. Two persons petitioned the court to have its name restored to the register under s. 353 (6)* of the Companies Act, 1948. The first petitioner held shares in the company which he acquired in September, 1959, and both petitioners claimed to be creditors of the company in respect of debts which were assigned to them in 1960, which accrued before the company's name was struck off. Neither petitioner became aware that the company's name had been struck off until after the first had acquired his shares and possibly not until after they had taken the assignment of the debts.

Held: (i) in order to qualify as a petitioner under s. 353 (6) it must be shown that at the date when the company was dissolved the petitioner was a member or creditor thereof, and anyone, whether in ignorance of the dissolution or not, who purported to become a member or creditor afterwards was not so qualified (see p. 868, letter D, post).

(ii) if, however, the petitioners were qualified to petition, the court would not exercise its discretion under s. 353 (6) to restore the company's name to the register because the evidence that any substantial benefit would thereby accrue to members or creditors was not, in the present case, sufficiently cogent (see p. 868, letter I, and p. 869, letter C, post).

SEMBLE: one who acquires shares or a debt of a company whose name has been struck off the register, and who at the time of acquisition has knowledge of that fact, is not a " person aggrieved " within s. 353 (6) of the Companies Act, 1948 (see p. 868, letter G, post).

[As to restoration of the name of a company to the register, see 6 HALSBURY'S LAWS (3rd Edn.) 788, 789, paras. 1590, 1591; and for cases on the subject, see 10 DIGEST (Repl.) 1140-1142, *7938-7957*.

For the Companies Act, 1948, s. 26, s. 353 (6), see 3 HALSBURY'S STATUTES (2nd Edn.) 480, 727.]

Petition.

This was a petition presented under s. 353 (6) of the Companies Act, 1948, by Albert Rodolphe Modiano, a holder of shares in the capital of New Timbiqui Gold Mines, Ltd. (" the company "), and a creditor thereof, and by Établissement Forrestal Industrial Development, a creditor of the company, that the company's name might be restored to the register of companies. The facts appear in the judgment.

K. W. Mackinnon, Q.C., and *Raymond Walton* for the petitioners.

E. Blanshard Stamp for the registrar of companies.

BUCKLEY, J.: This is a petition by two petitioners, one named Albert Rodolphe Modiano, who claims to be the holder of shares in a company called New Timbiqui Gold Mines, Ltd. as well as a creditor of that company, and one named Établissement Forrestal Industrial Development which claims to be a creditor of the company, asking that the name of the company may be restored to the register of companies.

New Timbiqui Gold Mines, Ltd., which I will refer to as the company, was incorporated in the year 1905 in this country with the object of acquiring and A taking over as a going concern the undertaking of an earlier company with its assets and liabilities and acquiring concessions, grants, rights, and so forth, from any company, state, sovereign or authority which might seem to the company capable of being turned to account. The capital of the company was £200,000 divided into two hundred thousand shares of £1 each, of which 194,678 were issued and fully paid. Of those shares 75,387 were held by share warrants B to bearer in denominations of one, five, ten and twenty-five shares. The remainder of the shares were registered shares. The company acquired and operated some mining property at Timbiqui in the Republic of Colombia; that property it acquired from the earlier company which the company was incorporated to take over. The mining rights of this property are free of any payments in the nature of mining taxes or royalties to the government of the Republic C of Colombia as a result of composition payments, which were made by the predecessors of the company. The company appears to have run into difficulties, and although in earlier years some gold mining was carried out on this land in Colombia, the petition states that the company has never had sufficient capital to exploit its properties properly. It succeeded in carrying out mining operations at various times in Colombia for a number of years, although in the later years the D activities were chiefly restricted to prospecting. The registered office of the company was in this country but its principal place of business was in Paris, and the directors, at any rate at the times which are relevant for consideration by me, were resident in France. Consequently when the recent war took place the directors were inhibited from effectively directing the affairs of the company. In the year 1944 bankruptcy proceedings were instituted against the company E in Colombia and those proceedings are still on foot. The debts admitted by the bankruptcy court in Colombia in the bankruptcy of the company consist of a debt of 40,000 pesos, due to the government of the Republic of Colombia and 380,000 pesos for other debts, being 20,000 pesos in respect of the debt for which the first petitioner Modiano now claims to be a creditor of the company and 360,000 pesos in respect of the debt in relation to which the second petitioner F now claims to be a creditor.

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* See p. 866, letter I, to p. 867, letter B, post.

In August, 1955, the registrar of companies struck the name of the company off the register pursuant to s. 353 of the Companies Act, 1948, and it is alleged in the petition that the persons who were then in control of the affairs of the company in Paris were well aware of the fact that the registrar was proposing to strike the name of the company off the register but that the petitioners had no G knowledge of that fact. That is not altogether surprising because Mr. Modiano did not acquire or purport to acquire his shares in the company until September, 1959, and I understand that the two debts in respect of which the petitioners now seek to petition the court were not assigned to the petitioners until some date or dates in 1960. The register of members of the company was unfortunately destroyed by enemy action in the course of the war in the year 1940. H

In those circumstances I have to consider, first, whether the petitioners are persons who are entitled to petition the court for restoration of the company's name under s. 353 (6), and, secondly, if they are, whether this is a case in which the court ought to exercise its discretion under that section to restore the name of the company to the register.

Section 353 provides machinery whereby the registrar of companies, if he has I reasonable cause to believe that a company is not carrying on business or in operation, after making certain inquiries directed by the section, may strike the name of the company off the register, and when he does that the company thereupon becomes dissolved. Subsection (6) provides:

> " If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of

> twenty years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off . . ."

The opening words of the subsection refer to a company or a member or creditor feeling aggrieved by the company having been struck off the register, which creates a somewhat artificial state of affairs in which it has to be assumed that the company or some member or creditor thereof can still be properly so described, although the company has been struck off the register and consequently has become dissolved. It is one of the anomalies of company law that a company which has been dissolved can petition the court under this section to have its name restored to the register. The opening words of the subsection clearly relate to a date after the name of the company has been struck off and, therefore, they do necessarily involve some latitude in the construction of the reference to " a company or any member or creditor thereof ".

How ought those words properly to be construed? Counsel for the petitioners says that the subsection pre-supposes that there is a company and members or creditors in existence, notwithstanding that the name of the company has been struck off and that there is no reason to restrict that language to persons who were members or creditors of the company at the date when its name was struck off, but that it is legitimate, and would be sensible, to construe the language so that it extends to persons who have become members of the company, or have become creditors since the company's name was struck off, in this sense—that if the company's name had not been struck off, having regard to the course of events which in fact occurred in the particular case, the particular person would have been a member or would have been a creditor of the company. Counsel says that the object of this subsection, where an order is made, is to abrogate the effect of the action of the registrar in striking the name of the company off the register and to produce such a position as there would have been if the company had always continued in existence and as if its name had never been struck off the register and the company had not become dissolved. Suppose, counsel says, that a transfer of shares has been duly registered by officers of the company after its name has been struck off the register, but at a time when nobody knew that the company's name had been struck off by the registrar. Counsel says that that transferee ought to be entitled under s. 353 (6) to come to the court and petition to have the company's name put back on the register in order that he may have the benefit of the shares and the rights attached to them, which he acquired in good faith. Counsel says, moreover, that the same position should apply in the case of bearer shares where such shares were transferred by delivery in good faith after the company's name was struck off the register, the transfer being made with every intention of constituting the transferee a member of the company in respect of the shares. There is a good deal to be said in favour of that point of view when one considers the policy adopted in the subsection.

On the other hand, counsel for the registrar, who assisted me by presenting the argument on the other side, submits that no one can become a member of a company which no longer exists, that under s. 26 of the Companies Act, 1948, apart from subscribers to the memorandum, a person only becomes a member of a company if he has agreed to become a member of the company and his name has been entered on the register, and that there cannot be any such agreement where the company is no longer in existence to agree. He also says that such a person's name could never properly be put on the register and that there would not be anybody qualified to put the name on the register. In the case of the bearer shares, there would be no company of which the holder of the bearer shares could be deemed to be a member. It seems to me to be no less clear that nobody could become a creditor of a company after the company had ceased to exist; there cannot be a creditor of a non-existent debtor.

That is not the position of the creditors here, as I understand it, because they claim to be creditors as assignees of debts which accrued before the company's name was struck off the register, but the position seems to be that the original creditor, although he might be a person who was a creditor within the meaning of this section, would not be in law a creditor of the company when the company had become dissolved, and it is debatable whether he could assign to anybody else. The subsection involves some degree of make-believe and the question is how far the make-believe ought to be carried. Should it be taken that people should be treated as continuing to be members or creditors, who were at some time undoubtedly members, just as the company, before its dissolution, was a company and has to be assumed to be in existence after its dissolution, or should the make-believe extend to include persons who purport to have become members or creditors after its dissolution? On the whole I think that the right way to approach this sort of problem of construction is to adopt that interpretation which would give to the subsection a working effect without extending the operation of inference or imagination further than is really necessary for that purpose. Although the point is a difficult one, I reach the conclusion that in order to qualify to be a petitioner under this subsection, the petitioner must show that at the date when the company was dissolved he was a member or was a creditor, and that anyone who purported to become a member or creditor of the company afterwards, whether in ignorance or otherwise of the dissolution of the company, is not a person within the subsection.

If, however, I were wrong on that point, I should have to go on to consider whether the petitioners here acquired the characters in which they purport to petition with or without knowledge of the fact that the company's name had been struck off the register. Counsel for the petitioners tells me that Mr. Modiano acquired his shares in September, 1959, and that he and the other petitioner acquired their debts some time in the year 1960, and the petition as it stands alleges: " Your petitioners first became aware that the company had been so struck off at the beginning of the year 1959 ". If that were right, I see great force in the argument which counsel for the registrar has put forward, that no one can maintain that he is aggrieved by the company's name having been struck off the register if he subsequently acquired his shares or his debt with the knowledge that the company's name had been struck off the register. It would really be impossible for such a person to maintain that he was aggrieved. He is in fact in the position of an officious interloper who, with knowledge of the fact that the company's name has been struck off, chooses to buy his shares or acquire the debt in the hope that he can get something out of it. Such a person in my judgment could not be said genuinely to be aggrieved by the company's name having been struck off the register.

However, I am told that the allegation in the petition that the petitioners became aware that the company's name had been struck off in the beginning of the year 1959 is erroneous and that in fact they did not become aware that the company's name had been struck off until after Mr. Modiano had acquired his shares and possibly after he and the other petitioner had taken an assignment of the debts. If so, it would be necessary for me, if I am wrong on my first ground of decision, to consider whether this is a proper case in which the court should exercise its discretion under sub-s. (6) to restore the company to the register. This is a company which, so far as one can judge from the evidence, has never prospered, at any rate since the early years of its existence. It is the subject-matter of bankruptcy proceedings in the country in which all its assets exist, and the evidence before the court that some benefit will accrue or might accrue as the result of the company's name being put back on the register and the company being allowed to try to turn its assets to account, is not very forceful. In these circumstances, having regard to the long period which has elapsed since the company's name was struck off the register, a period of five years, the very long period which has elapsed since 1940, when last there was any effective control by directors, the fact that the register of the company has been destroyed and that, as I am told, the shareholders of the company consist in the main of a very large number of small shareholders residing in France and that the latest records of their identity and their addresses is now over twenty years old, I think that the court would require more cogent evidence that some really substantial benefit would accrue to members and creditors of the company than the court has before it in the present case.

Therefore, even if I were wrong on my first ground, I should be inclined to regard this as a case in which I ought not to exercise my discretion under sub-s. (6) to restore the company's name to the register. Accordingly, I take the view that the petition should be dismissed.

Petition dismissed.

Solicitors: *Coward, Chance & Co.* (for the petitioners); *Solicitor, Board of Trade* (for the registrar of companies).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

JOHNSON *v.* J. STONE & CO. (CHARLTON), LTD.

[QUEEN'S BENCH DIVISION (Hinchcliffe, J.), February 20, 21, 22, 1961.]

Factory—Dangerous machinery—Duty to fence—Workpiece coming into contact with unfenced dangerous part of machinery—Whether breach of statutory duty—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

The plaintiff, an experienced bandsawyer, was employed by the defendants to cut aluminium and magnesium castings with a bandsaw. The bandsaw ran round two pulleys, one above and one below a table on which castings were cut, and came down through a slot in the table. The court found that the top pulley was a dangerous part of machinery and, though protected by a plate, was not securely fenced. The plaintiff was manoeuvring a casting into position for a second cutting when the top of the casting came into contact with the fast-moving top pulley, fracturing the pulley's bearing and causing it to drop from its anchorage onto the table and then onto the floor. The plaintiff's hand was injured by the pulley as it struck the table. In an action for damages for breach of statutory duty under s. 14 (1)* of the Factories Act, 1937,

Held: s. 14 (1) of the Factories Act, 1937, extended to a case where the cause of the injury was that a tool or workpiece being handled by an operator came into contact with an unfenced dangerous part of machinery, and was not limited to so fencing the dangerous part as to prevent the body of the operator coming into contact with it; accordingly the defendants were in breach of statutory duty under s. 14 (1) and the plaintiff was entitled to recover damages.

Sparrow v. *Fairey Aviation Co., Ltd.* (ante p. 216) not followed.

[As to the statutory duty to fence machinery securely, see 17 HALSBURY'S LAWS (3rd Edn.) 70-72, paras. 122, 123.

For the Factories Act, 1937, s. 14 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

Eaves v. *Morris Motors, Ltd.*, [1960] 3 All E.R. 656.

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* The relevant terms of s. 14 (1) are printed at footnote (5), p. 872, post.

Ginty v. *Belmont Building Supplies, Ltd.*, [1959] 1 All E.R. 414; 3rd Digest Supp.

Hoare v. *M. & W. Grazebrook, Ltd.*, [1957] 1 All E.R. 470; [1957] 1 W.L.R. 638; 3rd Digest Supp.

Lenthall v. *Gimson & Co. (Leicester). Ltd.*, (Leicester Assizes, May 24, 1956), unreported.

Lewis v. *High Duty Alloys, Ltd.*, [1957] 1 All E.R. 740; [1957] 1 W.L.R. 632; 3rd Digest Supp.

Moran v. *Tweedales & Smalley, Ltd.*, (Manchester Assizes, Dec. 1, 1960), unreported.

Rushton v. *Turner Bros. Asbestos Co., Ltd.*, [1959] 3 All E.R. 517; [1960] 1 W.L.R. 96; 3rd Digest Supp.

Smithwick v. *National Coal Board*, [1950] 2 K.B. 335; 2nd Digest Supp.

Sparrow v. *Fairey Aviation Co., Ltd.*, ante p. 216.

Walker v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, *212*.

Action.

In this action the plaintiff claimed damages for personal injuries against his employers, the defendants, J. Stone & Co. (Charlton), Ltd., for negligence and breach of statutory duty under s. 14 (1) of the Factories Act, 1937. The injuries were sustained when the workpiece in the plaintiff's hand came into contact with an unfenced dangerous part of machinery and the issue was whether s. 14 (1) imposed liability in such a case. The facts are fully stated in the judgment of HINCHCLIFFE, J.

J. D. May for the plaintiff.
Tudor Evans for the defendants.

HINCHCLIFFE, J.: The plaintiff is forty-four years of age. He is a bandsawyer. His job with the defendants was to cut aluminium and magnesium castings with a bandsaw. He was in reality cutting off surplus material which it was necessary to remove. The castings were of different types and they varied in shape and size. The casting involved in the accident had the following dimensions: its height was 27¾ inches; its width was 16½ inches; its thickness was 3½ inches. The bandsaw, when in operation, travels downwards. There are two pulleys. The bottom one is power-driven. The top one is an idler. The bandsaw runs round both pulleys in a clockwise direction. The two pulleys are two feet six inches in diameter and the bandsaw, which looks like a piece of string, can be seen coming down from the box-like structure and through the slot in the table. Both the pulleys are protected by a metal plate on the front, which is bolted to the structure of the machine. The plate of the upper pulley did not fully cover it. The radius of the plate was a quarter of an inch less than the radius of the pulley. The table, exemplified in a photograph, is 38½ inches off the ground. From the left-hand corner to the slot is three feet four inches. From the slot to the right-hand corner is three feet seven inches. The centre of the axle of the top pulley is about head level with the plaintiff, who is a man something over six feet in height. The position of the slot in the table and the bandsaw shows quite clearly that each side of the slot enables castings to be presented to the saw to the left of it and to the right of it. Mr. Wimbolt, the consulting engineer called on behalf of the defendants, agreed that there could be no objection to presenting small castings on either side of the bandsaw; but he thought that the casting in question should have been presented to the right of the bandsaw. Mr. Bevan, the consulting engineer called on behalf of the plaintiff, agreed and he said, to use his words, that it was the obvious and natural thing to do.

How did this accident happen? The plaintiff is a bandsawyer of considerable experience. He explained to the court that the castings were of different shapes and sizes. He said that they could be presented on either side of the bandsaw, that he had used both sides and that whether he used the left of the bandsaw or the right of the bandsaw would depend on the particular job he was doing. On Jan. 15, 1957, the plaintiff had worked on a similar casting to that involved in the accident. He had cut off a runner and a riser. On Jan. 16, 1957, shortly after 8 a.m., he started his work on the casting involved in the accident, helped by Mr. Roberts. Together they took off the runner. They had taken off the riser. They were manoeuvring the casting when there was a terrific bang and the plaintiff's left hand was injured. Mr. Roberts confirmed that account of the accident and stated that after the accident the casting was still on the table, but the top pulley was on the floor. Incidentally, Mr. Roberts also told the court that castings were presented on both sides of the bandsaw when they were cut. The plaintiff was a frank and straightforward witness. He told the court that he always was careful to keep the casting away from the pulley. He said that he should have presented the particular casting to the right of the bandsaw and, if he had done, there would have been no accident. But he said that, on this particular occasion—and I think on the day before—the casting had been presented to the left of the bandsaw. Neither he nor Mr. Roberts nor Mr. Downey, another employee, had ever known a casting foul the top pulley on any previous occasion. It is fair to say that none of these three men expected their foreman or chargehand to supervise them or teach them how to do a job they had been doing successfully for many years.

Two consultants were called to give evidence—Mr. Bevan for the plaintiff and Mr. Wimbolt for the defendants. Both of them expressed the opinion that the accident happened when the top of the casting was being manoeuvred after the riser had been cut off. It came into contact with the face of the pulley, thus creating a violent impact and the shock of it fractured the bearing, with the result that the pulley was released from its anchorage, dropped onto the table and thence to the floor. Both gentlemen are of the opinion that the casting in question should have been presented to the right of the bandsaw, having regard to its size and shape. Mr. Bevan for the plaintiff perhaps feels more strongly about it than does Mr. Wimbolt for the defendants. No foreman, or chargehand, or other employee was called to give evidence on behalf of the defendants.

I have come to the conclusion that the accident happened when the top of the casting came into contact with the moving pulley. The riser had been cut off and the plaintiff and Mr. Roberts were moving the casting into another position convenient for a second cut. On a balance of probabilities I have come to the conclusion that it was the pulley which caught, trapped and injured the plaintiff's fingers. The casting was still on the table after the accident and the position of the plaintiff and his left hand immediately after the riser had been cut off satisfies me that his hand was nipped by the pulley when it struck the table and just before it bounced off the table onto the floor. The pulley, which revolved at a great speed, was exposed in my judgment over the bottom half of the plate. No precise measurement as to this was given to the court. Neither of the consultants had any idea. I do not see any reason why I should disbelieve the plaintiff when he says that the radius of the plate was a quarter of an inch less than the radius of the pulley. I accept that this was so—certainly over the bottom half of the plate. The position therefore is that, at a time when the plaintiff and his mate were turning round this heavy casting in the course of their work, the top of it happened to come into contact with this unfenced moving pulley and the accident happened.

In the circumstances I am satisfied that the top pulley was a dangerous part of machinery and was not securely fenced. The defendants, therefore, were in breach of s. 14 (1) of the Factories Act, 1937. I take the view that it was dangerous in the sense explained by DU PARCQ, J., in *Walker* v. *Bletchley Flettons, Ltd.* (1). The learned judge said (2):

> ". . . a part of machinery is dangerous if it is a possible cause of injury

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(1) [1937] 1 All E.R. 170.

(2) [1937] 1 All E.R. at p. 175.

> to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."

I would also refer to the words of Denning, L.J., in *Smithwick* v. *National Coal Board* (3). I quote the learned judge's words:

> ". . . it is not only the likely but also the unlikely accident against which the occupier must guard. He must guard against all conduct which he can reasonably foresee. The limit of his responsibility is only reached when the machinery is safe for all except the incalculable individual against whom no reasonable foresight can provide—the individual who does not merely do what is unlikely, but also what is unforeseeable . . ."

I am satisfied on the evidence of the plaintiff, his two workmates and Mr. Wimbolt (4) that castings could be presented on either side of the bandsaw and were in fact so presented over the years.

The next question is whether the breach of s. 14 of the Factories Act, 1937 (5), was a cause of the accident. This is an interesting question, on the facts of this case, on which I have received much help from both the learned counsel appearing in the case, to whom I am most grateful. What is the object of s. 14? Is it merely to fence every dangerous part of machinery so as to prevent the body of the operator from coming into contact with it? This is the usual case, scores of which are heard in the courts. Or does it extend to fencing machinery which is not dangerous in the absence of materials or workpieces being inserted into the machine? There is a conflict of judicial opinion on whether s. 14 covers this second class of case. Lynskey, J., in *Hoare* v. *M. & W. Grazebrook, Ltd.* (6), Finnemore, J., in *Lenthall* v. *Gimson & Co.* (*Leicester*), *Ltd.* (7) and Winn, J., in *Eaves* v. *Morris Motors, Ltd.* (8) take the view that the section covers the second class of case. On the other hand, Ashworth, J., in *Lewis* v. *High Duty Alloys, Ltd.* (9) took a contrary view and held that s. 14 did not cover such a case. Thirdly, does the section extend to cover a case like the present, where the workpiece in the hands of the operative comes into contact with an unfenced dangerous part of machinery and injures the operative? I have come to the conclusion that it does.

It seems to me that, if a machine is so designed as to permit work, to be done on a table on either side of a moving bandsaw, and, if on one side of the bandsaw there is a revolving pulley insecurely fenced, which is liable to come into contact with a workpiece held by a workman, and injury is thereby caused, it would be quite wrong to hold that the breach of s. 14 was not a cause of the injury. In my judgment the obligation imposed by s. 14 is not limited to fencing a dangerous part of machinery so as to prevent the body of the operator coming into contact with the dangerous part. The obligation extends to cover the case where a tool or a workpiece, handled by an operator, has come into contact with an unfenced dangerous part of machinery and has thereby caused the operator to suffer an injury.

In expressing this view I am differing from Streatfeild, J., who took an opposite view in *Sparrow* v. *Fairey Aviation Co., Ltd.* (10). I read the headnote to that case.

> "The plaintiff, an experienced lathe operator employed by the defendants, was machining metal discs of some four inches diameter to form sealings for petrol filler caps. The jaws of a chuck were within the boss of a disc. viz., a hole that the plaintiff had bored in a disc, and were holding the disc

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(3) [1950] 2 K.B. at p. 351. (4) The consulting engineer called for the defendants.

(5) Section 14 (1) provides: " Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

(6) [1957] 1 All E.R. 470. (7) (Leicester Assizes, May 24, 1956), unreported.

(8) [1960] 3 All E.R. 656. (9) [1957] 1 All E.R. 740. (10) Ante p. 216.

> rotating in the lathe while he finished the disc by removing burring with a hand tool. There was only one-sixteenth inch clearance between the front of the jaws and the disc from which he was removing the burring. The tool caught against the jaws and the plaintiff's hand was thrown against the machinery or the disc (but did not come into contact with the jaws) and was injured. In an action for damages for breach of statutory duty under s. 14 of the Factories Act, 1937, viz., failure to fence securely a dangerous part of machinery, Held: the obligation imposed by s. 14 (1) of the Factories Act, 1937, was so to fence a dangerous part of machinery as to prevent the body of the operator coming into contact with it, and in the present case the jaws of the chuck (if they were a dangerous part of machinery) were sufficiently fenced by the component that was being worked to prevent contact with the plaintiff's body; accordingly the defendants were not in breach of s. 14, notwithstanding that the fencing, constituted as stated above, was not such as would prevent a tool coming into contact with the jaws of the chuck and that the injury to the plaintiff had been caused by the tool in his hand so doing."

In the judgment the learned judge says (11)

> "LORD SIMONDS (12) referred to the duty in this way: 'The fence is intended to keep the worker out, not to keep the machine or its product in'. It is quite true that the House of Lords was dealing with the situation either of the component being thrown out or part of the machine being thrown out from the machine and hitting the operator, but I cannot ignore the opinion of LORD MACMILLAN when he puts it that the obligation under s. 14 is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it. Now, that being the case, if this was a dangerous part, was it so fenced as to prevent the body of the operator coming into contact with it? In a sense, it was fenced by the component itself, that being the fence which in fact did prevent the body of the operator coming into contact with the dangerous part. The fence would appear to have fulfilled s. 14 of the Factories Act, 1937. What happened here may be a very fine distinction, but here a part, which was a dangerous part and which was fenced in such a way as to prevent the body of the operator or some part of his body coming into contact with it, in fact was not so fenced as to prevent a tool coming into contact with it. I am afraid that, with some reluctance, I must give effect to the submission of counsel for the defendants that that is the answer to it on the facts. If the injury was caused by the tool rather than some part of the plaintiff's body coming into contact with the dangerous part, that is not enough. In those circumstances, as I have said with some reluctance, I feel bound to hold that the dangerous part was fenced sufficiently within the meaning of s. 14 of the Factories Act, 1937."

With great respect, I dissent from that view.

My attention has been called to a case which was heard by PAULL, J., at assize. It is *Moran* v. *Tweedales & Smalley, Ltd.* (13). I have been provided with a transcript. It is sufficient if I say that in that case the plaintiff appears to have been polishing a metal substance on an emery belt which travelled over a wheel and roller at speed. Part of the emery belt was unguarded and exposed—indeed it had to be to enable the work to be done. The plaintiff's hand was injured, not by the hand coming into contact with the machine, but by the metal which he was holding against the machine. PAULL, J., in his judgment expressed this view:

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(11) Ante at p. 219.

(12) In *Nicholls* v. *Austin (Leyton), Ltd.*, [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.

(13) Manchester Assizes (Dec. 1, 1960), unreported.

> "Argument was placed before me that there is no liability under [s. 14 of the Factories Act, 1937] because it was not the plaintiff's hand which came against the machine, but the metal which he had to hold that did so. I am not very impressed with that argument. Once you have a dangerous machine and the man is compelled to put a piece of metal against it, I should have thought that the machine, under the Act, ought to have been protected against accidents due to the metal being forced against the hand. Be that as it may, there is, I think, negligence." A B

To summarise my findings in the present case: the plaintiff sustained an accident which I think was foreseeable. The danger was there to be seen by anyone. If a large casting was presented to the pulley side of the bandsaw, there was obviously a risk when the workpiece was being manoeuvred of some part of it coming into contact with the dangerous part of the machinery. The pulley was a dangerous part of machinery and was unfenced. The employers were under a statutory duty (14) to prevent dangers that would result from this dangerous part of machinery. This they failed to do, with the result that the plaintiff was injured. Fencing would have prevented the workpiece, handled by the plaintiff, from coming into contact with the revolving pulley. C

At the same time, I do not think that the defendants' breach of s. 14 was the sole cause of this accident. I take the view that the plaintiff's injury was caused by a combination of his own negligence and the defendants' breach of statutory duty. As to the plaintiff's negligence, what he did was this. He presented this very large casting to the left of the bandsaw instead of to the right of it. It was a foolhardy thing to do, having regard to the size and shape of the casting and to its proximity to the revolving pulley, which the plaintiff says he could see quite clearly in front of him. The plaintiff himself—as I have already stated, a frank and straightforward witness—admits that he should have put the casting the other way round and Mr. Bevan (15) for the plaintiff stated that the casting should have been presented to the right of the bandsaw and that that was the obvious and natural thing to do. It is difficult to understand why on this occasion the plaintiff was so careless as to do what he did. But, in my judgment, it is far away from being a case where the plaintiff was one hundred per cent. to blame. I do not think that this is a comparable case to *Ginty* v. *Belmont Building Supplies, Ltd.* (16) and *Rushton* v. *Turner Bros. Asbestos Co., Ltd.* (17) to which my attention has been drawn. In those two cases, although there was a breach of statutory duty, it was the plaintiff's deliberate and foolhardy conduct that caused the accident. When the court asked itself the question in each case—"Whose fault was it?", the answer had to be, on the facts—"The plaintiff's". I have come to the conclusion that, in all the circumstances here, the plaintiff must bear one-third of the blame to the defendants' two-thirds. D E F G

[HIS LORDSHIP went on to hold on the evidence, in particular, as to the skill and experience of the plaintiff, that the defendants were not in breach of their duty at common law to warn the plaintiff of the danger of the casting becoming jammed under the unfenced pulley. HIS LORDSHIP awarded the plaintiff general damages of £525 (of which sum he was entitled to two-thirds only) for the injuries that he sustained, viz., compound fractures of the left middle and ring finger which had necessitated amputation of the ends of these two fingers.] H

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Geoffrey Coombs & Co.* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(14) Viz., under s. 14 (1) of the Factories Act, 1937.
(15) The consulting engineer called for the plaintiff.
(16) [1959] 1 All E.R. 414.
(17) [1959] 3 All E.R. 517.

PRACTICE NOTE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Winn and Widgery, JJ.), March 6, 1961.]

Criminal Law—Practice—Binding over—Conditional binding over—Entry on depositions—Copies of depositions to show entry—Form 23 *of the Magistrates' Courts (Forms) Rules*, 1952 (*S.I.* 1952 *No.* 2191) *to be attached to depositions —Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 5 (2)—*Magistrates' Courts Rules*, 1952 (*S.I.* 1952 *No.* 2190), *r.* 12 (2) (*g*).

[As to depositions, see 10 HALSBURY'S LAWS (3rd Edn.) 361, para. 660; and as to conditional binding over, see ibid., 368, para. 669, especially note (h).

For the Magistrates' Courts Act, 1952, s. 5, see 32 HALSBURY'S STATUTES (2nd Edn.) 426.

For the Magistrates' Courts Rules, 1952, r. 12, see 13 HALSBURY'S STATUTORY INSTRUMENTS 45.]

LORD PARKER, C.J.: The attention of the court has been drawn to the fact that defending counsel at quarter sessions and at assizes have on occasion been taken by surprise to find that witnesses whom they expected to be able to cross-examine have been conditionally bound over (1). The original depositions will, of course, contain the letters C B O against the witnesses conditionally bound over, and in addition there will be attached a form setting out the names of those witnesses: cf. Form 23 of the Magistrates' Courts (Forms) Rules, 1952, and r. 12 (2) (g) of the Magistrates' Courts Rules, 1952. When, however, the defence obtains copies of these depositions, either from the committing court or from the court of trial, it seems that on occasions the letters C B O do not appear and Form 23 is not attached.

After consulting the Home Office, the court has decided to issue this Practice Note drawing the attention of justices' clerks, clerks of the peace and clerks of assize to this situation. Care must be taken to ensure that accurate copies of the depositions are made and as an added precaution the court considers that Form 23 should in every case be attached to the copies, even if it only discloses that no witnesses are conditionally bound over. In this way it is hoped to avoid the occurrence of mistakes in the future.

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(1) Viz., under s. 5 (2) of the Magistrates' Courts Act, 1952.

PLATO FILMS, LTD. AND OTHERS *v.* SPEIDEL.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Denning, Lord Morris of Borth-y-Gest and Lord Guest), January 25, 26, 30, March 2, 1961.]

Libel—Damages—Mitigation—Reputation—Evidence of general bad reputation only admissible in mitigation of damages.

Libel—Pleadings—Particulars—Character—Circumstances under which libel was published—Plea that plaintiff's claim did not deny certain libellous statements improper.

The plaintiff at all material times was the Supreme Commander of the Allied Land Forces in Central Europe. He claimed damages for libel against the defendants, and in his statement of claim pleaded that, in a film alleged to have been published and exhibited by the defendants, he had been depicted as having been a party to the murders of King Alexander of Yugoslavia and M. Barthou in 1934, and of having betrayed Field-Marshal Rommel to the Nazis in 1944. By their defence, the defendants pleaded justification. In addition, in para. 5, they alleged " Alternatively in mitigation of damages, the defendants will . . . give evidence in chief " (A) as to the circumstances under which the alleged libel was published, and (B) as to the character of the plaintiff. As particulars under (A), it was alleged that the photographic pictures and words of which the plaintiff complained " were published and exhibited as part of the film wherein the plaintiff was further depicted as having been guilty of the conduct hereinafter set out the truth of which the plaintiff in his amended statement of claim does not deny: namely that he: (a) . . . was a party to and/or responsible for acts which were war crimes and/or against humanity and/or atrocities, namely: ", and then there were set out various specific alleged war crimes and acts of espionage. In particulars under (B) " of the matters relating to the character of the plaintiff ", it was alleged that " the plaintiff is widely reputed to have been and in fact was " (i) guilty of the murders and betrayal in respect of which the plea of justification had been raised, (ii) concerned in enforcing and carrying out order relating to hostages and in developing, directing and enforcing Nazi anti-Jewish policy in occupied France, and (iii) an advocate of, and believer in, the suppression of German democratic political life. The plaintiff applied to strike out para. 5 of the defence, and, on appeal, the Court of Appeal ordered that the paragraph be struck out except for the introductory words " Alternatively in mitigation of damages the defendants will . . . give evidence in chief ", and gave leave to amend the paragraph by adding thereafter " that the plaintiff had . . . a bad reputation as a man who was party to and/or responsible for actions which were war crimes and/or against humanity and/or atrocities ". On appeal to the House of Lords,

Held: (i) in an action for defamation, evidence of the plaintiff's bad reputation (viz., per LORD DENNING at p. 889, letter F, post, reputation built on the estimate of those who know him) in a sector of life relevant to the alleged libel (see p. 885, letter A, and p. 890, letter C, post) was admissible in mitigation of damages, but evidence of specific instances of misconduct or tending to show what character the plaintiff ought to have in public estimation (as distinct from what he did have) was inadmissible in mitigation of damages; accordingly, the particulars allowed by the Court of Appeal (subject, per LORD RADCLIFFE at p. 885, letter G, post, to certain modifications) were permissible, but the rest of para. 5 of the defence had been rightly struck out.

Scott v. *Sampson* ((1882), 8 Q.B.D. 491) and *Hobbs* v. *Tinling* ([1929] All E.R. Rep. 33) approved.

Jones v. *Stevens* ((1822), 11 Price 235) disapproved.

A *Wood* v. *Earl of Durham* ((1888), 21 Q.B.D. 501) and *Scaife* v. *Kemp & Co.* ([1892] 2 Q.B. 319) criticised (see p. 887, letter G, and p. 891, letter A, post).

(ii) the question whether the whole of the film should be exhibited to the jury should be left to be determined by the judge at the trial (see p. 881, letter I, p. 882, letter H, p. 892, letter G, p. 895, letter E, and p. 896, letters E and F, post).

B *Cooke* v. *Hughes* ((1824), Ry. & M. 112) considered.

Per LORD RADCLIFFE: character [in the context of what is admissible in evidence in mitigation of damages for defamation] means the character that the plaintiff bears in public estimation, viz., his reputation, not his disposition, by which I mean the character that might be attributed to him on a nice assessment of all his actions; and no evidence should be admitted C which is not directed exclusively to proof of such reputation (compare p. 883, letters E and F, post).

Per VISCOUNT SIMONDS, LORD RADCLIFFE, LORD MORRIS OF BORTH-Y-GEST and LORD GUEST: to plead by way of defence that a plaintiff has not thought fit to include in his statement of claim every libellous statement made about him by a defendant is improper (see p. 881, letter E, p. 882, D letter F, p. 895, letter C, and p. 896, letter C, post).

Decision of the COURT OF APPEAL (sub nom. *Speidel* v. *Plato Films, Ltd.*, *Same* v. *Unity Theatre Society, Ltd.*) ([1960] 2 All E.R. 521) affirmed.

[**Editorial Note.** This case should be considered with the decision of the Court of Appeal in *Dingle* v. *Associated Newspapers, Ltd.*, p. 897, post, which illustrates the limiting of evidence of bad general reputation, admissible in a E libel action in mitigation of damages, to evidence of established reputation.

As to evidence in mitigation of damages at common law, see 24 HALSBURY'S LAWS (3rd Edn.) 116, para. 217, note (f); and for cases on the subject, see 32 DIGEST 166, 167, *2021-2047*.]

Cases referred to:

F *A.* v. *B.*, (1895), 22 R. (Ct. of Sess.) 402; 32 Sc.L.R. 297; 2 S.L.T. 515; 22 Digest (Repl.) 68, *391*.

Admiralty Comrs. v. *Valverda (Owners)*, [1938] 1 All E.R. 162; [1938] A.C. 173; 107 L.J.K.B. 99; 158 L.T. 281; 19 Asp. M.L.C. 146; Digest Supp.

Anon. v. *Moor*, (1813), 1 M. & S. 284; 105 E.R. 106.

G *Bell* v. *Parke*, (1860), 11 I.C.L.R. 413; 32 Digest 166 *g*.

Bracegirdle v. *Bailey*, (1859), 1 F. & F. 536; 175 E.R. 842; 32 Digest 167, *2037*.

Brittridge's Case, (1602), 4 Co. Rep. 18 b; 76 E.R. 905; sub nom. *Bridge* v. *Atkins*, Moore K.B. 666; 32 Digest 41, *422*.

C. v. *M.*, 1923 S.C. 1; 32 Digest 167, *2029 v*.

Clarkson v. *Lawson*, (1829), 6 Bing. 266; 3 Moo. & P. 605; 30 L.T.O.S. 291; H *subsequent proceedings* (1830), 6 Bing. 587; 4 Moo. & P. 356; 8 L.J.O.S. C.P. 193; 130 E.R. 1407; 32 Digest 94, *1259*.

Cooke v. *Hughes*, (1824), Ry. & M. 112; 171 E.R. 961; 32 Digest 61, *892*.

Hobbs v. *Tinling*, *Hobbs* v. *Nottingham Journal*, [1929] All E.R. Rep. 33; [1929] 2 K.B. 1; 98 L.J.K.B. 421; 141 L.T. 121; 30 Digest (Repl.) 267, *318*.

I *Jones* v. *Stevens*, (1822), 11 Price 235; 147 E.R. 458; 32 Digest 92, *1236*.

King v. *Waring*, (1803), 5 Esp. 13; 170 E.R. 721; 32 Digest 120, *1515*.

Kirkman v. *Oxley*, (undated), Phillips on Evidence (4th Edn.) 189, n.; 2 Starkie on Evidence (3rd Edn.) 306, n.; 32 Digest 166, *2029*.

Knobell v. *Fuller*, (1797), Peake, Add. Cas. 139; 170 E.R. 222; 32 Digest 168, *2056*.

Leicester (Earl) v. *Walter*, (1809), 2 Camp. 251; 170 E.R. 1146; 32 Digest 168, *2057*.

M'Pherson v. *Daniels*, (1829), 10 B. & C. 263; 5 Man. & Ry. K.B. 251; 8 L.J.O.S.K.B. 14; 109 E.R. 448; 32 Digest 88, *1193*.

Mangena v. *Wright*, [1909] 2 K.B. 958; 78 L.J.K.B. 879; 100 L.T. 960; 32 Digest 141, *1722*.

Mawby v. *Barber*, (1826), Starkie on Slander & Libel (3rd Edn.) 538, n.; 2 Starkie on Evidence (3rd Edn.) 642, n.; 32 Digest 167, *2034*.

Moore v. *Oastler*, (1836), Starkie on Slander & Libel (3rd Edn.) 538, n.; 2 Starkie on Evidence (3rd Edn.) 642, n.; 32 Digest 167, *2035*.

Scaife v. *Kemp & Co.*, [1892] 2 Q.B. 319; 61 L.J.Q.B. 515; 66 L.T. 589; 18 Digest (Repl.) 183, *1585*.

Scott v. *Sampson*, (1882), 8 Q.B.D. 491; 51 L.J.Q.B. 380; 46 L.T. 412; 46 J.P. 408; 32 Digest 167, *2045*.

Smith v. *Richardson*, (1737), Willes 20; Barnes 195; 125 E.R. 1034; 32 Digest 90, *1210*.

Smithies v. *Harrison*, (1701), 1 Ld. Raym. 727; 91 E.R. 1385; 32 Digest 167, *2042*.

Snowdon v. *Smith*, (1811), 1 M. & S. 286, n.; 105 E.R. 107.

Thompson v. *Nye*, (1850), 16 Q.B. 175; 20 L.J.Q.B. 85; 16 L.T.O.S. 234; 117 E.R. 846; 32 Digest 168, *2053*.

Underwood v. *Parks*, (1743), 2 Stra. 1200; 93 E.R. 1127; 32 Digest 166, *2022*.

Vessey v. *Pike*, (1829), 3 C. & P. 512; 172 E.R. 526; 32 Digest 166, *2024*.

Waithman v. *Weaver*, (1822), 11 Price 257, n.; Dow. & Ry. N.P. 10; 147 E.R. 466; 32 Digest 169, *2068*.

Watt v. *Watt*, [1905] A.C. 115; 74 L.J.K.B. 438; 92 L.T. 480; 69 J.P. 249; 32 Digest 166, *2020*.

Wood v. *Cox*, (1888), 4 T.L.R. 652; *on appeal* (1889), 5 T.L.R. 272; 32 Digest 188, *2307*.

Wood v. *Durham (Earl)*, (1888), 21 Q.B.D. 501; 57 L.J.Q.B. 547; 59 L.T. 142; 32 Digest 167, *2039*.

Appeal.

Appeal by Plato Films, Ltd. distributors, and Stanley Forman and Kenneth John Edward Smith, directors of the company, from an order of the Court of Appeal (ORMEROD and DEVLIN, L.JJ.), dated May 19, 1960, and reported sub nom. *Speidel* v. *Plato Films, Ltd.*, *Same* v. *Unity Theatre Society, Ltd.*, [1960] 2 All E.R. 521, allowing in part appeals by the appellants against orders of SACHS, J., in chambers, dated Mar. 31, 1960, whereby he dismissed the appellants' appeals against orders of Master CLAYTON, dated Nov. 16, 1959. The facts are set out in the opinion of VISCOUNT SIMONDS.

Gerald Gardiner, Q.C., and *D. J. Turner-Samuels* for the appellants.

J. G. Foster, Q.C., and *Colin Duncan* for the respondent.

Their Lordships took time for consideration.

Mar. 2. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises an interesting question, but it is one to which I have no doubt that the Court of Appeal has given the correct answer.

The respondent was at all material times the Supreme Commander of the Allied Land Forces in Central Europe. He brought the action out of which this appeal arises against the appellants, Plato Films, Ltd., and two directors of that company, claiming damages for libel and an injunction. The libel alleged was that, in a film called "Operation Teutonic Sword", which was exhibited and published by them at the National Film Theatre, London, on Nov. 19, 1958, he had by words and photographic pictures been depicted (a) as a party to the murders of King Alexander of Yugoslavia and M. Barthou in October, 1934, and (b) as having betrayed Field-Marshal Rommel to the Nazis in or about June, 1944. By their defence, the appellants pleaded that the words and photographic pictures were true in substance and in fact. But, in addition to this plea of justification, they sought to put in a plea which I must set out in full. It was as follows:

> "5. Alternatively in mitigation of damages the defendants will at the trial of this action give evidence in chief as to the circumstances under which the alleged libel was published and as to the character of the plaintiff.
>
> "(A) *Particulars of circumstances under which the alleged libel was published.*
>
> "The photographic pictures and words of which the plaintiff complains were published and exhibited as part of the film wherein the plaintiff was further depicted as having been guilty of the conduct hereinafter set out the truth of which the plaintiff in his amended statement of claim does not deny: namely that he:
>
> "(a) While Chief of Staff to the Military Commander in Occupied France about September, 1940, until about May, 1942, was a party to and/or responsible for acts which were war crimes and/or against humanity and/or actrocities namely: (i) the taking and/or shooting of civilians or others as hostages; (ii) the deportation and/or removal to concentration camps and/or to the East of Jewish and other persons; (iii) the execution in occupied France of the decrees whereunder the aforesaid and similar acts were carried out. The defendants rely on those parts of the said film which correspond with paras. 140 and 169 (inclusive) and 287 thereof.
>
> "(b) While Chief of General Staff to German Army Groups during the retreat of the German Armies in the U.S.S.R. was party to and/or responsible for acts generally accepted among civilised peoples as being contrary to the rules of warfare and/or wanton destruction of property and/or of terrorisation. The defendants will rely on those parts of the said film corresponding with paras. 170 to 200 (inclusive) and 204 thereof.
>
> "(c) While being a military attaché on the staff of or attached to the German Embassy in Paris between in or about the period between 1934 and 1938 (inclusive) engaged in espionage on behalf of Nazi Germany in preparation for the invasion of France. The defendants rely on those parts of the said film which correspond with paras. 99 to 112 (inclusive), 140 and 202 thereof.
>
> "(d) While being a military attaché on the staff of or attached to the German Embassy in Madrid in and about 1939, engaged in espionage on behalf of Nazi Germany against France, Great Britain and North Africa. The defendants will rely on those parts of the said film which correspond with paras. 112, 113, and 202 thereof.
>
> "(B) *Particulars of the matters relating to the character of the plaintiff.*
>
> "The plaintiff is widely reputed to have been and in fact was: (i) guilty of the conduct alleged against him in the said film as set out in paras. 3, 4, and 5 (A) hereof; (ii) while Chief of Staff to the Military Commander in occupied France between the aforesaid dates; (a) concerned in enforcing and carrying out the General Staff and other orders relating to the taking, selection, arrest, detention, execution and deportation of hostages; (b) concerned in developing directing and enforcing Nazi anti-Jewish policy in occupied France; (iii) since 1926 an advocate of and believer in the suppression of German democratic political life."

The paragraphs to which reference is made in this plea are from the English text of the film. The respondent forthwith applied in chambers that this plea should be struck out of the defence on the ground that it was scandalous and contrary to the rules of pleading and tended to prejudice, embarrass or delay the fair trial of the action. The Master in Chambers (Master CLAYTON) ordered that it should be struck out, and his order was upheld by SACHS, J. The appellants appealed to the Court of Appeal, who in part allowed their appeal, in that they were permitted to plead as follows:

> "Alternatively in mitigation of damages the defendants will at the trial of the action give evidence in chief that the plaintiff had on or before Nov. 19, 1958, a bad reputation as a man who was a party to and/or responsible for acts which were war crimes and/or against humanity and/or atrocities."

The respondent has not appealed against this order, and I say nothing about it. It must be left to the trial judge to determine what evidence he will admit. But this was not enough for the appellants, who, by their appeal to this House, ask that their plea should be restored in its entirety.

My Lords, I do not think that the Court of Appeal could have come to a different conclusion so far as they affirmed Sachs, J., if this case had come before them in or before the year 1882. For already by that time the clear preponderance of authority extending over a considerable period was that evidence of particular acts of misconduct on the part of the plaintiff could not be given in mitigation of damages where the defendant had failed to justify the libel of which the plaintiff complained. I find it unnecessary to examine this volume of authority, for that task was thoroughly performed by Cave, J., in *Scott* v. *Sampson* (1) in a judgment which has to this day never been challenged. His conclusion was that (2):

> "As to . . . evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation, and to admit evidence of this kind is in effect as was said in *Jones* v. *Stevens* (3) to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of. Among all the cases which have been reviewed there is not one which can be cited in support of the admissibility of this evidence. In *Bracegirdle* v. *Bailey* (4) such evidence was rejected by Byles, J., after consulting with Willes, J., and in *Jones* v. *Stevens* (3) the evils attending its admission are eloquently pointed out."

That was in 1882. In the year 1929, *Hobbs* v. *Tinling, Hobbs* v. *Nottingham Journal* (5) came before the Court of Appeal and, though the question in that case was not precisely the same, the court made it very clear that *Scott* v. *Sampson* (1) had been correctly decided. The judgment of Cave, J., said Scrutton, L.J., (6) had been accepted as an accurate statement of the law. But, said the appellants, it had never been reviewed in this House. That is true and, long though the decision has stood unchallenged, I should not hesitate to reverse it, if (to use the language of Lord Wright in *Admiralty Comrs.* v. *Valverda (Owners)* (7)) it was one of those cases in which serious inconvenience would follow from perpetuating an erroneous construction or ruling of law. But it is far, indeed, from being such a case. That the law was misunderstood or misstated by Cave, J., and Scrutton, L.J., seemed to me after a fresh review of all the authorities discussed in *Scott* v. *Sampson* (1) an impossible contention. In effect, therefore, the plea of the appellants was that the law was not what it ought to be. That is a plea to which this House is not inclined to listen when it is sitting as a Supreme Appellate Tribunal, and, perhaps, I should ignore it. But I cannot refrain from observing how emphatically I dissent from the view that the law should be altered to the advantage of those who make defamatory statements about others. The defences that are open to one who does so are numerous and adequate. If none of them is available to him, what excuse has he and why should

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(1) (1882), 8 Q.B.D. 491.

(2) (1882), 8 Q.B.D. at p. 504.

(3) (1822), 11 Price 235.

(4) (1859), 1 F. & F. 536.

(5) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1.

(6) [1929] All E.R. Rep. at p. 40; [1929] 2 K.B. at p. 17.

(7) [1938] 1 All E.R. at p. 174; [1938] A.C. at p. 194.

A any indulgence be shown him? It is, of course, possible that the so-called " notorious rogue " may recover damages which a perfect system of justice would deny him. But it does not follow that, because he receives more than he ought, the libeller pays less than he ought. I have some sympathy for the view expressed so eloquently by WOOD, B., in *Jones* v. *Stevens* (8) that even evidence of general bad reputation should be excluded. But I recognise that the law admits it. B It is no doubt true that, in practice, it may be difficult to define exactly either the border-line between evidence of general bad reputation and that of specific conduct which has led to it or the area of conduct which the general bad reputation is to cover. That is only to say that a libel action is an imperfect instrument for doing justice in every case. There may in the result be cases in which a rogue survives both evidence of general bad reputation and, where he has gone into C the witness box, a severe cross-examination nominally directed to credit, and recovers more damages than he should. But I would rather have it so than that the law should permit the injustice and, indeed, the cruelty of an attack on a plaintiff for offences real or imaginary which, if they ever were committed, may have been known to few and by them have been forgotten. I say nothing more of the inconvenience of having one or more trials within the original trial. The D main issue has been determined when the defendant has failed in his plea of justification. How many other trials of the offences pleaded in mitigation are to be permitted?

There is one aspect of the appellants' plea in mitigation which deserves special mention. They plead that the respondent has been depicted in the film as having been " guilty of the conduct hereinafter set out the truth of which the plaintiff E does not deny ". It surprises me that it should be considered a proper matter for pleading that a plaintiff has not thought fit to include in his action every libellous statement made about him by a defendant. It is, in my opinion, wholly improper.

My Lords, I do not think it necessary to say anything about R.S.C., Ord. 36, r. 37. Its operation is expressly limited to those cases in which justification F is not pleaded, and no relevant implication can be fairly drawn from it in regard to cases in which it is pleaded. I am the less inclined to do so because the very experienced counsel who appeared at the Bar on this appeal professed great doubt as to its meaning and effect. In any case, it does not, and does not purport to, alter the common law as laid down in *Scott* v. *Sampson* (9): see *Mangena* v. *Wright* (10).

G Finally, I must say something on a question which was much discussed before your Lordships, though it does not arise on the face of the order under appeal. In his judgment, DEVLIN, L.J., said (11):

> " It will also be for him [the trial judge] to determine whether the jury should see the whole film, including those parts which are supposed to H represent the [respondent] as a war criminal, or whether they should see only the parts that are relevant to the libel. We express no opinion on these matters because we are concerned with questions of the admissibility of evidence only in so far as they enter into the point of pleading."

It was urged on behalf of the appellants that it is a rule of law that, in a libel action, the defendant has the right to have exhibited to the jury the whole I of the film or other publication in which the libel is contained and that the judgment of the Court of Appeal implied that there was no such right but that it lay in the discretion of the trial judge to determine whether there should be such an exhibition. I am not sure that the Court of Appeal meant to decide anything of the kind. But, in any event, I think it right to say that it will be the duty of the trial judge first to determine whether (as the appellants allege) in all circumstances

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(8) (1822), 11 Price at p. 275.
(9) (1882), 8 Q.B.D. 491.
(10) [1909] 2 K.B. 958.
(11) [1960] 2 All E.R. at p. 524.

A the defendant has such a right and, if he answers this question in the negative, then to consider whether, in the circumstances of this case, the right should be conceded. These are matters on which it would not be right at this stage for your Lordships to come to any conclusion.

The appeal should, in my opinion, be dismissed with costs.

B **LORD RADCLIFFE:** My Lords, this appeal is wholly concerned with questions of pleading in preparation for a trial which has not yet taken place, and the points of pleading that arise are confined to issues in mitigation of damages. These issues are pleaded by appellants who have put in a separate defence of justification in respect of the matters alleged as libels by the respondent. Necessarily, therefore, one must restrict what one says at this stage to what requires to be said in advance of the trial with regard to the law bearing on the C disputed pleadings.

The pleading in question is para. 5 of the defence, which has been recited in full in the speech of my noble and learned friend on the Woolsack. Essentially, that paragraph seeks to do two things: (a) to rely on the fact that the film which contained the alleged libels depicted the respondent as having been responsible for or associated with other actions of a shameful nature which he had not D complained of in his statement of claim and which, they pleaded, he did not, therefore, deny; (b) to assert with regard to the character of the respondent that he was both widely reputed to have been, and in fact was, guilty of the matters complained of in the statement of claim and these other matters and also certain additional activities discreditable to him. That part of para. 5 which is summarised under (a) above has been struck out by the orders in the courts below. In my E opinion, these orders should stand. I do not think that what is there alleged is a matter of pleading at all, where mitigation of damages is in question; and I know of no rule of court which can be vouched as requiring it. If it is said that other parts of the entire film constitute "circumstances in which the alleged libel was published" (in themselves a recognised head of mitigation), I think that that is a highly artificial meaning to attribute to the phrase. The real purport F of this portion of para. 5 of the defence seems to be to make the point that the respondent must be taken to have admitted the truth of such accompanying derogatory statements as he has not challenged in his libel claim. That is not a matter for pleading. If it amounts to anything at all, it is a matter for comment. As a proposition of law designed to set up some sort of estoppel, I think that it has no foundation. As a comment, if it is permissible to make the comment at G any stage of the hearing, that must be at the trial and not before. I agree, therefore, that para. 5 (A) of the defence should remain expunged from the pleadings.

It was argued that the allowance or rejection of this pleading involved a decision of law whether, at the trial, the appellants would be entitled to require that the entire film should be shown to the jury and not merely those portions that H made up the sound track and pictures conveying the libels complained of. In my opinion, this point, which is not one of pleading, is not involved in our decision today. It can only be dealt with as part of the conduct of the trial. Certainly I do not regard the elimination of para. 5 (A) as affecting one way or the other the general rule recognised in *Cooke* v. *Hughes* (12) as to a defendant's right to have the whole of a publication placed before the jury; but that principle I leaves open the question what, in any particular case, constitutes the publication or article in which the libel is contained.

Paragraph 5 (B) raises more than one question, but the main one, which seems to be the core of this appeal, is whether a defendant may offer in mitigation of damages evidence which bears on the disposition of the plaintiff as distinct from his reputation, or only such evidence as bears on his reputation. On this main point, I am clearly of opinion that, in law, he has normally been, and ought to be, confined to the latter branch of evidence. I think that the law on all this question of mitigation of damages by proving bad character or reputation depends on two points of principle and, surrounding them, a number of rules which are primarily rules of practice or convenience designed for such purposes as to contain the length of trials within manageable limits, to prevent the jury being avoidably confused as to the bearing of evidence on different issues and to limit the grosser abuses of too great a liberty of reference given to either plaintiff or defendant. No one can regard these rules as constituting an instrument of precision for determining the vague concepts which themselves make up the definition of libel. I will only say that, in my view, either side may from time to time need protection from abuse of the permitted liberties; but this is better achieved by a sense of responsibility on the part of the counsel and by the judge's handling of the trial itself than by any close restriction of the range of evidence or cross-examination in matters of mitigation.

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(12) (1824), Ry. & M. 112.

The two matters of principle are these. First, is it to be permissible to call evidence of character at all by way of mitigation? There is much to be said against allowing it, because, if it is allowed, there come in all the difficulties of limitation and possible unfairness of which we have been made conscious by the arguments in this case. On the other hand, there is, I think, the preponderating consideration in favour of this head of evidence that it would be outrageous that a person should recover damages for injury to a character that he is generally known not to possess, or, to put it another way, to a reputation that is not his. In my opinion, therefore, the decision of *Scott* v. *Sampson* (13) ought to be treated as settled law on this point, as, indeed, it has been for more than eighty years. It follows, too, that *Jones* v. *Stevens* (14), which was a decision that a defendant cannot mitigate damages by any evidence of bad character whatsoever, is not good law and represents a wrong line of reasoning. The second matter of principle turns on this point to which I have alluded, whether evidence of a plaintiff's bad character is to be understood as meaning the character which he bears in public estimation, by which I mean his reputation, or the character which might be attributed to him on a nice assessment of all his actions, if not his thoughts and desires, by which I mean his disposition. In my opinion, character in this context ought to mean the former conception exclusively. No evidence should be admitted which is not directed to that head of proof. It is quite true that, in many of the earlier cases, disposition, character and reputation are spoken of without any clear distinction between the different ideas which they convey; it is true, too, that, on several occasions, judges and text writers have spoken of the character which a man " ought to have " as being the relevant matter of proof; but I think that the essential contrast between reputation and disposition was explained clearly enough in the judgment of CAVE, J., in *Scott* v. *Sampson* (13) and was re-affirmed in the judgment of SCRUTTON, L.J., in *Hobbs* v. *Tinling, Hobbs* v. *Nottingham Journal* (15). In my opinion, this is the right line of distinction. I do not believe that " the character that a man ought to have " or to enjoy has any intelligible meaning. It is not possible for a jury, learning, perhaps long after the event, of this or that discreditable action in a man's life, to remake the current public estimation of him by some ideal piece of analysis. The materials themselves could not be available. Moreover, any rule that made it possible for a defendant to put in evidence by way of mitigation some discreditable action of the plaintiff, irrespective of whether it was publicly known or not and so contributed to his reputation, would be a rule so inherently unfair that it ought not to be accepted.

These two principles commend themselves, I believe, to all your Lordships. But it does not seem to me at all clear that by settling them one has done enough to establish a workable rule governing the limits of evidence that can be called

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(13) (1882), 8 Q.B.D. 491.

(14) (1822), 11 Price 235.

(15) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1.

on the issue of reputation. This is not a question on which I myself can find A
any certain guide in numerous decisions prior to *Scott* v. *Sampson* (16). Most of them were given at nisi prius, few are reasoned, they are in some cases inextricably associated with rules of pleading that no longer obtain; and, in fact, you could find among these decisions authority for almost any of a number of conflicting propositions. I am content to start with *Scott* v. *Sampson* (16) which certainly reviewed and less certainly reconciled the previous decisions. In *Scott* v. *Sampson* B
(17), CAVE, J., identified three classes of evidence more or less bearing on proof of reputation. The first he described as "general evidence of reputation" or bad character; "the estimation in which he stands in the opinion of others". This was admissible. He rejected the second class, "evidence of rumours to the same effect as the defamatory matter complained of". The third class was also rejected, "evidence of particular facts tending to show the character and C
disposition of the plaintiff". *Hobbs* v. *Tinling* (18) does nothing to extend or limit this classification, which it purports to follow, although SCRUTTON, L.J., does not lighten the difficulties of maintaining the distinctions by treating "general evidence of bad character" as a term interchangeable with evidence of "general bad character" or reputation.

I think that one can safely get rid of the second class. If a man cannot justify D
the libel that he has actually published, it would be too confusing to the jury to allow him nevertheless to put in evidence on the mitigation issue evidence of rumours or suspicions to the same effect, the more so as the two issues, justification and mitigation, are often not tried in successive stages. Such evidence is a poor sort of evidence at best; and, although it is not irrelevant on the question of a defendant's express malice in issuing the libel and, originally, was probably E
admitted on this basis, I think that the better rule of practice is not to allow it at all—see *Watt* v. *Watt* (19). A jury will have a difficult enough time in learning to distinguish between the loss of credit which may result from a cross-examination of a plaintiff imputing to him a number of specific incidents bearing on his uprightness and probity and the retention of the same plaintiff's reputation if the same incidents are not, or are not allowed to be, proved in evidence by F
way of mitigation of damages. I cannot see, however, how it can prove possible to treat the first and third classes as altogether exclusive of each other, and I do not believe that in practice anyone ever does. The difficulty is that "general evidence of reputation" does not convey an idea of any content. Life not being a morality play or a Victorian melodrama, men do not enjoy reputations for being bad or good simpliciter; nor, if they did, would the proof of such generalities G
throw any light on the loss of reputation suffered from a particular libel. So far as the ordinary man enjoys a public reputation at all, it is a reputation, favourable or unfavourable, in respect of particular aspects or sectors of his life, and, of course, he is likely to have a good reputation in some aspects and a bad reputation in others. In any event, the existence of these reputations will, if tested, be found to rest on nothing more than particular incidents of some general notoriety or H
else on rumour or suspicion, which may or may not be well founded.

What, then, do we mean when we say that we affirm the principle of *Scott* v. *Sampson* (16) that general evidence of bad reputation is admissible but that evidence of particular facts tending to show the character and disposition of the plaintiff is not? I have not been able to find that the authorities supply any satisfactory answer to this. To begin with, there is a fallacy in supposing I
that some general phrase can govern the variety of situations that a libel can create, in particular in supposing that the admissible evidence ought to be the same, whether the libel is very particular or very general or whether the plaintiff is a public figure, whose reputation is largely based on notorious incidents, favourable or unfavourable, or a private individual whose affairs may well

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(16) (1882), 8 Q.B.D. 491. (17) See (1882), 8 Q.B.D. at pp. 498, 503, 505.
(18) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1. (19) [1905] A.C. 115.

escape the burden of notoriety altogether. These considerations lead me to the opinion that it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of a plaintiff's life that has relevance to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material on which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence in favour of the worse. It remains true that the issue is not whether the incidents actually happened but whether it is common report that they did. If it is, that seems to me the best available evidence of a plaintiff's reputation. I find it difficult to combine an aversion from rumour with an indulgence for general evidence of reputation which, unvouched, is virtually the same thing. We seem to have reached a situation in which, while it is regularly said that only general evidence of reputation can be given, and that evidence of particular facts cannot, yet in practice, when before trial there are furnished particulars of evidence of character intended to be called in mitigation, the particulars just as regularly refer to specific incidents. This seems to me very unsatisfactory, because it makes the worst of both worlds. I have no liking for the rule which admits evidence of reputation at all; I regard it as a disagreeable necessity to take care of certain libel cases which require such a rule; but if we are to have it, I think that there is everything to be said for trying to express it in the fairest and most workable form. I doubt if that is what we achieve today.

It must be remembered that CAVE, J., in his judgment (20) confined his exclusion of particular facts to those " tending to show the character and disposition of the plaintiff ", i.e., those which go to disposition as contrasted with reputation. As I have said, I am sure that this principle ought to be maintained. But I think that it goes beyond either what he said or what he would seem to have wished to imply to treat general evidence of reputation as excluding all reference to particular facts, if they are of notoriety. If evidence were to be admitted but confined in this way and fair warning were given in advance of any particular incidents to be raised, as is now done, it would not be realistic to apply to it the description which, in *Jones* v. *Stevens* (21) was thought to render inadmissible evidence of character, that it (22)

> " would allow the defendant to impeach all the transactions of the plaintiff's life, and throw on him the difficulty of showing an uniform propriety of conduct during all his existence."

If I apply what I have said to para. 5 (B) of the defence and compare it with the truncated form allowed by the order of the Court of Appeal, the plea that the respondent " in fact was " guilty of the conduct alleged would go out, since it is the repute, not the fact, that matters; and the references to para. 3 and para. 4 in subhead (i) would also go out, since those paragraphs are justification paragraphs which cannot be repeated as mere repute by way of mitigation. For the rest, I think that it would have been better to allow para. 5 (B) to stand as pleaded, subject to its reference to para. 5 (A), which will have disappeared, being rewritten. All that remains would be governed by the opening words " the [respondent] is widely reputed to have been " which seem to me to apply the right limitation in law. I do not know that the Court of Appeal's more restricted version of the pleading would make substantial difference to whatever may happen at the trial; but it does not seem to me any fairer to the respondent than to the appellants to face him with so vast and vague a denunciation as that he is reputed to have been party to or responsible for acts which were war crimes or crimes against humanity or atrocities.

Subject to this, I would dismiss the appeal.

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(20) (1882), 8 Q.B.D. at p. 498.

(21) (1822), 11 Price 235.

(22) (1882), 8 Q.B.D. at p. 501.

LORD DENNING: My Lords, the appellants here challenge the correctness of the judgment of CAVE, J., in *Scott* v. *Sampson* (23). This is a bold thing to do, seeing that it has been accepted for so long as good law. But, as the challenge was supported by a considerable show of authority, I would like to meet it on its own ground. The law on the subject cannot properly be understood without some knowledge of the old forms of action. From the earliest writ in 1536 in the Year Books down to the year 1852, the declaration contained three parts: First: The *prefatory averment* in which the plaintiff asserted that he was a man of good character. It usually said that he was a man of good character and reputation and had never before been suspected of misconduct of the kind which was imputed to him. Second: The *wrong done*. The plaintiff here alleged that the defendant had falsely and maliciously published of him the words following (here they were set out) imputing to him misconduct. Third: The *conclusion*. In this, the plaintiff stated that, by reason of the foregoing, he had been injured in his character and reputation and claimed damages. The defendant could not and did not plead to damages. He could only dispute them under the *General Issue*, that is, Not Guilty. And this gave rise to several important questions. The first was whether, under the general issue, the defendant could give in evidence the *truth* of the words in mitigation of damages, even though he had not pleaded a justification. In 1701, HOLT, C.J., ruled that he could: see *Smithies* v. *Harrison* (24). But in 1737, there was a celebrated case where the beer butler of Christ Church in Oxford brought an action because it was said of him: " John Smith is a rogue and has stolen my beer ". All the twelve judges met to consider it and it was held by eight to four that, as the words imputed a felony, the defendant could not give evidence of truth in mitigation of damages but had to plead it specially by a plea of justification: see *Smith* v. *Richardson* (25). And in 1743, this ruling was " extended to all sort of words, and not barely to such as imported a charge of felony ": see *Underwood* v. *Parks* (26). The reason given for requiring it to be pleaded was so that the plaintiff might be prepared to defend himself. From *Underwood* v. *Parks* (26), it followed inexorably that any evidence of particular facts which tended to prove a justification was not admissible in mitigation of damages, but only in support of a plea of justification, if made: see 2 STARKIE on SLANDER & LIBEL (2nd Edn.) (1830), pp. 90-95.

The second question which arose for decision was whether, under the general issue, the defendant could give in evidence the bad character of the plaintiff. In 1809, SIR JAMES MANSFIELD, C.J., held that it was open to the defendant (in answer to the prefatory averment of the plaintiff) to call general evidence to prove that the plaintiff was a man of bad character and had, previously to the slander, been generally reputed to be guilty of misconduct of the kind imputed to him: see *Earl of Leicester* v. *Walter* (27), and his decision was thereafter upheld by the full Court of Queen's Bench in *Anon.* v. *Moor* (28), and followed thenceforward by many other judges: see *Thompson* v. *Nye* (29), by ERLE, J. But the judges did not allow the defendant to go into particular instances of misconduct, as distinct from general evidence: see *Smithies* v. *Harrison* (24) by HOLT, C.J., *Waithman* v. *Weaver* (30) by ABBOTT, C.J. The reason for the distinction was well put by MR. STARKIE:

> " The principle on which such general evidence is admitted, whilst evidence of particular facts is excluded, has been frequently recognised: it is this,—that the party may be prepared with general evidence in support of character though he cannot be supposed to be prepared with evidence to justify his conduct through life."

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(23) (1882), 8 Q.B.D. 491.

(24) (1701), 1 Ld. Raym 727.

(25) (1737), Willes 20.

(26) (1743), 2 Stra. 1200.

(27) (1809), 2 Camp. 251.

(28) (1813), 1 M. & S. 284.

(29) (1850), 16 Q.B. at p. 180.

(30) (1822), Dow. & Ry. N.P. 10.

2 Starkie on Slander & Libel (2nd Edn.) at p. 93 in notis. It is only right to say, however, that the Barons of the Exchequer took a different view. They did not admit even general evidence of bad character: see *Jones* v. *Stevens* (31). But the judges of the King's Bench took no notice of what the barons said. They continued to go the circuits of England and admitted general evidence of bad character just as they had done before. Mr. Starkie tells us that such good judges as Holroyd, J., Lord Tenterden, C.J., Lord Denman, C.J., and Coltman, J., all received general evidence of bad character despite the ruling of the barons: see 2 Starkie on Evidence (3rd Edn.), pp. 641-2. But they did not allow the defendant to go into particular instances of misconduct: see *Moore* v. *Oastler* (32) by Lord Denman, C.J., after consulting Parke, B., and *Bracegirdle* v. *Bailey* (33) by Byles, J., after consulting Willes, J. There was once a suggestion that, where the defendant pleaded a justification, he could not give general evidence of bad character: see *Snowdon* v. *Smith* (34) in notis by Chambre, J. The reason is not far to seek. Suppose a man accused another of theft and sought to justify it. If he had to make good this charge with the same strictness as in a criminal court, he would not be allowed to bring in evidence of bad character to support it. Could he be allowed to get it in by a side-wind in mitigation of damages? The judges eventually held that he could. In *Kirkman* v. *Oxley* (35), Heath, J., allowed a defendant, who had justified a charge of theft, to go into evidence of the plaintiff's bad character in mitigation of damages; and in 1826, Lord Tenterden did the same: see *Mawby* v. *Barber* (36). On principle this is sound. The object of "general evidence of character", as Mr. Starkie says, "is to diminish the damages: and this the defendant is entitled to do, though he fail to establish his justification": see 2 Starkie on Slander & Libel (2nd Edn.), p. 97.

Such was the law as it stood in 1873. In that year, the old system of pleading was replaced by the modern system of pleading: see s. 69 of the Supreme Court of Judicature Act, 1873, and the Rules of Court, 1875. Each party was, by Ord. 19, r. 4, required to plead all the material facts on which he relied; but by Ord. 21, r. 4, no denial or defence was necessary as to damages claimed or their amount but they were deemed to be put in issue in all cases. These rules did not affect the law as to the admissibility of evidence. But the new rules did—and do—make it necessary for the defendant to plead the material facts on which he relies; and these facts include the plaintiff's bad character if and in so far as he relies on it. In this respect, I agree with what was said in *Scott* v. *Sampson* (37) and the Court of Appeal (38) in the present case. *Wood* v. *Earl of Durham* (39) is not good law.

This brings me to the case in 1882 of *Scott* v. *Sampson* (40) itself, the first decision after the new rules of pleading. Scott was a dramatic critic for the "Daily Telegraph". Sampson ran a weekly paper called "The Referee". Sampson wrote an article in "The Referee" to this effect:

> "Scott has systematically abused his position as a dramatic critic so as to extort money. He even threatened Admiral Glyn. He said he would publish some unpleasant facts about Miss Neilson unless he were paid £500: and Admiral Glyn paid him £500 to keep it out."

Scott sued for libel. Sampson pleaded justification and failed. The jury found for Scott with £1,500 damages. But, in the course of the trial, Lord Coleridge, C.J., rejected certain evidence which Sampson sought to adduce; and Sampson appealed on the ground that it ought to have been admitted. Most of the rejected evidence related to particular instances of misconduct. For instance, Sampson sought to give evidence that Scott had, when reviewing "Othello" in the "Daily Telegraph", grossly abused the actor who took the part of Iago because he disliked him personally. This evidence was clearly inadmissible. Such evidence of particular misconduct has never been allowed in any of the cases save one—*Knobell* v. *Fuller* (41), where Eyre, C.J., held that a defendant might, in mitigation of damages, give evidence of suspicion tending to justification but falling short of it. That case was so severely handled by Mr. Starkie that no one has taken any notice of it since: see 2 Starkie on Slander & Libel (2nd Edn.), pp. 93-97. It was clearly wrong. The rest of the rejected evidence related to rumours to the same effect as the libel. Sampson sought to call a witness to say that, before the article appeared in "The Referee", he had heard the same story in a London club. It seems perfectly obvious to us today that such evidence was not admissible. But at that time there was a considerable body of authority in support of it. Rumours were admissible, it was said, to the same effect as the libel so long as they were in existence previously to the publication. The point had been left open in *Thompson* v. *Nye* (42) in 1850 and there had been a division of opinion on it in Ireland in 1860 in *Bell* v. *Parke* (43). I need add nothing to the forceful remarks made by Cave, J. (44), in rejecting it. Was the court to receive the gossip of some idler in a club? Rumour is a lying jade, begotten by gossip out of hearsay, and is not fit to be admitted to audience in a court of law.

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(31) (1822), 11 Price 235.
(32) (1836), 2 Starkie on Evidence (3rd Edn.) 642, n.
(33) (1859), 1 F. & F. at p. 537.
(34) (1811), 1 M. & S. 286, n.
(35) 2 Starkie on Evidence (3rd Edn.) 306, n.
(36) (1826), 2 Starkie on Evidence (3rd Edn.) 642, n.
(37) (1882), 8 Q.B.D. at pp. 495, 496, 507.
(38) [1960] 2 All E.R. at p. 528.
(39) (1888), 21 Q.B.D. 501.
(40) (1882), 8 Q.B.D. 491.

Nothing in that decision touches the admissibility of general evidence of bad character. No such evidence was submitted. But Cave, J., made it quite clear that, in his opinion, it would have been admissible. He summarised the former practice succinctly when he said (45) that "general evidence of bad character was allowed to be given under a plea of not guilty". And I have no doubt he was correct. But it must be remembered that, up to his day, the decisions were conflicting. The King's Bench judges had decided in favour of its admissibility. The Barons of the Exchequer against it. Cave, J., came down on the side of the King's Bench judges. But it would appear that Hawkins, J. (from what he said later in *Wood* v. *Earl of Durham* (46)), would have come down in favour of the barons. The Divisional Court in *Scott* v. *Sampson* (47) could not overrule *Jones* v. *Stevens* (48); but your Lordships can, and I hope you will; and will hold that general evidence of bad character is admissible. The reasons in favour of it were given by Mr. Starkie (2 Starkie on Slander & Libel (2nd Edn.), p. 88) 130 years ago in a passage, part of which was quoted by Cave, J. (45):

> "General evidence . . . seems in principle to be admissible, as immediately and necessarily connected with the question of damages. He complains of loss of reputation, and that he has been deprived of his character by the act of the defendant. Is not the defendant, then, to be permitted to show that the plaintiff's character was previously tainted . . . or that he had in fact little character or reputation to lose? To deny this, would be to decide that a man of the worst of characters was entitled to the same measure of damages with one of unsullied and unblemished reputation; a reputed thief would be placed on the same footing with the most honourable merchant—a virtuous woman, with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material, but seems to be absolutely essential."

My Lords, up till this point I have spoken of "general evidence of *character*" because that is how it was usually referred to before *Scott* v. *Sampson* (47). But Cave, J., seems to prefer the expression "general evidence of *reputation*". The reason is, no doubt, because the words "character" and "reputation" have various meanings and he wished to make clear what he meant. A man's "character", it is sometimes said, is *what he in fact is*, whereas his "reputation" is *what other people think he is*. If this be the sense in which the words are being used, then a libel action is concerned only with a man's reputation, that is, with what people think of him; and it is for damage to his reputation, that is, to his esteem in the eyes of others, that he can sue, and not for damage to his own personality or disposition. That is why CAVE, J., spoke of "reputation" rather than "character".

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(41) (1797), Peake, Add. Cas. 139.
(42) (1850), 16 Q.B. 175.
(43) (1860), 11 I.C.L.R. 413.
(44) (1882), 8 Q.B.D. at pp. 503, 504.
(45) (1882), 8 Q.B.D. at p. 503.
(46) (1888), 21 Q.B.D. at p. 508.
(47) (1882), 8 Q.B.D. 491.
(48) (1822), 11 Price 235.

But there is another sense in which the word "character" is used, and quite properly used, when it overlaps the word "reputation". Thus, when I say of a man that "He has always borne a good character", I mean that he has always been thought well of *by others*; and when I want to know what his "character" is, I write, not to him, but to *others* who know something about him. In short, his "character" is the esteem in which he is held by others who know him and are in a position to judge his worth. A man can sue for damage to his character in this sense, even though he is so little known to the outside world that he has no "reputation" in the ordinary sense of that word. If it were said of Robinson Crusoe that he murdered Man Friday, he would have a cause of action, even though no one had ever heard of him before. But a man's "character", so understood, may become known to others beyond his immediate circle. In so far as this estimate spreads outwards from those who know him and circulates among people generally in an increasing range, it becomes his "reputation" which is entitled to the protection of the law just as much as his character. But here I speak only of a reputation which is built on the estimate of those who know him. No other reputation is of any worth. The law can take no notice of a reputation which has no foundation except the gossip and rumour of busybodies who do not know the man. Test it this way. Suppose an honourable man becomes the victim of groundless rumour. He should be entitled to damages without having this wounding gossip dragged up against him. He can call people who know him to give evidence of his good character. On the other hand, suppose a "notorious rogue" manages to conceal his dishonesty from the world at large. He should not be entitled to damages on the basis that he is a man of unblemished reputation. There must, one would think, be people who know him and can come and speak to his bad character.

This leads me to the conclusion that, in order to arrive at a man's character and reputation, one should call those who know him and have had dealings with him; for they provide the only sound foundation on which to build. And in actual practice it is only such persons who are called. I have looked into many of the cases where evidence of good or bad character has been given, and I have been engaged in quite a number myself. It usually takes this form: If it is evidence of good character, a witness of good standing is called, such as a clergyman, a schoolmaster or an employer, and is asked such questions as these:

> "What are you? How long have you known him? Have you known him well? Have you had an opportunity of observing his conduct? What character has he borne during that time for honesty, morality or loyalty [according to the nature of the case]? As far as you know, has he deserved that character?"

A good instance is *King* v. *Waring* (49). A servant girl was given a reference accusing her of dishonesty. In support of her claim for damages, LORD ALVANLEY, C.J., allowed a former employer to come and give evidence of her general character for honesty. But the witness cannot be asked questions in examination-in-chief about particular facts so as to illustrate the plaintiff's good behaviour on particular occasions. In cross-examination, however, he may be asked what are the grounds of his belief and he may be asked as to particular facts known to him tending to shake it. If it is evidence of bad character which is given (such as that a man is a reputed thief or a woman is a common prostitute), the evidence often takes the form of a police officer who knows him being called and saying: "I know the defendant and have known him (or her) for some time. He is a well-known pickpocket", or "She is a common prostitute", or as the case may be. In such cases, the witness usually speaks from his own observation and knowledge. The greater his personal knowledge, the more valuable his evidence. A good illustration is *Wood* v. *Cox* (50). There a jockey had been accused of "pulling" a horse called Success. It was said that "he nearly pulled his head off." He sued for damages. Lord Coleridge, C.J., admitted evidence of four officials of the Jockey Club who gave evidence of the plaintiff's bad character for foul riding and not trying to win. (Incidentally, his employer, the Duke of Portland, gave evidence in the jockey's favour, though he seems to have been cross-examined to some effect.) The jockey only got one farthing damages. When general evidence of bad character is given, the witness cannot in chief give particular instances; though he can, of course, in cross-examination be asked the grounds of his belief and on what it is based. When evidence of good or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the judge to rule what is the relevant sector.

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(49) (1803), 5 Esp. 13; 170 E.R. 721.

In the year following *Scott* v. *Sampson* (51), Ord. 36, r. 37, was made, It is confined to cases where justification is not pleaded. This looks as if someone thought that the evidence receivable in mitigation of damages was different according as justification was pleaded or not; just as Chambre, J., did in 1811 (52). But this is not true. There is no difference in principle between the two cases. I prefer, however, to think that the makers of the rule thought that, when justification was pleaded, as it was in *Scott* v. *Sampson* (51), that case made it clear that, if the defendant intended to give evidence in mitigation of damages, he had to include the material facts in his defence. See what Mathew, J., said (53) and Cave, J. (54). Then, in order to cover cases where justification was not pleaded, Ord. 36, r. 37, was passed so as to require the defendant to give particulars. The rule did not enlarge the matters of which he could give evidence. So far as evidence of "character" was concerned, the defendant could still only give in chief general evidence of bad character and not particular instances: see *Mangena* v. *Wright* (55), but henceforward he had to give notice to the plaintiff of his intention in that behalf at least seven days before the trial. These particulars may or may not be included in the pleadings. But in either case the court has, I think, power to strike them out if and in so far as they contain specific instances which would be likely to embarrass the fair trial of the action.

This brings me, however, to *Scaife* v. *Kemp & Co.* (56). Kemp & Co. were a trade protection society. They received an inquiry about the plaintiff, one J. Scaife of Liverpool. They mistook him for another man of the same name, J. Scaife of Liverpool, and they answered: "He is a bad payer, is frequently sued, and nothing can be got out of him." When the plaintiff sued for libel, the defendants found out that he, too, was a bad payer. Both the Scaifes were apparently bad payers. But instead of pleading justification, as they should have done, the defendants furnished particulars under Ord. 36, r. 37. These particulars specified certain cheques dishonoured, executions levied, and so forth. And the defendants followed up these particulars with interrogatories asking whether certain cheques of the plaintiff at certain dates had not been dishonoured, whether or not certain executions had been levied on his goods, and so on. The master refused these interrogatories. But Denman, J., allowed them; and, on appeal, Mathew and A. L. Smith, JJ., affirmed his decision. It seems to me that both the particulars and the interrogatories were an attempt to get in evidence of particular facts which, if proved, would constitute a justification; and, as such, they were not admissible in mitigation of damages. In the absence of a plea of justification, they ought not to have been allowed. *Scaife* v. *Kemp* (57) was, I think, a wrong decision.

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(50) (1888), 4 T.L.R. 652.

(51) (1882), 8 Q.B.D. 491.

(52) In *Snowdon* v. *Smith*, (1811), 1 M. & S. 286, n.

(53) (1882), 8 Q.B.D. at pp. 495, 496.

(54) (1882), 8 Q.B.D. at p. 507.

(55) [1909] 2 K.B. at p. 979.

(56) [1892] 2 Q.B. 319; 61 L.J.Q.B. 515.

Finally, in this review of the cases I come to *Hobbs* v. *Tinling, Hobbs* v. *Nottingham Journal* (58). It was a distinct affirmation of *Scott* v. *Sampson* (59). Hobbs had been convicted of conspiracy to blackmail. A newspaper thereupon accused him of a lot of other offences which it did not attempt to justify. But, in order to mitigate damages, it delivered particulars under Ord. 36, r. 37, giving many instances of specific misconduct. Scrutton, L.J., said that this was wrong. The only matter which was properly included was this (60):

> " the plaintiff was a man of worthless reputation and character, being known to the police, and in the profession of the law as such."

Then the newspaper, in order to mitigate damages, cross-examined Hobbs on specific instances of misconduct. This too, it was held, was wrong. Such instances cannot be adduced in cross-examination to damages any more than they can be in chief. The defendants ought to have called the police officers and lawyers (indicated in their particulars) to prove he was a rogue.

Notwithstanding this weight of authority counsel for the appellants argued that, in principle, specific misconduct should be admitted in mitigation of damages. He put this instance: Suppose a newspaper said of a man: " He has been convicted six times for dishonesty ", but, on being sued, the newspaper finds that he has in fact only been convicted twice. The newspaper cannot justify, he said, because it cannot prove the words were true. Nor can it bring forward the two convictions in mitigation of damages because they are specific misconduct. So the plaintiff will get damages on the footing that he has never been convicted at all. If such were the law, I would agree with counsel that it would be most unjust and ought to be remedied. But it is not the law. Although the newspaper cannot justify in whole, it can justify in part. It can plead that, in so far as the words meant that he had been convicted twice, they were true and thus bring the two convictions before the jury. In *Clarkson* v. *Lawson* (61), Sergt. Wilde put the very case: If the defendant charges the plaintiff with stealing three horses, can he not justify as to one? ", and Park, J., said (62) he could. " It was the common practice ", said Sir James Scarlett in one of the cases cited to your Lordships,

> " if a defendant could not justify all, to justify a part of the libel, and produce witnesses to prove the part justified, as a ground of mitigation and reduction of damages ":

see *Waithman* v. *Weaver* (63). This rule is based on sound sense. Seeing that the law does not permit a defendant, in mitigation of damages, to adduce evidence which tends to justification, it must permit him to adduce the self-same evidence when pleaded in partial justification: see *Vessey* v. *Pike* (64) by Lord Tenterden, C.J. If it were not so, the plaintiff would recover damages for a character which he did not possess or deserve; and this the law will not permit.

But then counsel for the appellants says that there are cases where not even a partial justification is open to the defendant, because of the way the plaintiff frames his action. He took this case. Suppose a newspaper said of a man: " He has murdered his father, stolen from his mother and does not go to church on Sundays "; and the plaintiff brings a libel action complaining only of the imputation that he does not go to church. The defendants, said counsel, cannot justify the major charges of murder and theft, because the plaintiff has not complained of them. They cannot give evidence of them in mitigation of damages because they are only specific instances. What is, then, the position? It would, says counsel, be most unjust that the plaintiff should get damages for the minor matter when, if the jury had had the whole before them, they would have given him nothing. I agree it would. But the answer is that the defendants, who had produced such a piece of bathos, would be entitled, in the apt words of Lord Coke, to "have showed all the words and the coherence of them": see *Brittridge's Case* (65); and the jury would no doubt only have given one farthing, as they did in *Cooke* v. *Hughes* (66). In those cases the words so "cohered together" that it was necessary for the jury to see all the words in order to make a correct appreciation of their impact. Whether the present is such a case, the judge will say at the trial. Your Lordships can hardly do so at this stage, not having seen the film.

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(57) [1892] 2 Q.B. 319.

(58) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1.

(59) (1882), 8 Q.B.D. 491.

(60) [1929] All E.R. Rep. at p. 37; [1929] 2 K.B. at p. 11.

(61) See (1829), 6 Bing. at p. 591.

(62) (1829), 6 Bing. at p. 594.

(63) (1822), Dow. & Ry. N.P. at p. 11.

(64) (1829), 3 C. & P. at p. 513.

Counsel for the appellants referred also to the Report of the Committee on the Law of Defamation in 1948 (Command 7536), in which it was suggested that, as a result of *Scott* v. *Sampson* (67), a libel action may resolve itself into a tactical battle so as to force the plaintiff into the witness-box where he can be cross-examined to credit. I agree that, if this were the result, it would be plainly undesirable. The only legitimate purpose of cross-examination to credit is to damage or destroy the plaintiff's credibility; but, as often as not, the plaintiff will have said nothing to warrant it. The plaintiff cannot speak as to his own character and reputation because he does not know what other people think of him, or at any rate he cannot give evidence as to what they think of him. And if the purpose of the cross-examination is to introduce illegitimately specific instances of misconduct—which cannot be legitimately put in evidence—then it should be discouraged. It is not good for the law that a judge should admit a "roving" cross-examination to credit and then go on to tell the jury to ignore it when they come to assess damages, knowing that it is an impossible thing to ask them to do. Better not to have it introduced at all. Better to keep to general evidence of bad character which, when given by people who know the plaintiff and can judge his worth, is worth more than many instances and does not embarrass the trial as they would do.

My Lords, I think that I have now dealt with all the points raised by the appellants, save the seduction cases and the cases in aggravation of damages, but these are so far removed from the present case that I will not spend time on them. It remains only to apply the law to the present case. The original particulars under para. 5 (A) were misconceived because there is no need for the respondent to give evidence in chief about the rest of the film. If it is one single publication, in which it is necessary to see the whole in order correctly to appreciate the impact of the parts, the judge will let the jury see the whole and both sides can make any fair comment on it. The original particulars under para. 5 (B) were misconceived in so far as they related to specific instances of misconduct. The amended particulars, as allowed by the Court of Appeal, are permissible in so far as they relate to general evidence of bad character in a relevant sector.

I would, therefore, dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, if a plaintiff complains that a defendant has published defamatory matter concerning him, the defendant may in civil proceedings absolve himself from any liability to pay damages by showing that what was published was no more than the truth. But if a defendant fails to do that, or is not otherwise protected, is he to be entitled to reduce his liability to pay damages for having published false defamatory matter by making new and further accusations and asserting that they reveal the plaintiff in his true light? Is a defendant in an action for defamation to be allowed for the purpose of reducing his liability in damages to say in effect: "Though what I published was false if I had published what I now assert all of that would have been true"? Or is he to be entitled to say:

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(65) (1602), 4 Co. Rep. at p. 19 b.

(66) (1824), Ry. & M. 112.

(67) (1882), 8 Q.B.D. 491.

> "If what is complained of is false then the damages which I ought to pay should be diminished because I have in fact published other defamatory statements of the plaintiff and I say that those are true"?

My Lords, though it would seem incongruous if someone with a bad reputation could claim damages for injury to his reputation without risk of the fact of his bad reputation being made known to the court, it would seem objectionable if the measuring of the damages that should be paid for publishing some false defamatory matter could be made the occasion for asserting and investigating other allegations against a plaintiff with a view to disclosing his true character and disposition. If, in a quest to discover or to assess the true character and disposition ~~of a~~ plaintiff, a defendant could assert and seek to prove certain deeds which were discreditable to the plaintiff, the latter could hardly be denied the right to counterbalance them by asserting and seeking to prove deeds which redounded to his credit. The limits of roving inquiry would be hard to control. There would be trials within a trial. The last stage of a trial would be far removed from the first. While in some cases any unseemly use of opportunity to expose a plaintiff might dangerously react, there might be cases in which the possession of some piece of information as to the past could in callous and unscrupulous hands be the means of deflecting a plaintiff from pursuing a just claim.

It is the contention of the appellants that, in an action for defamation, a defendant should be allowed, on giving due notice, to adduce evidence in mitigation of damages not only of the circumstances under which the matter complained of was published but also of the true character and disposition (at the material time) of the plaintiff. This should, however, be limited (according to the appellants' contention) to what is relevant to the nature of the allegations made against the plaintiff in the publication complained of, though not otherwise limited, inasmuch as all facts intended to be alleged in the damages-mitigating process ought, it is contended, to be pleaded with particularity. If the considerations both favourable to and adverse to these contentions were being judicially examined for the first time there would be much to be said for being sparing (when the sole issue is that of the amount of the damages) in giving protection to those who give currency to defamatory statements the accuracy of which they cannot defend. But, my Lords, the vexing issues to which the appellants' contention gives rise were often before the courts in the periods before the decision in *Scott* v. *Sampson* (68). In some cases, a person who was sued sought to defend himself by showing that he had merely said what was currently and widely being said about the plaintiff. "If so many are saying this what injury has my mere repetition done?"; such was one form of the plea. My Lords, had such a plea found any lasting favour the ugly voices of rumour and gossip with their furtive breathing of scandal would have gained a hearing which the law denies to them. In other cases it was sought (as it is now sought) to give evidence of particular facts tending to show the character and disposition of the plaintiff. If that could be done without prior notice, it would be manifestly unfair. A plaintiff might not be prepared with the material to refute some suggestion which, had there been knowledge that it would be raised, could convincingly have been refuted. But, even after due notice (the desirability of which the appellants recognise), ought such procedure to be allowed? A man should have damages, say the appellants, for injury to such reputation as he deserves to have and not for injury to a reputation that he does not deserve. The reason, they say, why justification is recognised as a defence in defamation proceedings is that, if truth is shown, it is thereby shown that a plaintiff cannot A assert injury to a character which he neither does nor ought to possess. In *M'Pherson* v. *Daniels* (69), LITTLEDALE, J., said:

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(68) (1882), 8 Q.B.D. 491.

> " . . . the truth is an answer to the action, not because it negatives the charge of malice . . . but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, B to possess."

But, in my judgment, that applies to the character which a plaintiff ought to possess in relation to the particular matters which are the subject of the libel complained of. A true statement made of a plaintiff may damage his reputation, but, so far as civil proceedings are concerned, a defendant may say that, inasmuch as the statement was true, he is not liable for having caused the C damage.

In his notable judgment in *Scott* v. *Sampson* (70), CAVE, J., traced the evolution of certain underlying principles, though he recognised and demonstrated that as to some issues there was a considerable conflict of judicial opinion. He said (71):

> D " Speaking generally the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously E held."

It was a logical step from this to conclude that those who have to award damages should be entitled to know, if it be the fact, that a plaintiff is a man of no reputation and that general evidence of reputation should be admitted; the balance of previous authority, the learned judge concluded, supported that view. One of the further issues in the case related to the admissibility of F evidence of particular facts tending to show the character and disposition of a plaintiff. As to this, CAVE, J., concluded that both principle and authority were equally against its admissibility; no case that had been cited to him supported its admissibility.

Although the principles which were classified and stated in *Scott* v. *Sampson* (70) have now stood for nearly eighty years, it would be open to your Lordships, G if so persuaded, to hold that the case was wrongly decided. My Lords, I am not so persuaded. It records and sets out what might be regarded as the greatest common measure of principle which emerged from the progressive experience of trial courts over many years. It may, nevertheless, be recognised that criticisms can be directed against the rule which it affirmed that general evidence of reputation can be admitted but not evidence of particular facts H tending to show the character and disposition of a plaintiff. The line, it may be said, between general evidence of reputation and evidence as to rumour may often become slender. If there be cross-examination of a witness who has given general evidence of reputation, then the flood-gates may be opened through which streams of details and particular facts may flow. Furthermore, it may be said that, under existing practice, in cases where cross-examination I of a plaintiff as to his credibility is legitimate, the range of the questioning may be wide and the length of a trial correspondingly extended. Also it may be said that there may in some cases be difficulties in having available a witness who can speak as to a man's reputation. If there is force in some or all of these criticisms, it may be that even more forceful criticisms could be directed against some proposed new rule. These matters, however, do not so much present themselves as the problems of the courts but rather of any who might wish by legislation to seek to change the law as it has been evolved.

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(69) (1829), 10 B. & C. at p. 272.

(70) (1882), 8 Q.B.D. 491.

(71) (1882), 8 Q.B.D. at p. 503.

One of the complications in the present case arises from the circumstance that the appellants are seeking to assert that the film not only depicts the respondent as guilty of the particular conduct of which the respondent complains in the action, but that the film further depicts him as having been guilty of other particularised conduct and they seek to be entitled in order to mitigate damages to prove that he was in fact guilty of such other conduct. For the reasons that I have indicated, I do not consider that they ought to be entitled to do more than to adduce such evidence as the trial judge admits within the pleading in the form allowed by the Court of Appeal. I cannot think that the appellants should be entitled to give evidence of particular facts tending to show the character and disposition of the respondent merely because those alleged facts are said to be asserted or presented in some parts of the film itself. I furthermore cannot agree that it is legitimate to plead that it was a " circumstance " under which certain defamatory pictures and words complained of were published in a film that there were other pictures and words in the film "the truth of which the [respondent] in his amended statement of claim does not deny ". The appellants have submitted that

> " the decision of the Court of Appeal that the [appellants] did not have the right to require that those parts of the film referred to in para. 5 (A) be shown to the jury at the trial of this action was wrong."

My Lords, it seems to me that it will be for the judge at the trial to decide whether the appellants will have the right to insist that the whole of the particular film should be seen by the jury. The Court of Appeal recognised that the appellants might wish to make a comment to the jury that the respondent was prepared " to sit down under " charges made in the film and not complained of by the respondent in the action. My Lords, I do not consider that we are called on to express opinion on any of these matters. It will be for the judge at the trial to decide whether either as of the right of one or other of the parties or otherwise the jury should see the whole film, and it will also be for him to decide what evidence is admissible as being relevant to the issues raised by the pleadings.

I would dismiss the appeal.

LORD GUEST: My Lords, I have had the opportunity of reading the speech delivered by my noble and learned friend on the Woolsack, and I agree with the reasons which he gives for dismissing this appeal. I only desire to add these observations.

It was argued by the appellants that, although the decision in *Scott* v. *Sampson* (72) was averse to their contention, it should not be followed because it has led to inconvenience and injustice. I am not satisfied that it has led to these results. In my view, inconvenience and injustice would certainly follow if the law were to be as the appellants argued that it ought to be. If allegations of specific instances of misconduct were allowed to be proved in evidence in mitigation of damages, it would open the door to issues which were truly collateral and which had but an indirect bearing on the main question in the case. It would inevitably prolong the trial and tend to confuse the minds of the jury by distracting their attention from the main issue. The result might be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations whether or not relevant to the subject-matter of the libel, introduced by the defendants for the purpose of mitigating damages.

It is satisfactory that the law of Scotland has been for a number of years in consonance with the law of England on the matter (*C.* v. *M.* (73)). The decision in that case derived authority from an earlier case of *A.* v. *B.* (74), and I quote the opinion of Lord President ROBERTSON:

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(72) (1882), 8 Q.B.D. 491.

(73) 1923 S.C. 1.

> " But, then, courts of law are not bound to admit the ascertainment of every disputed fact which may contribute, however slightly or indirectly, towards the solution of the issue to be tried. Regard must be had to the limitations which time and human liability to confusion impose upon the conduct of all trials. Experience shows that it is better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great amount of time, and confuse the jury with what, in the end, even supposing it to be certain, has only an indirect bearing on the matter in hand."

On the question of the extent to which the film should be exhibited to the jury, the Court of Appeal have left that matter to the judge at the trial. The appellants submit that, even if para. 5 (B) is to be struck out, they are still entitled to have para. 5 (A) remain as this is the only method of ensuring that the whole film will be shown to the jury. In my view, para. 5 (A) is objectionable and should be struck out. It contains the objectionable expression in relation to the allegations " the truth of which the [respondent] in his amended statement of claim does not deny ". It also contains the appellants' gloss on the passages of the film referred to. The respondent is not, in my opinion, called on at this stage to admit or deny this gloss. The appellants base their argument for the retention of para. 5 (A) on the decision in *Cooke* v. *Hughes* (75) where it was held that the defendant was entitled to have the whole publication in which the libel was contained read to the jury. The decision must be read in the light of the facts of that case. I have no doubt that in some cases it may be necessary in order to explain the context in which the libel is contained to put the whole publication before the jury. But this must depend on the circumstances of each case. In any event, the point taken by the appellants relates not to pleading but is a question of evidence. This House is being asked in advance to rule on a question of evidence which will arise for the decision of the judge as a matter of law at the trial. In my view, para. 5 (A) should be struck out for the reasons that I have given. But this does not mean that the appellants may not be entitled at the trial to have the whole film exhibited to the jury, if they can persuade the judge that in order to explain the libel it is necessary to do so. In my opinion, the Court of Appeal were right in declining to make any comment on the question and leaving it to the judge at the trial.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Garber, Vowles & Co.* (for the appellants); *Holland & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(74) (1895), 22 R. (Ct. of Sess.) at p. 404.

(75) (1824), Ry. & M. 112.

DINGLE *v.* ASSOCIATED NEWSPAPERS, LTD. AND OTHERS.

[COURT OF APPEAL (Sellers, Holroyd Pearce and Devlin, L.JJ.), November 30, December 1, 2, 5, 6, 1960, February 8, 1961.]

Libel—Damages—Mitigation—Previous publication in privileged Parliamentary Paper—Subsequent publication with additional actionable defamatory material by defendant newspaper.

Libel—Damages—Mitigation—Reputation—Established bad reputation only taken into account in mitigation—Prior publication of same libel not evidence of such reputation.

The plaintiff, who was town clerk of the City of Manchester, wrote in 1957 a letter to shareholders of a cemetery company containing an offer on behalf of the corporation to purchase the shares in the company at £1 each. A report of a select committee of the House of Commons on a Manchester Corporation Bill, which was before the House in 1958 and which contained clauses to enable the corporation to clear the land of the cemetery company for use as, e.g., an open space, criticised the corporation's offer to purchase the shares. The report stated—" It was clear to the committee that the corporation obtained the shares by presenting a one-sided view, which failed to disclose the true position of the company on a break-up ". The report was widely publicised by newspapers, including the " Daily Mail ", the first defendants' national newspaper, on May 17, 1958. On June 16, 1958, the " Daily Mail " published an article which described an interview with the chairman of the cemetery company who was reported as stating that by the plaintiff's letter the corporation obtained the shares for less than half their real value; the article contained other allegations and reproduced the sentence set out above from the Parliamentary report. On July 2, 1958, the " Daily Mail " published an article entitled " Town Clerk Cleared "; the article showed that the plaintiff was cleared of threat of prosecution under s. 12 of the Prevention of Fraud (Investments) Act, 1939, it also set out the corporation's defence to the criticism, but it did not intimate that the accusations of the plaintiff's critics had been successfully met or offer any apology to the plaintiff. In an action by the plaintiff for libel he pleaded, among other matters, an innuendo that the article of June 16, 1958, meant and was understood to mean that he had been guilty of an offence against s. 12. The trial judge found that the price offered by the corporation was generous, that other allegations in the article were also untrue, and that there was nothing wrong with the plaintiff's letter to the shareholders or with his conduct in the matter, but that the defendants acted without malice in reporting the Parliamentary report. The trial judge held that the defendants' publication of the extract from the report was privileged, but that the plaintiff was entitled to damages for libels contained in the rest of the article, and he assessed the damages at £1,100. On appeal on the quantum of damages,

Held: the damages should be increased (and would be increased to £4,000) for the following reasons—

(i) damages for the libel should not be mitigated on account of any injury to the plaintiff's reputation due to the publication of the report of the select committee because—

(a) it was only established bad reputation that could be taken into account in mitigation of damages for defamation, and the publication of the report was sufficiently contemporaneous with the libel by the defendants that there could be no inference that bad reputation had attached to the plaintiff at the time of the libel (see p. 921, letter H, p. 922, letter F, p. 910, letter I, p. 911, letter A, and p. 908, letter B, post).

Judgment of CAVE, J., in *Scott* v. *Sampson* ((1882), 8 Q.B.D. at pp. 503 et seq.) approved.

(b) previous publication of the same libel by other persons was no ground for mitigating damages (see p. 905, letter I, to p. 906, letter B, p. 910, letter B, and p. 915, letter A, post).

Saunders v. *Mills* ((1829), 6 Bing. 213) approved.

Dictum of LORD HANWORTH, M.R., in *Chapman* v. *Lord Ellesmere* ([1932] All E.R. Rep. at p. 230) disapproved.

(c) (per DEVLIN, L.J.) where injury has been done which is indivisible any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it (see p. 916, letter A, post); on the supposition that the report and the article of June 16, 1958, were contemporaneous, the defendants would be responsible for the whole damage flowing from publication of the article, since damage referable to the reference to the report would be indivisible from the rest (see p. 918, letter F, post).

(ii) the trial judge was wrong in regarding the period of damage as having ended by July 2, 1958, for the publication of the article on that date, which contained no apology by the defendants, was not the complete vindication of character to which the plaintiff was entitled (see p. 908, letter H, and p. 912, letter I, to p. 913, letter A, post).

(iii) (per SELLERS, L.J.) the trial judge had failed to take adequately into account that part of the innuendo which alleged that the plaintiff had committed a criminal offence (see p. 908, letter H, but cf. p. 911, letter H, post).

Decision of PEARSON, J. (noted [1960] 1 All E.R. 294) varied.

[**Editorial Note.** With regard to the nature of evidence of bad reputation which is admissible in mitigation of damages in an action for libel, the present case should be considered with the decision of the House of Lords in *Plato Films, Ltd.* v. *Speidel*, p. 876, ante.

As to giving evidence of the plaintiff's bad reputation in mitigation of damages in a defamation action, see 24 HALSBURY'S LAWS (3rd Edn.) 116-118, paras. 217, 218; and for cases on the subject, see 32 DIGEST 166-169, *2029-2067*.

As to evidence of character, see 15 HALSBURY'S LAWS (3rd Edn.) 293, 294, paras. 530-532.]

Cases referred to:

Adam v. *Ward*, [1917] A.C. 309; 86 L.J.K.B. 849; 117 L.T. 34; 32 Digest 129, *1608*.

Cadam v. *Beaverbrook Newspapers, Ltd.*, [1959] 1 All E.R. 453; [1959] 1 Q.B. 413; [1959] 2 W.L.R. 324; 3rd Digest Supp.

Chapman v. *Ellesmere* (*Lord*), [1932] All E.R. Rep. 221; [1932] 2 K.B. 431; 101 L.J.K.B. 376; 146 L.T. 538; Digest Supp.

Clement v. *Lewis*, (1822), 3 Brod. & Bing. 297; 10 Price, 181; 7 Moore, C.P. 200; 129 E.R. 1299; *affg.* S.C. sub nom. *Lewis* v. *Clement*, (1820), 3 B. & Ald. 702; 106 E.R. 817; 32 Digest 24, *148*.

Davies v. *Powell Duffryn Associated Collieries, Ltd.* (*No. 2*), [1942] 1 All E.R. 657; [1942] A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 36 Digest (Repl.) 231, *1229*.

Harrison v. *Pearce*, (1858), 1 F. & F. 567; 175 E.R. 855; *subsequent proceedings*, (1859), 32 L.T.O.S. 298; 32 Digest 169, *2078*.

Hawkins v. *Express Dairy Co., Ltd.*, (1940), 163 L.T. 147; 2nd Digest Supp.

Hobbs v. *Tinling*, *Hobbs* v. *Nottingham Journal*, [1929] All E.R. Rep. 33; [1929] 2 K.B. 1; 98 L.J.K.B. 421; 141 L.T. 121; 30 Digest (Repl.) 267, *318*.

Jones v. *Stephens*, (1822), 11 Price 235; 147 E.R. 458; 32 Digest 92, *1236*.

Nance v. *British Columbia Electric Ry. Co., Ltd.*, [1951] 2 All E.R. 448; [1951] A.C. 601; 36 Digest (Repl.) 172, *922*.

Pankhurst v. *Hamilton*, (1886), 2 T.L.R. 682; 18 Digest (Repl.) 191, *1652*.

R. v. *Gunewardene*, [1951] 2 All E.R. 290; [1951] 2 K.B. 600; 115 J.P. 415; 35 Cr. App. Rep. 80; 22 Digest (Repl.) 484, *5349*.

R. v. *Hardy*, (1794), 24 State Tr. 199; 1 East, P.C. 60; 15 Digest (Repl.) 769, *7116*.

R. v. *Rowton*, (1865), Le. & Ca. 520; 34 L.J.M.C. 57; 11 L.T. 745; 29 J.P. 149; 14 Digest (Repl.) 322, *3115*.

Saunders v. *Mills*, (1829), 6 Bing. 213; 3 Moo. & P. 520; 8 L.J.O.S.C.P. 24; 130 E.R. 1262; 32 Digest 138, *1696*.

Scott v. *Sampson*, (1882), 8 Q.B.D. 491; 51 L.J.Q.B. 380; 46 L.T. 412; 46 J.P. 408; 32 Digest 167, *2045*.

Speidel v. *Plato Films, Ltd.*, *Speidel* v. *Unity Theatre Society, Ltd.*, [1960] 2 All E.R. 521; [1960] 3 W.L.R. 391.

Truth (*N.Z.*), *Ltd.* v. *Holloway*, [1960] 1 W.L.R. 997.

Appeal.

The plaintiff, Philip Burrington Dingle, town clerk of Manchester, brought this action for damages for libels contained in the issues of the "Daily Mail" newspaper for June 16 and June 26, 1958. The first defendant, Associated Newspapers, Ltd., were the proprietors of the "Daily Mail". The second defendant, Arthur George Wareham, was the editor of the "Daily Mail" and the third defendant, Michael Kelly, was a journalist employed by the first defendant. The plaintiff alleged that in the issue of the "Daily Mail" for June 16, 1958, the defendants falsely and maliciously printed and published an article concerning the circumstances in which Manchester Corporation acquired the shares in Ardwick Cemetery, Ltd. The article, which stated that it was written by the third defendant, purported to be a report of an interview with Mr. Bromley, the chairman of the cemetery company; it contained allegations by him that while negotiations for the sale of shares in the company were going on between the company's board and Manchester Corporation, the plaintiff went behind the backs of the board by sending a letter to the shareholders in which the plaintiff offered them £1 for each share, a sum which was less than the offer for which the company were then negotiating. The chairman alleged in the article that the shares of the company were worth more than double the £1 each that, as the result of the plaintiff's letter to the shareholders, the corporation paid for them. The article then continued with the following paragraph:

> "Objections.
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> "Twice there have been formal objections in the House of Commons to a Bill dealing with the cemetery. A debate has been arranged for Thursday, but this may be shelved. Sir John Barlow, M.P. for Middleton and Prestwich, has put down a motion that there should be an independent valuation of the shares. If it proved more than £1 the balance would be paid by the corporation for all shares bought after Dec. 2, last. If not, the original £1 deal would stand. Last month, a committee of the House of Commons, examining the Bill—it was intended to enable Manchester to take over the cemetery for conversion to playing fields or an open space—reported:—'It was clear to the committee that the corporation obtained the shares by presenting a one-sided view, which failed to disclose the true position of the company on a break-up'."

The article concluded with a report of the chairman of the cemetery company's views on the take-over of the company by Manchester Corporation. The plaintiff complained of the whole of this article alleging that it meant and was understood to mean that he had by a statement which he knew to be misleading, false or deceptive or by dishonest concealment of material facts induced or attempted to induce the shareholders of Ardwick Cemetery, Ltd., to enter into or offer to enter into an agreement to sell their shares and that the plaintiff was guilty of an offence under s. 12 (1) of the Prevention of Fraud (Investments) Act, 1939.

Pearson, J., found that the article of June 26, 1958, was not defamatory of the plaintiff, and that the publications of the report of the parliamentary committee were privileged, but that the plaintiff had acted properly in writing the letter and throughout the transaction. His Lordship inferred that the plaintiff's reputation had been damaged by the defendants' publication of the parliamentary report and of reports thereof in other newspapers, and held that the plaintiff was entitled to compensation only for any additional damage which he suffered by reason of the unprivileged libels by the defendants. Pearson, J, accordingly assessed the plaintiff's damages at £1,100 and gave judgment for the plaintiff for this sum. The plaintiff appealed.

Geoffrey Lawrence, Q.C., and *W. D. T. Hodgson* for the plaintiff.
Neville Faulks, Q.C., and *David Hirst* for the defendants.

Cur. adv. vult.

Feb. 8. The following judgments were read.

SELLERS, L.J.: This is an appeal by the plaintiff in respect of a judgment (1) in his favour for £1,100 damages for defamation of character given by Pearson, J., against the defendants as the publishers of the " Daily Mail " and the editor and a reporter of the " Daily Mail " respectively. It has been submitted that the amount awarded is on any view far too small and out of harmony with the present-day awards in comparable circumstances. More particularly it has been submitted that in arriving at his assessment of damages the learned judge misdirected himself in law and misapprehended certain vital facts and issues.

The plaintiff is the town clerk of Manchester and has been in this important office since 1944 when he was appointed at the age of thirty-eight. His promotion with Manchester corporation was rapid. He was appointed senior assistant solicitor in January, 1938, and advanced to deputy town clerk in October of the same year. In addition to the office of town clerk the plaintiff holds many other appointments which are associated with or incidental to that position. He was, and is, undoubtedly well-known in local government circles and his duties bring him into professional association with a wide range of people, not only fellow-lawyers but administrators, both governmental and local, particularly in south-east Lancashire. Anything disparaging of the plaintiff might be regarded as news but it is obvious that a man in such a position would be highly vulnerable to allegations against his integrity and honesty or his standards of conduct in his office and profession. If those who provide and publish material for newspapers find that defamatory material affecting a public man, such as the plaintiff, is " news " they cannot be unaware that it will be most damaging and hurtful to him whether true or untrue and therefore of the risk they run of heavy damages if the matter they choose to write and publish is untrue and unprotected. A man's legitimate grievance in such a matter can only be redressed in a court of law by an award of damages commensurate with the wrong done, especially when no apology is forthcoming when the true facts are known or are ascertainable.

It is right to say at the outset that the plaintiff vindicated his character from whatever source it was impugned and showed that he acted throughout in the best interests of all concerned in the matter which gave rise to all the trouble. I would say also that the plaintiff, despite much provocation to act immediately and to denounce those who misjudged him, restrained himself and curbed his personal interest in order to serve the corporation which employed him, by doing nothing which might prejudice or delay an important Bill which the corporation was seeking to have passed through Parliament. This was desirable and commendable and in no way mitigates the responsibility of the defendants.

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(1) Noted only on points which did not arise on this appeal [1960] 1 All E.R. 294.

A It was from this Bill that all the trouble arose. The history of the Ardwick Cemetery in Manchester is amply set out in the judgment of PEARSON, J., and I do not repeat it. There is no doubt that it had become not only unserviceable as a cemetery but in a state of neglect and ruin which made it an eyesore and a most undesirable open place which was frequented by hooligans and children. It was therefore in the interest of the city and its good administration that the B site should be acquired and be properly controlled. The contemplated Manchester Corporation Bill provided an opportunity to insert some minor provisions giving power to the corporation to deal with the Ardwick Cemetery and this brought to a head the matter which had been under consideration for some time. In 1925 the Ardwick Cemetery, Ltd., was formed and, put shortly, it acquired the cemetery and presumably took over its obligations. The company's concern C was not to conduct or maintain it as a cemetery but, it seems, to sell or let off what land it could, the legality of which is at least questionable. As far back as 1948 the plaintiff and other officials of his corporation had discussed with Mr. Bromley and Mr. Evans, directors of the company, a proposal that the corporation should acquire the company's undertaking in order to convert the cemetery into an open space but nothing came of it. At intervals there were D further meetings, discussions and correspondence until on Dec. 2, 1957, the plaintiff, in his capacity as town clerk, wrote this letter to the shareholders of Ardwick Cemetery, Ltd.:

> " Dear Sir or Madam. Ardwick Cemetery, Ltd. If you have not visited this cemetery recently you may not be aware how neglected it has become. E The entrance gates are broken and the growth of weeds and shrubbery has in places made it almost impossible to reach some of the graves. It is difficult to see how the cemetery company, with their limited resources, can hope to make any substantial improvement in these conditions, and there seems a real danger of the cemetery becoming a public scandal as has happened with one or two commercial cemeteries in other towns. The company could F not dispose of the cemetery for commercial purposes without obtaining an Act of Parliament and at a very high cost, as this would involve not only the removal of the tombstones but also the exhumation of all the human remains. The city council could usefully make use of the land for school playing fields or as an open space (which should avoid having to remove the human remains) and they will be prepared to do this notwithstanding G the considerable cost involved in clearing away the weeds and removing the tombstones, if they are able to acquire the cemetery undertaking as a whole, which means acquiring all the shares. They have therefore instructed me to include the necessary clauses in the corporation's Bill which has now been deposited in Parliament, and to make a formal offer to the shareholders of £1 per share. This is considered a generous offer H considering that the dividend paid of recent years, and not every year, has been only 2½ per cent. It is realised that the company still have some investments and also receive rent from some properties, but it will be appreciated that it would hardly be fair to expect the corporation to acquire the burdensome part of the company's property, namely the cemetery itself, and for the shareholders to retain the profitable assets in the shape of I investments and the rents. I am therefore writing to ask you to let me know if you would be prepared to accept an offer of £1 per share for the shares which you hold in the company if the corporation obtain the necessary powers from Parliament, as unless it is clear that a majority of the shareholders are prepared to agree to this I think the corporation may drop the proposal. You will understand that if this opportunity is allowed to pass, it is doubtful whether such a favourable offer would be forthcoming in the future, quite apart from the fact that the company may in the meantime be forced by public opinion to use more of their income and investments on

> caring for the cemetery than they have done in the past. It would be most helpful if you would let me have your decision as soon as possible." A

PEARSON, J., comments on that letter as follows:

> " I studied it very carefully and I see nothing wrong with that letter at all; nothing wrong with it at all. I cannot see anything in the least improper about it. To my mind, it placed the whole position quite fairly B before the shareholders. That was important, of course, and one is basing that finding on the view now taken as to the value of the shares: really, it was a generous offer, from that point of view, and perfectly fair."

I now turn to the pleadings, which allege two separate libels. The first is in the " Daily Mail " for June 16, 1958, as set out in para. 3 of the statement of claim, which sets out the whole article (2) and I do not propose to read it now. C Paragraph 4 is as follows:

> " By the words set out in para. 3 hereof the defendants meant and were understood to mean that the plaintiff had by a statement which he knew to be misleading, false or deceptive or by the dishonest concealment of material facts induced or attempted to induce the shareholders of the D Ardwick Cemetery, Ltd. to enter into or offer to enter into an agreement for disposing of their shares in the said company and that the plaintiff was guilty of an offence under s. 12 (1) of the Prevention of Fraud (Investments) Act, 1939."

Some of the statements made in the article complained of were found to be true and were justified by the defendants but substantial defamatory matters were E not justified or even alleged to be true. Any innuendo must be derived from the defamatory statements which were not justified.

The judgment finds, after a full and careful analysis of the evidence, that the shares of the company were of very dubious value and were worth much less than £1 each and that any corporation which offered to buy them in 1957 or 1958 at £1 each was making a generous offer. It was established that after April, 1940, F the highest price paid for any share was 10s. and that in December, 1955, Mr. Evans had bought twenty-four shares at 2s. 6d. each, at which price shares in the company had on some five occasions been valued for probate purposes. These findings were not challenged. The article therefore was untrue when it said that the shares were worth twice what the corporation paid or more than double the £1 each that Manchester Corporation paid for them. It was shown to be untrue G to say that this is what the corporation got by buying 2,017 of the 2,100 shares at £1 each: The cemetery itself; land surrounding it, which brings in an income from chief rents of £430 a year; gilt-edged securities—mostly short-term—worth between £4,000 and £5,000 and giving an income of between £200 and £300 a year. The reader, on the information given, would not only see that the chairman of the company said the shares were worth twice at least the £1 the corpor- H ation offered and paid but would see for himself the alleged income and assets and would be likely to form his own conclusion that that was so.

The article complained of also alleges that the plaintiff's letter to the shareholders went out while negotiations were still going on. This has been found to be justified and the plaintiff has attacked the finding. [HIS LORDSHIP considered the facts on which this finding was based, and concluded thereon:] I I would not disturb the judge's conclusion that negotiations had not terminated. It matters little.

The words which have been held to be untrue and unprotected by any defence amply in my view fulfil the innuendo that the plaintiff had by the letter which he knew to be misleading and false and by the dishonest concealment of material facts induced or attempted to induce the shareholders of the Ardwick Cemetery

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(2) The article is summarised at p. 899, letters F to I, ante.

Company to part with their shares. In the minds of readers who were lawyers or accountants (both classes of people who might well be especially interested in a town clerk and in particular the town clerk of Manchester) I think that the words written and unjustified would also bring to their minds that an offence under s. 12 of the Prevention of Fraud (Investments) Act, 1939, had been committed by the plaintiff.

These are grave allegations against a town clerk. The stigma of sharp practice or dishonesty is greatly damaging. These most damaging observations are set out in the course of the article which in other parts also, as the judge finds, gives quite a false impression. For instance, so far from Mr. Bromley thinking the plaintiff would not have done such a thing, this was quite untrue as Bromley when he heard from Evans about the £1 offer said " You must grab it before he withdraws ". As the judge says, the most material parts are untrue.

I turn now to the second libel alleged by the plaintiff in the statement of claim. Paragraph 5:

> " In the issue of the said newspaper for June 26, 1958, the defendants falsely and maliciously printed and published of the plaintiff the words following: ' No prosecutions after cemetery deal probe. By Daily Mail Reporter. No prosecutions will follow Scotland Yard's investigations into the take-over bid for Ardwick Cemetery by Manchester Corporation. The decision not to take any action will be announced, I understand, in the next week. A full report by Fraud Squad officers is now with the Director of Public Prosecutions, Sir Theobold Mathew. It contains statements taken from a number of officials and persons who were consulted about the proposed purchase of the derelict cemetery. All interested parties have been cleared of any deliberate attempt to defraud '."

Paragraph 6 is as follows:

> " By the words set out in para. 5 hereof the defendants meant and were understood to mean that the plaintiff had by the reckless making of a statement which was misleading, false or deceptive induced or attempted to induce the shareholders of the Ardwick Cemetery, Ltd. to enter into an agreement for disposing of their shares in the said company and that the plaintiff was guilty of an offence under s. 12 (1) of the Prevention of Fraud (Investments) Act, 1939."

It was argued for the plaintiff that the word " deliberate " justified the innuendo that although there was no deliberate attempt to defraud by the plaintiff there was a recklessness which would make him guilty of an offence under s. 12 of the Prevention of Fraud (Investments) Act, 1939. On the face of it, as the judgment points out, this article was in favour of the plaintiff and I agree with the judge that the article would not be regarded by the reasonable reader as defamatory.

I would therefore uphold the learned judge in respect of two out of the three attacks made on the judgment on the issue of liability. He was justified in holding that negotiations were still pending and that the second article relied on by the plaintiff was not actionable; but, with respect, I agree with the submission for the plaintiff that the judge either disregarded or attached too little importance to the innuendo of the first article that the plaintiff had committed an offence under s. 12 of the Prevention of Fraud (Investments) Act, 1939. There would, I think, be many informed readers to whom this would appear a serious matter and this omission will have to be taken into assessment when the amount of the damages is later considered.

The damages have to be assessed on what has been established as the actionable defamation contained in the first libel with its innuendoes and the real issue on the appeal has been what matters if any have to be taken into consideration in their mitigation.

The submissions of the plaintiff were that in assessing the damages on the basis of the defamation which he found to be actionable (limiting, as it would appear that he did, the full extent of the pleaded innuendo) the learned judge (a) wrongly took into consideration the effect on the plaintiff's reputation of defamatory statements which had appeared previously and contemporaneously in many other newspapers as well as in the " Daily Mail ", which it was submitted were inadmissible as evidence for this purpose and which did not, in any event, affect the defendants' liability for damages, and (b) wrongly held that there had been a complete clearance and vindication of the plaintiff's reputation which limited the damage done to the plaintiff's character to a period of approximately a fortnight following June 18, 1958. As I read the judgment, the learned judge did take both these matters into consideration with the undoubted effect that they greatly reduced the damages awarded. Before considering whether the judgment was right or not in these matters it will be necessary to refer as briefly as possible to the circumstances which arose.

When the sections of the Manchester Corporation Bill dealing with the Ardwick Cemetery came up for consideration in Parliament there was a Report of the Select Committee criticising the town clerk's letter. This was given wide publicity on May 17, 1958, not only in the " Daily Mail " but in many other papers throughout the country as well. The " Daily Mail " article of that date had large headlines " MPs. Censure Town Clerk over Shares " and contained these passages:

> " The town clerk of Manchester, Mr. Philip Dingle, has been censured by an all-party group of the M.P.s which investigated share-buying methods of the city council. A Select Committee yesterday expressed ' unanimous strong disapproval ' of a letter written by Mr. Dingle to shareholders of a cemetery. It added: ' They now draw the attention of the House of Commons to the facts '. This means there will probably be a debate on the town clerk's action in the Commons after Whitsun. According to the committee's report, this is what happened: Mr. Dingle wrote to shareholders owning an old cemetery at Ardwick, Manchester, saying the corporation wanted to use the land as playing fields. The corporation offered to pay £1 a share in compensation. Said Mr. Dingle ' This is considered a generous offer '. Evidence taken by the committee revealed, however, that the break-up value of the shares was more than £1 each. Mr. Dingle did not disclose this. Manchester Corporation has since bought most of the shares. The committee stated ' The corporation obtained the shares by presenting a one-sided view which failed to disclose the true position of the company on a break-up '."

Quotations of some part of the committee's report were repeated on June 12, 1958, and on several subsequent occasions including the article complained of in the first libel alleged.

In so far as the article was an extract from the Select Committee's Report, all the defendants satisfied the learned judge that they had acted without malice and they established protection under the Parliamentary Papers Act, 1840. Therefore there was in the article complained of defamatory matter which was not actionable because privileged, a little defamatory matter which was justified, and substantial defamatory matter to which there was no defence.

There had been published in other newspapers as well as the " Daily Mail " on May 17, 1958, and June 12, 1958, extracts from the Report of the Select Committee and many other newspapers had been put in evidence by the defendants in the course of the trial to refute the plaintiff's allegation that the defendants acted maliciously and that they were campaigning against him. The same articles were sought to be used in mitigation of damages. The learned judge regarded other articles in the " Daily Mail " before the article complained of and prior and contemporary articles in other newspapers as having a bearing on the assessment of damages. He says that

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> ". . . in so far as the making of the report and the printing of extracts from it in various newspapers caused damage to the plaintiff's reputation the defendants are not responsible for that damage . . . As one expects, one finds that this Report of the Select Committee, which expressed a strong view and strong disapproval of a local government officer, received substantial publicity. That must have done substantial damage to the plaintiff's B reputation. For that damage the defendants are not responsible, and the plaintiff cannot recover for it, therefore, in this action . . . As regards the proper measure of damages one has to remember that a good deal of damage had already been done by the publication of the report."

Put in that way, that the defendants are not responsible for damage done by the publication of the report or by other newspaper articles, the statement is un- C objectionable, but apart from the harm done by all the criticism over the Ardwick Cemetery transaction there is nothing at all against the character or reputation of the plaintiff and the position is that the judgment has completely vindicated the plaintiff of the imputations against him and there is no evidence remaining of anything to besmirch his character and no evidence at all of bad reputation. It would be a regrettable situation if a man who has cleared his D character of the allegations made against it is to have his damages assessed on the false basis that his reputation is to be regarded, inferentially, as bad on the ground of the very allegations which the action has successfully refuted.

In the recent case of *Truth* (*N.Z.*), *Ltd.* v. *Holloway* (3) the Judicial Committee referred to a passage from GATLEY ON LIBEL AND SLANDER with approval and acceptance as follows:

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> "GATLEY opens this chapter on republication and repetition with the quotation: 'Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him': See GATLEY ON LIBEL AND SLANDER (4th Edn.), p. 106. This case is a good instance of the justice of this rule."

F So I think is the present case before us.

It has not been the law that a man pays less for his defamatory remarks which he cannot justify merely because someone else has published previously or concurrently the same libel. If it were otherwise a defamed man might have no adequate redress, for the full range and extent of publication or republication can rarely if ever be traced and established and every offender brought to G justice. A national newspaper such as the "Daily Mail" penetrates to many readers over a wide area some of whom may, most of whom probably will not, read any other paper broadcasting matter stated in a Report of a Select Committee of Parliament.

The Press properly have the freedom, if they wish to exercise it, to inform the public of the contents of such a report provided it is done in the public H interest and not in any way maliciously but I see no ground for excusing or benefiting those who publish such matter if they repeat it or the defamatory substance of it in a form which is unprotected, still less if they enlarge and embellish the publication with falsehoods which are highly defamatory and completely untrue. When the libellous matter is held to be untrue then I fail to see how in justice or good sense it can be said nevertheless that a man's charac- I ter or reputation has to be judged on the basis that what he has disproved in a court of law has still to be regarded as damaging to his reputation.

In GATLEY ON LIBEL AND SLANDER (5th Edn.), p. 620, the general rule is thus stated:

> "The defendant cannot prove in mitigation of damages that some other person or persons have on previous occasions published the same libel, for the fact that others have defamed the plaintiff is wholly irrelevant."

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(3) [1960] 1 W.L.R. at p. 1002.

This rule is derived from *Saunders* v. *Mills* (4). On that authority the other newspapers, though no doubt rightly introduced by the defendants as evidence to rebut malice, were not admissible in mitigation of damages and were not at the trial contended to be. The general rule so stated is established law and I see no ground for acceding to the defendants' counsel's request to hold that *Saunders* v. *Mills* (4) should be reversed even if it were possible so to do with an authority so old and so frequently applied over the years. At common law a defendant could not in mitigation of damages give evidence to show that the plaintiff had already commenced an action or recovered damages against some other person or persons for other publications of the same libel. It was irrelevant. By the Law of Libel Amendment Act, 1888, s. 6, liberty was (5) given to newspapers to give evidence in mitigation of damages that the plaintiff had already recovered (or had brought actions for) damages or had received or agreed to receive compensation in respect of a libel to the same purport or effect for which the action being tried had been brought. By the Defamation Act, 1952, s. 12, similar provision is made for all and not only for newspapers. These statutory provisions only emphasise the existence of the general rule of *Saunders* v. *Mills* (4) and in no way serve to prevent a plaintiff from receiving the full compensation for the wrong done to him but only to prevent him being paid the full damage more than once or at least to avoid an overlapping of damages taking into consideration that the matters for assessment may not always have common features affecting the amount of damages, some defendants may have apologised at once most generously or may have made the publication complained of in excusable circumstances whereas others may have acted maliciously and sustained their allegation to the end. Damages for libel of the same purport would clearly from the nature and extent of a publication not necessarily be the same against all defendants against whom liability was established except in the case of joint tortfeasors.

Libel is a tort but the damage which it may do does not from its nature resemble damage by physical injury to the body. In physical injury the damage and loss actually inflicted is constant and should be the same in amount whether one person is liable for it or more. It is not so in libel. What A has published may never have been seen by B's readers and as the law stands no one could be called in mitigation of damages to say that he had read precisely, or the substance of, what B had said either on the same day or on some prior occasion. It seems to me to be a salutary and practical rule without which it might be difficult or impossible for a plaintiff to get adequate redress for the wrong done him. I find much force in the argument of counsel for the plaintiff that a previous publication of the same libel cannot be used to establish a bad reputation. Indeed, as the law stands it is not possible to adduce evidence of particular acts of conduct which could adversely affect a plaintiff's reputation. Ever since *Scott* v. *Sampson* (6) in 1882 a defendant has been allowed to give evidence of a plaintiff's general bad character only and not of specific facts and circumstances which a judge or jury might think should establish his character to be bad. Whether this is logical or desirable or not it is long established and it serves at least to show that any specific allegation which might be said to be detrimental to a man's character could not be used to condemn him—as it is sought to be used here—if it was proved in the course of the trial to be untrue. Where evidence of general bad reputation is called, a plaintiff may I apprehend refute it if he can by evidence of general good reputation and a judge or jury has to decide. This particular allegation of misconduct is refuted and the plaintiff's character and reputation stand where they did.

Scott v. *Sampson* (6) has stood since 1882 and was approved in this court nearly fifty years later in *Hobbs* v. *Tinling* (7) where SCRUTTON, L.J., said (8) that the judgment of CAVE, J., concurred in by MATHEW, J., has been accepted as an accurate statement of the law. Certainly this court must so regard it. The learned lord justice continued (9):

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(4) (1829), 6 Bing. 213.

(5) Section 6 was repealed by s. 18 (3) of the Defamation Act, 1952.

(6) (1882), 8 Q.B.D. 491.

(7) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1.

(8) [1929] All E.R. Rep. at p. 40; [1929] 2 K.B. at p. 18.

> " On the other hand, the defendant may not give evidence of rumours at the time of publication to the same effect as the libel. Nor may the defendant give evidence of specific facts and circumstances to show the disposition of the plaintiff, as distinct from general evidence that he has that reputation. If those specific facts are to the same effect as the libel, which he has not justified, he cannot justify under the plea of mitigation of damages."

In *Hawkins* v. *Express Dairy Co., Ltd.* (10) STABLE, J., took into consideration a bad reputation which the plaintiff himself had revealed in evidence showing " misconduct during his term of service with his employers closely connected with the subject-matter of the libel ". The evidence showed fraud by the plaintiff known to and indeed participated in by a number of servants of the company with whom he worked. I see no reason to differ from STABLE, J. There the bad character or reputation was established by the plaintiff and could not be overlooked. The present case is almost the converse of that. Here the substance of the libel has been disproved and nothing remains against the plaintiff's character and reputation.

The only support for the view taken by the learned judge cited to us on behalf of the defendants was a passage in the judgment of LORD HANWORTH, M.R., in *Chapman* v. *Lord Ellesmere* (11) where the Master of the Rolls said:

> " For these reasons it seems that the right course will be to direct a new trial as to paras. 3 and 4. The jury should be directed that they cannot impeach the decision which was reached; that the publication was in the ordinary course of the news agencies' and newspapers' business; and was one which must in any case have become known to a very large circle through the protected publication of the ' Racing Calendar ' on Oct. 2."

I am not clear, with respect, what the learned Master of the Rolls had in mind. He cannot be held to have thought that at the future trial the protected publication of the " Racing Calendar " could be put in evidence, for that would be contrary to established authority which was not, it would appear, challenged or argued in the case. I think that it was an obiter dictum and is but little guide in the circumstances to the decision in the present case.

In the course of the argument reference was made to *Speidel* v. *Plato Films, Ltd.* (12), an interlocutory appeal recently before this court and now on appeal to the House of Lords. The case raised points of pleading and I think ultimately of substance which do not in any way arise in the present case. The defendants here did not seek to give in evidence any specific facts or circumstances outside the libel alleged or the substance of it to show the plaintiff's true character or to call evidence of bad reputation. All that is said, as I understood it, is that having regard to what was published of the Parliamentary Report, both contemporaneously in the protected part of the offending article in the " Daily Mail " and in articles prior thereto in the " Daily Mail " and other newspapers, which was the substance of the libel and nothing independent of it, the learned judge had to infer and was justified in inferring that the plaintiff's reputation had been lowered thereby and therefore in awarding damages he had to treat the plaintiff as a man with a sullied reputation. For the reasons which I have already given I do not think that any such inference can be relied on. The plaintiff in this action has proved the foundations of any such inference to be false.

I do not think either that the question of the character or reputation which a man has or ought to have and which of these is the relevant consideration in an action of defamation calls for consideration here. No one suggests anything against the plaintiff except the facts and circumstances which have been in controversy in this case. I am prepared to say, as I think should be said, in justice to the plaintiff that he has cleared his character. I feel that it is much less satisfactory to an aggrieved man merely to say that he has cleared his reputation for that in itself might be said to give rise to an innuendo. I am therefore of opinion that there was no evidence, when the time came for the damages to be assessed, that the plaintiff had either a bad character or a bad reputation so as to limit in any way the damages to be awarded to him for the wrong done by the defendants' statements which defamed him. He had no doubt been personally hurt and outwardly damaged by assertions of others but the action has established that they were false and did not impeach his character or his reputation. If this is right then the plaintiff's submission that the learned judge misdirected himself in this respect in assessing damages succeeds and it fundamentally affects the amount to be awarded.

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(9) [1929] All E.R. Rep. at p. 40; [1929] 2 K.B. at p. 18. (10) (1940), 163 L.T. 147.
(11) [1932] All E.R. Rep. at p. 230; [1932] 2 K.B. at p. 457.
(12) [1960] 2 All E.R. 521; affirmed p. 876, ante.

I think, too, with respect, that the learned judge went too far in favour of the defendants when he held that there had been clear and complete vindication of the plaintiff by July 2. It would have been of real benefit to the plaintiff if on or about that date there had been a full and frank apology by the defendants and a retraction of all of which the plaintiff could legitimately complain. Merely to say " There will be no prosecution in the case of the neglected graveyard " and to head the article " Town Clerk Cleared " and to set out what the Attorney-General and Manchester Corporation said, still leaves open the question: " Yes, but what do you say? ". Even the mind of a newspaper—which may be made up of the minds of several individuals—could not overlook the hurt which the statements, true or untrue, must have done to the plaintiff, his anguish of mind and distress, and yet not a word of reinstatement or of regret nor an indication that it gave them pleasure that one in so important a position had been restored to the position of respect and confidence which his important office required.

On behalf of the defendants it can be said that they acted without malice in publishing extracts from the Report of the Select Committee and it was that report which brought the matter into the news and that the learned judge has found that the reporter, the third defendant, " did not doubt Mr. Bromley's word in the least " and that he, the judge, had no doubt that " what the defendants reported was what Bromley had in fact said but there were many untrue statements." Against them is the absence of any apology until very belatedly when, of little avail, one was inserted by learned counsel in the defence and this notwithstanding that the matter had been kept in the news in the " Daily Mail " in one way or another over a prolonged period commencing on May 17, 1958, until Nov. 13, 1958, altogether on some seventeen different dates with reference often on more pages than one.

However, these and perhaps other matters of a minor character complained of by the plaintiff were for the judge and this court would not intervene merely because it thought the amount low. For the reasons which I have stated I would hold that the learned judge failed in the assessment of damages to take adequately into account the second part of the innuendo which alleged that the plaintiff had committed a criminal offence; that he concluded that the period of damage was much less than it was; and above all that he assessed damages on the basis that the plaintiff had a bad reputation prior to the publication complained of by reason of the publicity given to the report. These are in my opinion vital matters. We were properly referred to what was said by LORD WRIGHT in *Davies* v. *Powell Duffryn Associated Collieries, Ltd.* (*No.* 2) (13) and by VISCOUNT SIMON in *Nance* v. *British Columbia Electric Ry. Co., Ltd.* (14), for direction by which an appellate court should be guided in reviewing damages. If the damages were assessed on a wrong basis at least in part, as I with every respect have had to conclude, then there is no doubt that they call for re-assessment. Damages in such a case as this are hard to assess. I should have thought a jury would have been, with their respective viewpoints, the right tribunal for the task. My two brethren have assessed the damages at £4,000, which I accept although my own unaided assessment would have been somewhat higher, based perhaps on a view of the innuendo more favourable to the plaintiff's claim but primarily on the injury done to one holding the high and important office of town clerk of a great city by the defendants' readiness to exploit the matter in the way they did and then by their unwillingness, or at least failure, to see and to redress the wrong they had done.

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(13) [1942] 1 All E.R. 657; [1942] A.C. 601.
(14) [1951] 2 All E.R. 448; [1951] A.C. 601.

I would therefore allow the appeal and substitute a judgment for £4,000.

HOLROYD PEARCE, L.J.: Counsel for the plaintiff contends first that the learned judge was wrong in holding that the second libel was not defamatory. It is conceded that the question depends largely on first impression. I, too, share the learned judge's view of it. Secondly it is argued that the learned judge wrongly mitigated the damages by reason of injury to the plaintiff's reputation by the publication in the "Daily Mail" and in other newspapers of the Report of the Select Committee.

The judge dealt with this question in the following passages. He said:

> "The defendants put in evidence more or less contemporaneous articles in other newspapers. Those have been read and they are, I suppose, mainly relevant to the assessment of damages and, indeed, they are important on one element of the assessment of damages, as I will endeavour to explain later . . . Finally, on the issue as to the assessment of damages, here again the Report of the Select Committee is something which happened, an event which happened, and, in so far as the making of the report and the printing of extracts from it in various newspapers caused damage to the plaintiff's reputation, the defendants are not responsible for that damage, and, again, any amount of comment would have very little materiality . . . How much damage is attributable to so much of the libel as is neither privileged under the Act nor true? So far as the article contained extracts from the Select Committee's Report, if they were doing that bona fide, without malice, that is privileged and, in so far as what was said was true, that is, of course, justified. One has to isolate the indefensible part of the libel from the rest . . . As one expects, one finds that this report of the Select Committee, which expressed a strong view and strong disapproval of a local government officer, received substantial publicity. That must have done substantial damage to the plaintiff's reputation. For that damage the defendants are not responsible, and the plaintiff cannot recover for it, therefore, in this action . . . This very serious stigma had been cast on the plaintiff and added a lot, in my view, to the damage flowing from the original Report of the Committee. I would say that probably the Report of the Committee, while it caused much damage—there are various ways of putting it—one way of putting it is that the article of June 16 put the meat on the bones, in this way, that the committee merely reported that the shares were acquired under value, but this article in the 'Daily Mail' added the meat to it by saying that the true value was more than twice what was offered. As regards the proper measure of damages, one has to remember that a good deal of damage had already been done by the publication of the report."

It is argued with force that the evidence of other newspapers which published the report was not admissible in mitigation of damages. They were only (and quite properly) put in evidence on the question of malice to show that the "Daily Mail" was not maliciously conducting an individual campaign. They could not properly be proved in mitigation of damages (see *Saunders* v. *Mills* (15); and see also per Scrutton, L.J., in *Hobbs* v. *Tinling* (16)).

If the judge's observations, stated previously, mean that he was doing no more than isolating the publication of the report in the " Daily Mail " and other newspapers from the actionable matter in respect of which he had to give damages and leaving the former out of account when he did so, he was admittedly dealing correctly with the matter. If, however, he was mitigating the damages on account of injury done to the plaintiff by the publication of the report he was not, in my judgment, entitled to do so.

In *Harrison* v. *Pearce* (17), a case of libel, Martin, B., said: " The plaintiff has a right to recover against this defendant all the damage which the jury think arose from *his* wrongful act ". It is only in respect of the wrongful act that the damages are assessed, but the defendant in a libel action cannot rely on the argument that since others have thrown mud at the plaintiff he, the defendant, has caused very little harm by throwing some extra mud. *Truth (N.Z.), Ltd.* v. *Holloway* (18), to which Sellers, L.J., has referred, makes this plain. The fact that other persons on previous occasions have published the same libel has been held irrelevant (*Saunders* v. *Mills* (15)). Such evidence is inadmissible, even when coupled with evidence that the plaintiff took no steps to contradict the libel (*Pankhurst* v. *Hamilton* (19)). Nor can the existence of rumours corresponding to the libel be proved (see per Cave, J., in *Scott* v. *Sampson* (20), and the cases there cited). Cave, J., said:

> " . . . it would seem that on principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue . . . both the weight of authority and principle seem against the admission of such evidence."

Cave, J., goes on to make it plain that it is for injury to his reputation that a plaintiff obtains damages, and if his reputation is bad he recovers smaller damages since the injury is less. The learned judge does not specifically differentiate between reputations that are deservedly or undeservedly bad. He is dealing with the generality of cases where a man, as a rule, has approximately the reputation that he deserves. Nevertheless the general reasoning of the judgment makes it clear that it is reputation, not disposition, that is to be considered. He says (20):

> " As to the third head or evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation, and to admit evidence of this kind is in effect as was said in *Jones* v. *Stevens* (21) to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of."

From that judgment it is plain that it is the evidence of the plaintiff's bad reputation and not the evidence of rumours or incidents that might make it bad which is admissible in mitigation. That judgment has been uniformly treated as accurate in the Court of Appeal as well as in courts of first instance

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(15) (1829), 6 Bing. 213.
(16) [1929] All E.R. Rep. at p. 40; [1929] 2 K.B. at p. 18.
(17) (1858), 1 F. & F. at p. 569.
(18) [1960] 1 W.L.R. 997.
(19) (1886), 2 T.L.R. 682.
(20) (1882), 8 Q.B.D. at p. 504.
(21) (1822), 11 Price 235.

A (see *Hobbs* v. *Tinling* (22), and *Speidel* v. *Plato Films, Ltd.* (23)). It is not open to this court to take a different view.

Can it here be said that there was some evidence of the plaintiff's bad or partially bad reputation? In my judgment there was none. Evidence of bad reputation must be properly proved. It is a grave matter. One is not entitled to assume without evidence that the plaintiff's reputation must have changed in B the four weeks following the publication of the report. As the months went by such report if uncontradicted would no doubt have its effect on his reputation especially if it was succeeded by other similar matters; and the plaintiff's reputation might in due course become bad and be proved against him. No doubt the public unmasking of a villian or a conviction in a court of law will have a more immediate effect. When, however, the defendants' libel was C published the plaintiff was a man of good reputation who had recently had something damaging attributed to him. A man's reputation in the sense in which the word is used in civil or criminal courts does not alter daily as good or bad deeds are ascribed to him. It is the judgment of his fellows on his general life over a period. Any man is presumed on general principles to have a good reputation until the contrary is proved. Here the contrary was not proved D and there is no evidence on which we should be entitled to say that the plaintiff had acquired a bad or partially bad reputation by the date of the libel.

In *Speidel's* case (23) there was a consideration of matters on which under the machinery of litigation the defendants may lead evidence in mitigation. But a consideration of when and in what circumstances the defendants can introduce evidence to mitigate their damages is not to the point in the present case. The E publication of the report was fairly and squarely before the court. The plaintiff presented the history of the facts to the judge and asked for damages for the wrong that the defendants had done him. That history included the publication of the report, but nevertheless the defendants are not thereby entitled to rely on that publication for the purpose of mitigating their damage. It is for such purposes irrelevant. In my opinion the learned judge was influenced in some F degree by a view that in comparison with the publicity given to the report the defendants did not add a great deal; and that the damages should be thereby diminished. As a result he estimated the damages at a figure which I respectfully think was too low.

The plaintiff further complains that the learned judge wrongly failed to decide whether the innuendo in the first libel was made out. But in my judgment G he was entitled to say, as he did:

> "The broad effect of the libel . . . is that the plaintiff while he was in negotiations with the directors of Ardwick Cemetery, Ltd., went behind the backs of the directors and sent a false or at any rate misleading letter to the shareholders and thereby induced them to part with their shares at a price which was less than their true value and perhaps it can be said also H thereby implied that there was an offence under s. 12, which is so to speak the serious section of the Prevention of Fraud (Investments) Act, 1939."

When, as here, the words in their ordinary meaning are defamatory and unjustifiable the question whether the innuendo is made out is only relevant to damages. The imprecise finding of the judge on the question of the innuendo is adequate for that purpose and is probably truer than a more precise finding one way I or the other would be. In general the innuendo was not made out, but it might well be that to some of the readers the libel conveyed the effect pleaded in the innuendo.

Fourthly the plaintiff argues that the judge in dealing with the part which the defendants sought to justify wrongly severed the allegation that the parties were still in negotiation, holding that it had been justified, and failed sufficiently to take into account that the real gist of the libel, namely, all the rest of the libel A dealing with the value of the shares and Mr. Bromley's (24) various exaggerations and untruths had been the subject of an unsuccessful attempt to justify. In my judgment that point is not made out. [HIS LORDSHIP gave his reasons for this conclusion, and continued:] Finally counsel for the plaintiff argues that the judge misapprehended the facts in holding that on July 2 there was "complete" or "ample" vindication and that therefore he had only to award B substantial damages in respect of a period of a fortnight. I venture to think that the judge was not justified in considering the article of July 2 to be an "ample" or "complete" vindication. The article was headed "Town Clerk Cleared". A perusal of the details showed that the plaintiff was cleared of the threat of prosecution under s. 12. The article starts in heavy type—"There will be no prosecution in the case of the neglected graveyard". There follows C the fact of the Attorney-General's announcement; and the article sets out his statement to the effect that

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(22) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1.
(23) [1960] 2 All E.R. 521; affirmed p. 876, ante.

> "there is no ground for concluding that the latter contained any false misleading or deceptive statement or that there was any dishonest concealment of material facts. Consequently there are no grounds for a prosecution for an offence against s. 12 of the Act." D

The article also sets out the corporation's defence as given in their booklet. But the corporation were clearly concerned to put the best face on their town clerk's action on their behalf and their view could hardly be thought by readers to be impartial. Therefore it is not correct to say that the plaintiff had been completely vindicated on July 2. He had been acquitted of dishonesty which E would render him liable to prosecution, and it had been made clear that his own council were saying that their offer for the shares was generous, but readers were reminded in that same article that the Board of Trade alleged that the break-up value of the shares was greater than £1 each and that "some shareholders said later that the stock was worth more than £2". An important matter was left undecided, namely, whether he had without actual dishonesty F succeeded in getting shares from the shareholders behind the chairman's back for a sum less than their true value. Such behaviour would be sharp practice. Though not unknown in some circles, it would be deplorable in a town clerk acting for a very large and important corporation.

That article of July 2 gave an opportunity for the "Daily Mail", as the unbiased person who had put forward the accusations of the plaintiff's critics, G to assess whether the defence put forward by the corporation in their booklet had been made out. It would have been easy (but perhaps distasteful) for the defendants to say that there was no sharp practice, that the accusations of the critics had all been successfully dispersed, that the figures put forward by them had been inaccurate, that the offer had been generous, and to add, for good measure, an apology to the plaintiff; but they did not do so, and thereby at H their own risk they allowed a serious part of the damage they had done to continue. There has never been any apology for the untruths or any recantation of them. Indeed, the fact that the defendants attempted to justify them was the antithesis of recantation. The partial apology in a pleading which attempted to justify a large amount of defamatory untruths was no apology at all. It is inevitably, in such a context, mere faux bonhomie. I

It is argued by the defendants that the error with regard to "complete" vindication is not a matter which would justify altering an assessment of damages which is compounded of so many factors of varying importance. However, the question of vindication is a very important matter. It affects the plaintiff in the extent of his injury and the defendants in an assessment of their conduct. They were acquitted of malice; but nevertheless they should have taken all

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(24) Mr. Bromley was chairman of Ardwick Cemetery, Ltd.

A reasonable steps to counteract the damage that they had caused and to prevent it from continuing. No valid grounds are put forward for their failure to do so. As a result the damage continued long after July 2. Not until the judge gave judgment was there any pronouncement by any impartial person that the town clerk had not unworthily behind the directors' backs obtained the shares for less than their true value but had in fact made " a generous offer to the share- B holders which they were very fortunate to get ".

I agree with the judgment of SELLERS, L.J., and I would accordingly substitute for the figure of £1,100 the figure of £4,000.

DEVLIN, L.J.: The main argument in this appeal has been devoted to counsel for the plaintiff's submission that PEARSON, J., was wrong in taking C into account the fact that the plaintiff's reputation would in any event have been injured by the Report of the Select Committee (the publication of which by the " Daily Mail " was privileged and which did not therefore sound in damages) and by reason of this diminishing the damages which he would otherwise have awarded to the plaintiff. I think that the judge did diminish the damages on this ground and it does not appear that he was ever asked to do otherwise. D Counsel for the defendants has not contended that the point is not open to the plaintiff; but the omission means that we have not got the benefit of the judge's conclusion on a difficult point.

The argument for limiting the damage can be put in two ways. First, it can be said that looking at the defamatory article by itself and without regard to what had gone before, it consisted of Mr. Bromley's (25) story, much of which E was indefensible and for which the defendants have to pay, and of a statement from the Select Committee's Report, which was defensible and for which therefore the defendants have not got to pay. The learned judge appears to be looking at the matter in this way, for in his judgment he says:

> " How much damage is attributable to so much of the libel as is neither privileged under the Act nor true? . . . One has to isolate the indefensible F part of the libel from the rest."

On this view it is not a question of mitigating the damage but simply of ascertaining for how much of the damage done the defendants are responsible.

The other way is to treat the question as one of mitigation of damage and to assert, as the defendants do, that on the date when the libel was published the plaintiff already had a tarnished reputation which must be taken into G account as diminishing the damages that would have been awarded if his reputation had been unblemished. Under the first head, the prior publication of the report is irrelevant, and can be conceded as inadmissible; under this head it is essential and involves going back to the date when the committee's report was first published, that is May 17, and relying on the fact that it received widespread publicity not only in the " Daily Mail " but also in all the other H national newspapers. The contents of the other national newspapers are summarised by the judge in his judgment. He concludes that the report of the committee received substantial publicity which must have done substantial damage to the plaintiff's reputation: " For that damage the defendants are not responsible and the plaintiff cannot recover for it therefore in this action." He says the same thing earlier in his judgment; and later, in the paragraph I in which he fixes the damages, he begins:

> " As regards the proper measure of damages, one has to remember that a good deal of damage had already been done by the publication of the report."

Counsel for the plaintiff says that he had to accept the other newspapers as admissible on the issue of malice because they were being properly used to show that the " Daily Mail " was not conducting a special campaign of its own against the plaintiff; but he disputes that they were admissible on the issue of damage.

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(25) Mr. Bromley was chairman of Ardwick Cemetery, Ltd.

Before considering separately these two limbs of the argument, it is convenient to refer to *Saunders* v. *Mills* (26), because that was the authority on which counsel for the plaintiff chiefly relied as supporting his argument as a whole. In this case the plaintiff, an attorney, claimed damages for a libel published in a newspaper. At the trial the defendant tendered evidence that he had copied the libel in substance from the " Observer " newspaper and that many other journals had published the same statement. TINDAL, C.J., admitted the " Observer " (27) " . . . as showing there was less of malice than if the defendant had been the original composer . . ." but declined to receive evidence of a similar publication having been made in other newspapers. This ruling was upheld by the Court of Common Pleas in Banc.

Counsel for the defendants has submitted that we should not approve *Saunders* v. *Mills* (26). I think that we ought to do so, not only because it is a decision of long standing, but because Parliament has treated it as being good law and has passed enactments which are insensible except on the hypothesis that the principle on which it is based is part of the law of the land. I shall refer later in this judgment to the statutes of 1888 and 1952 which subject to certain limitations permit evidence to be given of other publications of the same libel.

At first sight, it looks as if *Saunders* v. *Mills* (26) introduced into the law of libel a sort of extension of the rule applicable to joint tortfeasors. Separate publications of the same libel are of course separate torts; but the principle in *Saunders* v. *Mills* (26), it may be thought, is that notwithstanding that they are separate torts, one defendant is liable for the whole of the damage flowing from the libel just as he would be if he were one of several participators in a joint tort. But that is not, I think, the reasoning behind *Saunders* v. *Mills* (26) nor its effect. In the first place, one publisher will not be liable for all the damage done by another. If a libel is published simultaneously in the national Press and in a parish magazine, the damage payable by the latter will not be assessed on the basis of the circulation of the former as it would in the case of a joint tort. This is shown by *Harrison* v. *Pearce* (28). In this case a certain writer composed a statement defamatory of the plaintiff and had it published as a placard and also as an advertisement in the defendant's newspaper. The defendant contended that part of the plaintiff's damage was due to the publication in the placard for which the plaintiff was bringing another action. MARTIN, B., said that the jury could not take into account the other action; the plaintiff had a right to recover against this defendant all the damage which the jury thought arose from *his* wrongful act. But he goes on to say that the jury is not to assume that all the damage necessarily arose from the defendant's publication.

The reasoning behind *Saunders* v. *Mills* (26) and *Harrison* v. *Pearce* (28) is, I think, simply that the damage done by other publications is deemed to be irrelevant. So in one sense it is. If each publisher is thought of as having his own circle of readers or listeners, he will be made responsible for the publication to them but not beyond; and it is irrelevant to say that some other publisher will be responsible for another publication of the same libel to another circle. But in defamation the damage goes beyond the harmful effect on the minds of those who receive the publication at first hand. There has to be taken into account as well, for example, the element of mental distress which does not increase proportionately with the extent of the publication. More important, there is the slow spread of the libel beyond the immediate circle; and if eventually the whole public mind is permeated, no one can identify each separate source of infection. The damage due to mental distress and to widespread repetition constitutes, it may be said, an indivisible injury for which the damages cannot be separately assessed as between different publications of the same libel; and

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(26) (1829), 6 Bing. 213.

(27) (1829), 6 Bing. at p. 220.

(28) (1858), 1 F. & F. 567.

A therefore each wrongdoer whose act is a substantial cause of the injury must pay for the whole. " Each publisher is answerable for his act to the same extent as if the calumny originated with him ": this statement of the law in GATLEY ON LIBEL AND SLANDER (5th Edn.), p. 101, has recently been approved in *Cadam* v. *Beaverbrook Newspapers, Ltd.* (29) and in *Truth* (*N.Z.*), *Ltd.* v. *Holloway* (30).

B Thus, where a libel was published by several defendants the common law permitted the plaintiff to recover damages several times over in respect of those elements of damage that were common to each libel. Each jury had to be directed to consider such elements as mental distress and the spread beyond the immediate circle as if the libel under consideration was the only one in the field. (Obviously therefore it would not be permissible mitigation of damage C to say that some of the distress and some of the spread whose source could not be identified would or might be due to some other privileged publication.) The common-law position has been partly alleviated by legislation which foreshadowed to a limited extent the solution that was later applied for joint torts (31) in 1935. The Law of Libel Amendment Act, 1888, s. 5, provide that where actions are brought in respect to the same or substantially the same libel against D two or more defendants, the actions may be consolidated and tried together; and the damages given in respect of the libel apportioned between the defendants. By the Defamation Act, 1952, s. 12, enlarging the scope of a similar provision previously made in s. 6 of the Act of 1888, the defendant is permitted to give in evidence in mitigation of damages that the plaintiff has recovered damages or brought actions for damages or received or agreed to receive compensation E in respect of publications to the same effect as that sued on. The distinction between this form of relief and that which is now granted to joint tortfeasors is that the joint tortfeasor has the right to initiate a claim for contribution while the defendant under the Acts of 1888 and 1952 cannot get any relief at all unless the plaintiff chooses to sue more than one publisher.

I turn now to consider specifically the first limb of the argument which really F amounts to a contention that the damage done by the defamation ought to be notionally apportioned and that the defendants should pay only for so much of it as was caused by the unprotected part of the publication. In my judgment the fact that a passage in the defamatory article is protected by privilege is irrelevant in the assessment of damages in this case. The foundation for this conclusion is that the report and Mr. Bromley's story are as a piece of defamation G essentially one and the same. The defamatory essence of them both is that the plaintiff was guilty of sharp practice. The story is worse than the report because it goes further but in substance they contain the same libel. Privilege attaches to form or occasion but not to substance. What a Member of Parliament says in the House of Commons is privileged; the repetition of the very same words outside is not. A report of a judicial or parliamentary proceeding H may be privileged, but if the substance of the matter be cast into another form, the publication is subject to the ordinary law. The object of the privilege is so that the public can obtain a fair report of what is said and decided in Parliament and in courts of law; it is not to confer a licence on anyone to handle the subject-matter thereafter in whatever way he wishes. If Mr. Bromley's story had been printed by itself (and I shall assume for this purpose that it goes no I further than the report) it would be no answer to an action for libel to say that the same thing had already been said in the report any more than it would be an answer by a Member of Parliament who spoke slander at a public meeting to say that he had said or could say the same or worse with impunity in the House of Commons. If Mr. Bromley's story by itself is unprotected, it cannot alter or diminish the defendants' liability if they publish with it as part of the same article an extract from a protected report.

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(29) [1959] 1 All E.R. 453; [1959] 1 Q.B. 413. (30) [1960] 1 W.L.R. at p. 1003.

(31) See the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6.

This conclusion appears to me to be in accordance with, and indeed to exemplify, a fundamental principle in the law of damage. Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly.

These are elementary principles and readily recognisable as such in the law of damage for physical injury. It is not so easy to distinguish and apply them in the law of damage for loss of reputation. It may be easier to do so, I think, if one takes as an illustration separate publications to one man only and a piece of special damage flowing from them. If a master during the course of a morning hears the same slander about the plaintiff, his servant, from four different defendants, he may after he has heard them all decide that coming from four sources it must be true and he may dismiss the plaintiff in the afternoon. Subject to any defence he may have, each defendant is severally liable for the whole of the financial loss which the plaintiff suffers from the dismissal. If one defendant has no defence, it will not help him at all that the other three can make out a good case on the grounds of qualified privilege.

The same principle must apply to general damage for loss of reputation. If a man reads four newspapers at breakfast and reads substantially the same libel in each, liability does not depend on which paper he opens first. Perhaps one newspaper influences him more than another, but unless he can say he disregarded one altogether, then each is a substantial cause of the damage done to the plaintiff in his eyes. A fortiori, when a reader of the " Daily Mail " picked up the issue for June 16, 1958, and read the article complained of, it is not possible to say how much damage was done by the privileged extract from the report and how much by Mr. Bromley's story; all that can be said is that they combined to injure the plaintiff's reputation.

In the application of these general principles to damage done by a libel there are two qualifications to be borne in mind. Each of them is illustrated by an authority relied on by counsel for the defendants. The first is that damage done by two distinct libels is separately measurable and it is immaterial that the two libels form part of the same publication. The second is that the damage done by the publication of a libel must be measured, albeit roughly, in accordance with the number of people to whom the publication is made. A man's reputation is in the keeping of others and it is by words uttered to those others that it is injured; the larger the number to whom the publication is made the greater the injury. If the libel is spread from mouth to mouth by a series of utterances, A the damage done by each must be separately assessed; if the publication consists of only one utterance to a large number, there can be only one assessment but it must be made in accordance with size.

The first of these two points is illustrated by a dictum of EARL LOREBURN in *Adam* v. *Ward* (32), on which counsel for the defendants relied. His Lordship said:

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> " I will only add that when one part of a libel is held to be protected by privilege and the other part not protected the jury ought to be told that they cannot give damages in respect of the first part at all, unless they are satisfied that it was malicious . . ."

It does not appear from the facts in this case that the libel was divisible and I C think that his Lordship's observations must have been directed to an argument advanced by Sir John Simon, K.C., in the following terms (33):

> " A case might conceivably arise in which a document contained two subject-matters, both containing defamatory statements, so wholly divorced from one another that the judge might rule that the occasion was privileged as regards one subject-matter but not as regards the other, but the point D has never arisen for decision, although it has been mooted in several cases."

When, as in this case, the libel is essentially one and the same, the position is illustrated by an old case. In *Lewis* v. *Clement* (34) the plaintiff was an attorney who had brought proceedings in the Insolvent Debtor's Court. In the course of the proceedings the judge " deprecated in strong language the E conduct of the plaintiff ". The defendant's newspaper published the report of the proceedings under the heading " Shameful conduct of an Attorney ". The plaintiff brought an action for libel against the defendant. ABBOTT, C.J., held, delivering the judgment of the Court of King's Bench, that without deciding whether the report of the proceedings was privileged, the claim succeeded because the defendant had not confined himself to what actually passed in F court but had prefaced the statement with the words " Shameful conduct of an Attorney " and therefore taken on himself to make that allegation concerning the plaintiff. The court awarded a writ of inquiry to assess the damages and as a result of the inquiry judgment was entered for £500. The defendant brought a writ of error in respect of this assessment and in 1822 the matter came before the Court of Exchequer Chamber, where it is reported under the G heading of *Clement* v. *Lewis* (35). The first argument advanced on behalf of the defendant was "that the heading of the libel imputed no misconduct beyond that which was developed in the ensuing statement ". The argument failed, the court on this point affirming the judgment of the court below.

The other point is illustrated by a dictum in *Chapman* v. *Lord Ellesmere* (36), on which counsel for the defendants also relied. In this case the plaintiff, a horse H trainer, sued in respect of the publication of a decision of the stewards of the Jockey Club which was a libel on him. The plaintiff sued the stewards (and their agents, Messrs. Weatherby) and " The Times ", the stewards in respect of three publications and " The Times " in respect of one. The first publication was the publication by the stewards of their decision to the Press Agencies on Sept. 29; the second publication was that in " The Times " on Sept. 30 I and the stewards and " The Times " were alleged to be jointly liable for this; and the third publication was in the " Racing Calendar " on Oct. 2 for which the stewards as proprietors of the " Racing Calendar " were held to be responsible. The publication in the " Racing Calendar " was held to be privileged but that to the News Agencies and in " The Times " was held not to be privileged. The Court of Appeal considered that the damages awarded in respect of the first and second publications were excessive and ordered a new trial. LORD HANWORTH, M.R., referred to the directions which should be given to the jury in the new trial and said (37): A

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(32) [1917] A.C. at p. 321.

(33) [1917] A.C. at p. 316.

(34) (1820), 3 B. & Ald. 702.

(35) (1822), 3 Brod. & Bing. 297.

(36) [1932] All E.R. Rep. 221; [1932] 2 K.B. 431.

> "The jury should be directed that they cannot impeach the decision which was reached; that the publication was in the ordinary course of the news agencies' and newspapers' business; and was one which must in any case have become known to a very large circle through the protected publication of the 'Racing Calendar' on Oct. 2." B

This is in the nature of an obiter dictum, though one made by a careful and learned judge, because the point did not strictly arise at that stage and does not appear to have been argued. I think with great respect that it is incorrect in form. To admit evidence about the contents of the "Racing Calendar" would be contrary to what was decided in *Saunders* v. *Mills* (38), an authority that was not considered or overruled: moreover the "Racing Calendar" was published after "The Times". But I am far from saying that in substance the proposed direction would not be correct. LORD HANWORTH, M.R., must have meant that the damages should be reduced in consideration of the fact that a number of the readers of "The Times" would also be readers of the "Racing Calendar"; if so, they were persons to whom a protected publication could be made. The vehicle of publication, whether it is the "Racing Calendar" or "The Times", is immaterial. As I have said, the law requires and permits that damages should be measured by the extent of the publication. A jury can properly be directed to give less damages against a paper which has a circulation of one hundred than against one that has a circulation of one thousand. It may be therefore that if a proportion of readers of "The Times" could properly have received the news anyway as a privileged communication to them, they can be counted out when the extent of the circulation is being considered. Whether this is so or not—and it is unnecessary for me to offer any firm opinion on it—it raises a different point from the one which we have to consider in this case. In this case the privilege depends on form and if in amplification there is a loss of form, there is a total loss of privilege. There is no scope for a division into "privileged" and "unprivileged" readers. C D E F

Accordingly, the defendants are liable to pay for the whole of the damage to the plaintiff's reputation caused by the publication in the "Daily Mail"; and on that issue—I am still not considering the effect of antecedent damage to reputation—no evidence is admissible of other publications of the same libel whether privileged or not. The defendants are liable for what was said in Mr. Bromley's story, neither more nor less; since the story contains the whole libel, they must pay the whole damage that flows from it. The extent of the damage done is to be measured in accordance with the circulation that the "Daily Mail" is presumed to have. The damage is limited to readers of the "Daily Mail" who received the libel direct from the defendants and to those others to whom those readers may be assumed in due course to pass it on. That is the extent of publication which has to be considered. The trial judge had evidence before him that the same libel reached a number of other readers by means of publication in other newspapers. That evidence he would be right to ignore; the defendants have not to pay for that; the damages assessed against any one national newspaper are to be assessed on the basis of its circulation and not on the basis of the circulation of all national newspapers combined. Counsel for the defendants has submitted that this is all that the learned judge was doing —that he was taking note of the fact that the plaintiff's reputation had been injured by other publications and was saying that the defendants were not responsible for the total injury done by all the publications put together. I have set out the relevant extracts of the judgment. It is difficult to be sure of G H I

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(37) [1932] All E.R. Rep. at p. 230; [1932] 2 K.B. at p. 457.
(38) (1829), 6 Bing. 213.

A interpreting them accurately since the point was never argued before the judge, but I think that he is doing more than merely directing himself to ignore irrelevant evidence. I think that he is assessing the defamatory excess in Mr. Bromley's story over and above the defamation in the report. If he is not doing that, then I think with respect the figure of £1,100 is inordinately low and ought to be altered.

B All that I have said hitherto is based on the supposition that the report and Mr. Bromley's story were published contemporaneously. They were published together in the article complained of and I have been dealing with the legal position on the supposition that that is the only publication that can be looked at. I must now turn to consider the second limb of the argument, that is, that at the time of the publication complained of the plaintiff already had a C tarnished reputation because of the publicity given in the national Press, including the "Daily Mail", to the Report of the Select Committee a month earlier.

Here again we are concerned with a fundamental principle of the law of damage which has to be applied with modifications to damage done by libel because injury to reputation is slippery to handle compared with bodily injury. D In cases of bodily injury the principle is simply applied. Where there is not one indivisible injury but two separate injuries, the second wrongdoer—at any rate in cases where the legal consequences of the first injury are complete and ascertained before the second injury is done—is liable only for the excess of damage done by the second injury. That excess is not necessarily smaller than the damage done by the first injury. The earning capacity of a man who has lost E an eye may be diminished by perhaps ten per cent. If he loses his other eye, his earning capacity will probably disappear altogether. A defendant who is responsible for the loss of the second eye will have to pay for much more than half of the consequences of total blindness. In the example I have taken, he will have to pay for ninety per cent. of the loss of earnings; but he will not have to pay the full one hundred per cent. because he can properly plead that F the plaintiff's earning capacity was already damaged.

In a libel action the plaintiff is seeking to recover compensation for loss of reputation; and it is well established and in accordance with the general principle applicable to all torts that it is open to the defendant to show that, at the time when he inflicted his injury on the plaintiff's reputation, it was already damaged. There is nothing in *Saunders* v. *Mills* (39) to dispute this; there is indeed G nothing to show that the other publications in that case were not contemporary. In cases of defamation evidence of previous bad reputation is usually considered as evidence in mitigation of damage, whereas in cases of bodily injury the same effect is obtained simply by measuring the consequences of the second injury; but, as counsel for the defendants submits, the principle in both cases is the same. In each case one has to take, as one finds it at the time when the second injury H was done, the state of the plaintiff's bodily fitness or the state of his reputation, as the case may be.

The modern law on mitigation of damage of libel is contained in the judgment of CAVE, J., in *Scott* v. *Sampson* (40). Much of that judgment was approved in *Hobbs* v. *Tinling* (41), particularly by SCRUTTON, L.J., and the case itself was recently followed in this court in *Speidel* v. *Plato Films, Ltd.* (42). In the I latter case my recollection is that *Scott* v. *Sampson* (40) was accepted as good law. In the present case counsel for the defendants has argued that we ought not to approve the whole of the judgment of CAVE, J., in *Scott* v. *Sampson* (40) and in particular that we ought not to hold that "character" for the purpose of mitigation of damage in the law of libel means reputation and not quality or disposition. In view of this submission I have carefully considered the judgment of CAVE, J., and have looked at a number of the authorities which he cites. They are, as he says, conflicting; his judgment settled a number of disputed points in a way which seems to me to be full of good sense and that has stood unchallenged for nearly eighty years. In my opinion we should not depart from it now. I refrain from elaborating this because the judgment in *Speidel* v. *Plato Films, Ltd.* (43) is at present being considered in the House of Lords (44); their Lordships will doubtless express their view of *Scott* v. *Sampson* (45) and thereafter no opinion of mine will be of any value. Moreover, the proposition that " character " means reputation and not quality or disposition does not depend solely on the authority of *Scott* v. *Sampson* (45) and is not peculiar to the law of libel; it applies throughout the civil and criminal law when the character of a witness or a prisoner is in issue: see *R.* v. *Rowton* (46), per COCKBURN, C.J., and *R.* v. *Gunewardene* (47), per LORD GODDARD, C.J.

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(39) (1829), 6 Bing. 213.
(40) (1882), 8 Q.B.D. 491.
(41) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1.
(42) [1960] 2 All E.R. 521.

The rule is therefore that evidence of character in mitigation of damage for defamation must be evidence of general reputation only (48). In the application of this rule it is necessary to consider just what is meant by " character " in the sense of reputation. Leaving aside for the moment all questions as to form of proof of bad character, it may be thought that the plaintiff in this case is in a dilemma. How can he say that Mr. Bromley's story gravely injured his reputation if in the same breath he asserts that the weightier censure by the Committee did him no harm? A closer understanding of what is meant by " character " in this branch of the law will help to show whether the dilemma is more than superficial. I desire to adopt a definition or description of " character " which was given by Mr. Erskine in the course of his submission in *R.* v. *Hardy* (49), and which has since been cited in argument in *R.* v. *Rowton* (50) and in *R.* v. *Gunewardene* (51). In the course of his submission (52), he reviewed many earlier authorities and gave some interesting illustrations of the way in which questions designed to obtain evidence about reputation should properly be put; and he said (53):

> " Character is the slow-spreading influence of opinion arising from the deportment of a man in society; as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion, is allowed to be given in evidence."

In my opinion it is only a settled bad character of this sort that ought to be taken into account in mitigation of damage. Where it exists, it shows that the permanent injury to a man's character done by a libel on him is less grave than it would otherwise have been. There are other elements besides permanent injury to character to be taken into account in the assessment of damages for defamation. There is mental distress, the pain caused by those who doubt, even if they hold final judgment in suspense, and maybe financial loss also if they hold business in suspense as well. There is the malice of the defendant if it is proved; the presence or absence of an apology and his conduct and that of his counsel before and during the trial. If the innocence of a plaintiff was after a short period conclusively established, if the defendant was held up to universal execration so that it could be said that there was no possibility of anyone ever thereafter believing his falsehoods, still the plaintiff might obtain a verdict for heavy damages. Now, it cannot be said that in these respects a man with a bad character will necessarily suffer less. If he is a hardened sinner, he may not be much distressed and may not care about the doubts of others, but if he is a

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(43) [1960] 2 All E.R. 521.

(44) See p. 876, ante.

(45) (1882), 8 Q.B.D. 491.

(46) (1865), 34 L.J.M.C. at pp. 60, 62.

(47) [1951] 2 All E.R. at p. 293; [1951] 2 K.B. at p. 606.

(48) Compare now, *Plato Films, Ltd.* v. *Speidel*, H.L., p. 876, ante, the speeches in which were delivered after the judgment here being reported.

(49) (1794), 24 State Tr. 199.

(50) (1865), 34 L.J.M.C. at p. 58.

(51) [1951] 2 K.B. at p. 604.

(52) (1794), 24 State Tr. at p. 1066 et seq.

(53) (1794), 24 State Tr. at p. 1079.

A good man who has fallen once he may suffer all the more because of it. His distress will be the greater because he knows himself to be more vulnerable; the doubts about him will be more easily aroused and less easily borne than by a man who has had hitherto an unsullied reputation. Whether he be a hardened sinner or not, there is no reason why his defamers should pay a penny the less for their malice or misconduct. It is only really when one comes to consider B permanent injury to reputation that it can be said that less is taken from a man who has already lost a part than from one who has preserved the whole. Thus it is fair and right that it is only when a man's bad reputation has formed and settled that it should be used against him.

So treated, the rule covering mitigation of damage in libel does not differ materially from that applicable in the ordinary law of tort. If a man is injured C a second time while he is still recovering from his first injury and before the effect of that injury on his earning capacity can properly be ascertained, the second wrongdoer will be liable for the whole loss of earning capacity partly caused by his act. Just as in physical injury it takes time to ascertain what the degree of disablement will be, so the state of a man's reputation cannot fairly be assessed the moment after a slander is spoken. There can of course D be cases when a man's reputation is ruined overnight just as he may be clearly disabled by a single blow. If, for example, a man pleads guilty to a charge of dishonesty, there is not much room left for question. But otherwise the loss of reputation is a slow process. Men wonder, doubt, ask questions, say at first that they really do not know where the truth lies; and it is only when the dust has settled that the extent of the damage is revealed.

E If the rule as to mitigation of damage is applied in this way, injury done to reputation by tales, true or untrue, will be ignored until, in Mr. Erskine's words, they have united to produce one general opinion, and then that general opinion will be allowed in evidence. This interpretation of the rule meets many of the objections that can be urged, and have been urged on behalf of the plaintiff in this case, against this form of mitigation of damage. Time is given for unfounded F rumour and unjust accusation to be dispelled; they cannot at once be seized on in diminution of damage. The danger of injustice inherent in the rule that a man's character depends on what others believe about him and not on his true disposition is much lessened; a false accusation can easily be made and may temporarily prevail, but it is not often that a man's settled reputation is founded on untruth. Under this rule there is no danger of tomorrow's newspaper G saying what it likes in the expectation that yesterday's will have to pay most of the bill. There is no danger that what is said in the House of Commons on one day can be repeated the next day with comparative impunity outside the House. It is indeed highly unlikely that an earlier publication of the same libel can be used to diminish the damage for a repetition of it; it is not impossible, for the libel may be an old one that has come to be generally believed.

H Accordingly, I come to the conclusion that what is relevant when character is in issue, whether in a criminal or a civil case, is established reputation. Counsel for the plaintiff has submitted that there is no admissible evidence in this case to show that at the time of the libel the plaintiff's reputation had been damaged in this sense, so I turn to consider the way in which established reputation should be proved. Customarily the evidence is that of men who live in the community I where the plaintiff is known and in which the libel has circulated and who have heard the plaintiff discussed, but I do not think that an inference from facts can or should be excluded. If it can be proved that a man has been convicted of theft and that that fact has received wide publicity, it can be inferred that his reputation for honesty has suffered. There may be exceptional cases in which such an inference could be rebutted, but it is at least a prima facie inference. It is unnecessary to call a witness to give formal proof of what must be obvious; but when the inference is at all doubtful, it is important that it should be put to the test of what the neighbours actually think.

A It is common practice in criminal cases to accept proof of convictions without more as evidence of bad character. The point does not appear to have been much discussed in relation to libel, but counsel for the defendants has found one case which supports his submission that the court can act on inference. In *Hawkins* v. *Express Dairy Co., Ltd.* (54) STABLE, J., reduced to a farthing the damages of £750 which he would otherwise have given to the plaintiff for a libel on his honesty, because the plaintiff in his evidence in chief volunteered the B information that he was guilty of a systematic deception known to the men among whom he worked. STABLE, J., said (55):

> " The plaintiff has said that in this yard, among his associates even up to the area manager, everyone knew that he was pursuing this dishonest practice . . . It seems to me that I am not only entitled, but bound, to consider the reputation which has been injured." C

I think that STABLE, J., was entitled in principle (I do not of course concern myself with the correctness of the inference) to act on an inference that in the circles where the libel was effective the plaintiff had already lost his reputation.

Finally, I must consider what has been put forward by the defendants as evidence of bad character. They called no witnesses to give direct evidence D of it. They put some questions in cross-examination to the plaintiff about the effect of the other newspapers which carried the Report of the Select Committee, but (even if it be conceded, which I doubt, that a man is competent to give evidence about the esteem in which he is held by others) they got no answers from him which could amount to a concession that already within the month his established reputation had been permanently injured. There is left the E inference to be drawn from the admitted facts; and this was the strongest way in which counsel for the defendants put his case. For this purpose he was willing that the contents of all newspapers other than the " Daily Mail " itself should be excluded from consideration. He relied solely on the fact that the plaintiff put in as part of his case the article in the " Daily Mail " of May 17 which published the Report of the Select Committee and he invited us to infer, F which I do, that the report would also have been given wide publicity in other papers. This publicity, he contended, must have injured the plaintiff's reputation. I agree that the publicity must have caused the plaintiff immediate serious injury but I am not prepared to infer that within a month his established reputation was lowered. I agree that a finding by a Select Committee must carry very great weight with the ordinary man and that some might have G thought it conclusive and felt that they wanted to hear no more, but the proceedings before the committee are not like those at a trial where the whole matter is thrashed out in public and the whole story is known. There may well have been influential people in Manchester putting about another point of view. Many members of the corporation may have known the truth. Professional men who had advised the shareholders to accept the offer may well have known H something of the true value of the shares. Many men might have preferred to wait until they heard the town clerk's side of the question before passing judgment. In my opinion this is not a case in which in the absence of direct evidence it would be safe to draw the inference that in a short period of a month and while the whole affair was still being agitated the plaintiff's character in the estimation of his fellow-citizens had been changed.

I For these reasons I think that the learned judge was wrong in taking into consideration in mitigation of damage the publication, whether in the " Daily Mail " or elsewhere, of the Report of the Select Committee. It follows that we must ourselves assess the proper figure to award to the plaintiff. For this purpose we have had to consider other criticisms that were made of the summing-up. I agree broadly with the views on these matters expressed by SELLERS, L.J., and HOLROYD PEARCE, L.J., and I do not think that it is necessary for me to deal with each criticism in my own words. I think that the figure of £4,000 is fair compensation for the damage sustained by the plaintiff; I agree that this figure should be substituted in the judgment for the figure awarded by PEARSON, J., and that to that extent the appeal should be allowed.

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(54) (1940), 163 L.T. 147.

(55) (1940), 163 L.T. at p. 149.

Appeal allowed: damages increased to £4,000. *Leave to appeal to the House of Lords granted.*

Solicitors: *Stephenson, Harwood & Tatham*, agents for *Grundy, Kershaw, Farrar & Co.*, Manchester (for the plaintiff); *Swepstone, Walsh & Son* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

DELAHUNTY *v.* DELAHUNTY (NOBES cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), February 14, 15, 16, 17, 20, 21, 22, 23, 1961.]

Divorce—Parties—Death of party cited—Striking name of party cited from suit.

Divorce—Evidence—Statement made by party cited—Death of party cited after service of proceedings but before hearing of suit—Admissibility of statement.

Where in his answer the respondent makes a charge of adultery by the petitioner with a party cited, and after service of the proceedings on the party cited but before the hearing of the suit the party cited dies, the proper procedure is to strike his name from the suit.

Walpole v. *Walpole and Chamberlain* ([1901] P. 86) applied.

The wife petitioned for divorce on the grounds of the husband's cruelty and adultery. By an amended answer the husband cross-prayed for divorce on the ground of the wife's adultery with a party cited. The proceedings were duly served on the party cited but before the hearing of the suit began he died. At the hearing the husband learnt for the first time of the death of the party cited and sought to adduce in evidence a statement made by him before his death.

Held: (i) the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1) had not rendered inapplicable the practice established by *Walpole* v. *Walpole and Chamberlain* ([1901] P. 86), because there was no cause of action (viz. circumstances giving rise to an enforceable claim) against the party cited within s. 1 (1), and, although there would have been such an enforceable claim if damages had been claimed against him, yet such a claim for damages would be expressly excluded by the proviso to s. 1 (1); accordingly the name of the party cited would be struck out of the title to the suit.

(ii) as there could be no cross-examination nor any rebutting evidence in relation to the admissions by the party cited, it would not be right to admit his statement.

[As to the effect on the suit of death of a co-respondent after service on him of the petition, see 12 HALSBURY'S LAWS (3rd Edn.) 329, para. 671, note (s), 381, para. 834, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 536, *4824-4828.*

As to the admissibility of statements made by deceased persons, see 15 HALSBURY'S LAWS (3rd Edn.) 302, para. 549; and for cases on the subject, see 22 DIGEST (Repl.) 91, 92, *690-708.*]

Cases referred to:

Cooke (*Cook*) v. *Gill*, (1873), L.R. 8 C.P. 107; 42 L.J.C.P. 98; 28 L.T. 32; 1 Digest 13, *106*.

Dipple v. *Dipple*, [1942] 1 All E.R. 234; [1942] P. 65; 111 L.J.P. 18; 166 L.T. 120; 27 Digest (Repl.) 611, *5729*.

Read v. *Brown*, (1888), 22 Q.B.D. 128; 58 L.J.Q.B. 120; 60 L.T. 250; 1 Digest 13, *107*.

Richards v. *Richards and Flockton*, (1940), 111 L.J.P. 20, n.; 27 Digest (Repl.) 573, *5291*.

Walpole v. *Walpole and Chamberlain*, [1901] P. 86; 70 L.J.P. 23; 84 L.T. 63; 27 Digest (Repl.) 536, *4825*.

Petition.

On Oct. 20, 1959, the wife presented a petition for divorce on the grounds of the husband's cruelty and adultery. By his answer dated Mar. 15, 1960, the husband denied the charges and by an amended answer dated June 14, 1960, he alleged adultery with the party cited. The amended answer was served on the party cited but in December, 1960, the party cited died. This fact was not known to the husband's legal advisers until the hearing of the suit had begun. At the hearing it was sought on behalf of the husband to put in evidence a statement alleged to have been made by the party cited. Counsel for the wife was asked by the court to argue as amicus curiae on the question of the admissibility of this statement as evidence. The case is reported for the judge's ruling on the point.

J. K. Wood for the respondent husband.
John B. Gardner for the petitioner wife.

COLLINGWOOD, J.: In *Walpole* v. *Walpole and Chamberlain* (1) it was held that where a co-respondent dies before the hearing, the proper course to be taken is for the petitioner to move to strike out his name from the title of the suit. That was a decision of GORELL BARNES, J. I can see no reason why the same should not apply to the case of a party cited. The only difference between the present case and the *Walpole* case (1) is that in the latter case the charge of adultery was brought by the respondent and not by the petitioner. It was urged on behalf of the respondent in the present case, first that the decision in *Walpole* v. *Walpole and Chamberlain* (1) should not be followed, for the reason that it was not fully argued before GORELL BARNES, J., and was not a satisfactory decision. The answer to that, I think, is that it has never been questioned in the last sixty years. The learned judge held that it was a proper course to take and in that I am content to follow. Secondly, it was contended that the decision was now rendered of no effect by reason of the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1). That subsection reads as follows:

> "Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925, for damages on the ground of adultery."

In support of the contention I was referred to the decision of HODSON, J., in *Dipple* v. *Dipple* (2). In that case it was held that the right of a wife to whom a decree absolute had been granted to apply for secured maintenance under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, was not a "cause of action" against her husband within s. 1 (1) of the Law Reform

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(1) [1901] P. 86.

(2) [1942] 1 All E.R. 234; [1942] P. 65.

(Miscellaneous Provisions) Act, 1934, and, therefore, on the death of the husband, it did not survive against his estate.

I was referred to a portion of the judgment of HODSON, J., which, it was submitted, supported the contention now before me. The learned judge said (3):

> "A cause of action is defined in STROUD'S JUDICIAL DICTIONARY as the entire set of circumstances giving rise to an enforceable claim. As LORD ESHER, M.R., said in *Cooke* (*Cook*) v. *Gill* (4) and later in *Read* v. *Brown* (5), a cause of action is 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court'. The only cause of action which the applicant [wife] had was, in my opinion, the matrimonial offence on proof of which she obtained a decree of dissolution of marriage. If the respondent [husband] had died during the pendency of the suit, the Law Reform (Miscellaneous Provisions) Act, 1934, would no doubt have kept this cause of action alive so as to enable the wife to have proceeded with the suit had not his death brought about the very thing claimed, namely, the dissolution of the marriage."

The learned judge then goes on to differentiate an application for maintenance, and I need not read any more of his judgment.

In the present case it was argued that there is an enforceable claim against a party cited in that there was a right to a finding that he had been guilty of adultery. In my opinion that is not so. The "enforceable claim" referred to by the learned judge in *Dipple* v. *Dipple* (6) was a claim in the petition—that is a claim for the dissolution of the marriage. There is no such enforceable claim against a co-respondent or a party cited. There would be if there were a claim for damages, but that is expressly excluded by s. 1 (1) of the Act of 1934.

As regards costs it seems clear that the test since the Law Reform (Miscellaneous Provisions) Act, 1934, is whether there is any order which has created an enforceable claim, and if there is an order for costs against a person during his lifetime, it constitutes an enforceable claim (see *Richards* v. *Richards and Flockton* (7)).

In my opinion, the Act of 1934 has not affected the decision in *Walpole* v. *Walpole and Chamberlain* (8), namely, that the proper course is to strike out the name of the party cited from the suit.

The only issue remaining in this case is as to proof of adultery by the petitioner. On this issue the proposed evidence is obviously inadmissible, and I, therefore, rule that it must be excluded.

Rule accordingly.

Solicitors: *Dennis Berry & Co.*, Reading (for the respondent husband); *Blandy & Blandy*, Reading (for the petitioner wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(3) [1942] 1 All E.R. at p. 235; [1942] P. at p. 67.
(4) (1873), L.R. 8 C.P. 107.
(5) (1888), 22 Q.B.D. 128.
(6) [1942] 1 All E.R. at p. 235; [1942] P. at p. 68.
(7) (1940), 111 L.J.P. 20, n.
(8) [1901] P. 86.

PRACTICE DIRECTION.

CHANCERY DIVISION.

Practice—Trial—Lists—Witness List—Fixed dates—Chancery Division.

The fixing of dates in the Witness List having been made hitherto on the basis of three judges hearing witness actions, it is possible now to thicken up the List.

Causes not yet in the List may appear therein with dates for hearing earlier than those allotted to causes set down before them and already in the List.

Consent applications in any cause already in the List to fix an earlier date than that appearing in the List may be made through the clerk to RUSSELL, J.

The List referred to is the printed Witness List exhibited in Room 136: any dates not in that List are provisional only and must not be relied on.

This notice does not affect the existing practice whereby a cause will appear in the List twenty-three days after setting down with a date fixed for hearing not earlier than twenty-one days from appearance in the List.

THE COMPLETE WARNED LIST CAN BE INSPECTED IN ROOM 136.

By direction of the judges of the Chancery Division.

J. B. H. WYMAN,
Chief Registrar.

Mar. 9, 1961.

STRONG *v.* DAWTRY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, JJ.), March 2, 1961.]

Road Traffic—Parking place—"Leaving" vehicle otherwise than as authorised—Meter charge payable on leaving vehicle in the parking place—Driver leaving vehicle for a few minutes while obtaining change to enable him to put coin in meter—Returned at once to pay the charge—Whether driver guilty of offence of failing to pay initial charge—Parking Places (Westminster) (No. 1) Order, 1959 (*S.I.* 1959 *No.* 2104), *art.* 8 (1)—*Road Traffic Act*, 1956 (4 *&* 5 *Eliz.* 2 c. 67), *s.* 22 (1).

The appellant was the driver of a motor car which he parked at 11.5 a.m. in a parking bay. Finding that he had no change with which to pay the initial charge into the parking meter he approached a police constable standing approximately fifteen yards away and asked him for change but he was unable to give it to him. The appellant obtained change from a taxi-driver and returned at once to the parking meter to make the initial payment. While he was obtaining change a parking meter attendant arrived at the parking meter which showed an excess of thirty minutes and attached to the car an excess charge notice indicating that at 11.10 a.m. an excess charge of 10s. had been incurred. While he was attaching the notice the appellant approached and told him that he had left the bay for two minutes immediately after parking his car there for the purpose of obtaining change. He then paid the initial charge into the meter. The appellant was convicted of unlawfully failing to pay the initial charge prescribed by the Parking Places (Westminster) (No. 1) Order, 1959, art. 8 (1)*, contrary to s. 22 (1) (a)† of the Road Traffic Act, 1956. On appeal,

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* Article 8 (1) provides: "The standard period for which a vehicle may be left in a parking place during the permitted hours shall be two hours, and subject as hereinafter provided the amount of the charge for a vehicle left in a parking place for a time not exceeding the standard period (hereinafter referred to as 'the initial charge') shall be 1s. and shall be payable on the leaving of the vehicle in the parking place by the insertion in a parking meter of a coin of the denomination of 1s. or two coins each of the denomination of 6d. . . ."

† Section 22 (1) provides: "Any person who—(a) being the driver of a vehicle, leaves the vehicle in a parking place designated under this Act otherwise than as authorised by an order thereunder or leaves the vehicle therein for longer after the excess charge has been incurred than the time prescribed under sub-s. (5) of the last foregoing section, or fails duly to pay any charge payable under s. 19 of this Act, or contravenes or fails to comply with any provision of an order relating to the parking place as to the manner in which vehicles shall stand in, or be driven into or out of, the parking place, . . . shall be liable . . . to a fine . . ."

Held: the appellant was rightly convicted because the words "payable on the leaving of the vehicle in the parking place" in art. 8 (1) denoted that payment should be made as soon as the vehicle was placed in the parking place; and no qualification for allowing a reasonable time, according to circumstances (including the obtaining of change) between getting out of the car and inserting the coin into the meter, could be imported into the words of art. 8 (1).

Appeal dismissed.

[**Editorial Note.** The Road Traffic Act, 1956, s. 22 (1), is replaced by the Road Traffic Act, 1960, s. 88 (1).

For the Road Traffic Act, 1956, s. 22 (1), see 36 HALSBURY'S STATUTES (2nd Edn.) 824.]

Case Stated.

This was an appeal by Gershon Gerald Strong by way of Case Stated by a metropolitan magistrate sitting at Bow Street in the county of London, before whom an information had been preferred on Aug. 25, 1960, by the respondent, Alan Graham Dawtry, against the appellant. The information charged that the appellant on June 7, 1960, at the parking place at Hertford Street, London, W.1, being the person driving a vehicle at the time it was left therein did unlawfully fail to pay the initial charge prescribed by the Parking Places (Westminster) (No. 1) Order, 1959, art. 8 (1), contrary to s. 22 (1) (a) of the Road Traffic Act, 1956. The information was heard on Oct. 17, 1960, and the following facts were found. On June 7, 1960, the appellant was the driver of a motor car. Shortly before 11.5 a.m. the appellant parked the motor car in parking bay No. 1283 in Hertford Street for the first time. He then found that he needed change to pay the initial charge into the parking meter. At about 11.5 a.m. the appellant approached Police Constable Cook at the junction of Curzon Street and Hertford Street for the purpose of obtaining change but the constable was unable to give it to him. The junction was approximately fifteen yards from parking meter No. 1283. The appellant obtained change from a taxi-driver and returned at once to the parking meter for the purpose of making the required initial payment. While the appellant was obtaining change as aforesaid a parking meter attendant, one James Palmer, arrived at the parking meter which showed an excess of thirty minutes and he attached to the motor car an excess charge notice in the prescribed form indicating that at 11.10 a.m. an excess charge of 10s. had been incurred and was payable to Westminster City Council.

As the excess charge notice was being put on the vehicle the appellant approached the parking meter attendant and told him that he, the appellant, had left the bay for approximately two minutes immediately after parking his motor car there, that he had done so for the purpose of obtaining small change for the initial payment and that he had not left Hertford Street. The appellant stated that the initial payment was then made by him. The appellant then brought Police Constable Cook to the attendant to confirm these facts.

It was contended by the appellant that reasonable time must be allowed for the driver of a vehicle to pay the initial payment prescribed by art. 8 (1) of the Parking Places (Westminster) (No. 1) Order, 1959, before an offence was committed contrary to s. 22 (1) (a) of the Road Traffic Act, 1956. It was contended by the respondent that art. 8 (1) clearly indicated that the prescribed charge was payable immediately a vehicle was left in a parking meter bay and that the question of reasonableness should not be read into the order.

The magistrate was of opinion that the respondent's contention was correct in law and that the appellant's contention went to mitigation of the penalty only. He accordingly found the appellant guilty, imposed a fine of £1 and ordered him to pay 10s. 6d. costs.

The question for the opinion of the court was whether the magistrate came to a correct determination in law.

R. Stock for the appellant.

Sebag Shaw for the respondent.

LORD PARKER, C.J., having stated the facts, continued: For my part, I have every sympathy with this motorist. It seems to me to be a perfectly genuine case of not having change and having to get it, but the sole question here is: is there any defence, or do those circumstances only go towards mitigation? Both the Road Traffic Act, 1956, in s. 22 (1) (a), and the Parking Places (Westminster) (No. 1) Order, 1959 (S.I. 1959 No. 2104), in art. 8 (1), provide to this effect, that the payment shall be payable on the leaving of the vehicle in the parking place by the insertion in the parking meter of a coin.

It was apparently argued before the magistrate that a reasonable time must be imported between, as I understand it, the time when the driver leaves his driving seat and the time when the coin is inserted, and that reasonable time is to be governed by all the circumstances, including whether he has the necessary change in his pocket. The magistrate clearly did not accept that argument and, indeed, it has not been advanced in this court. It seems to me that no element of reasonable time can be imported at all unless it be such reasonable time as is involved in getting out of the driving seat and putting the coin into the meter: in other words, between stopping the car and stepping onto the pavement and inserting a coin. The argument, however, that has been adduced to this court is based on the word " leaving ". It is said that a driver has not left a vehicle until he has done all he intends to do as part of the operation of parking. That argument is based on an interpretation of " leaving " as meaning the driver physically leaving the car. It is to be observed, however, that the words here are " payable on the leaving of the vehicle in the parking place " which, to my mind, clearly denote the placing or depositing of the car in the parking bay. Accordingly, I read those words as meaning that the payment is to be made as soon as the vehicle is placed in the parking place. Whether the driver leaves the vehicle in the sense that he gets out of the driving seat, or whether he stays there cannot affect the matter at all. Looked at in that way, I am perfectly clear that the appellant in this case was rightly convicted. I am a little surprised that he was fined at all. It may well be that magistrates are finding that this defence is put up so often that, if only as a deterrent, they fine everyone. I would dismiss this appeal.

WINN, J.: I agree.

WIDGERY, J.: I also agree.

Appeal dismissed.

Solicitors: *J. B. Izod*, agent for *Gershon Gerald Strong*, Liverpool (for the appellant); *Allen & Son* (for the respondent).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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